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April 25, 2008

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**RE: DHS Docket No. ICEB-2006-0004  
8 CFR 274a**

**Safe-Harbor Procedures for Employers Who Receive a No-Match  
Letter: Clarification; Initial Regulatory Flexibility Analysis**

Dear Ms. Hernandez:

The American Immigration Lawyers Association (AILA) submits the following comments to the Supplemental Proposed Rule published on March 26, 2008, Docket number ICEB-2006-004. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent thousands of U.S. businesses and industries with respect to immigration law concerns, as well as individuals seeking to enter the United States on a temporary or permanent basis. AILA members also represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

AILA's comment to the Supplemental Proposed Rule ("SPR") details a substantial number of deficiencies in the rulemaking. The Department has failed to provide a reasoned basis for the change in its position with regard to SSA "no-match" letters, and therefore the rule is arbitrary and capricious. The SPR fails to eliminate ambiguity, clarify employers' responsibilities, or provide clear guidance to

employers in connection with no-match letters, and raises new questions.

The Department lacks the legislative authority to promulgate the underlying final rule and fails to comply with the Congressional notification provisions of Section 274 of the INA. The final rule is clearly a legislative rule, such that a Regulatory Flexibility Analysis is required, but the Department's attempt to satisfy the Regulatory Flexibility Act is deficient. The SPR and its underlying final rule fail to comply with the Unfunded Mandate Reform Act and the Small Business Regulatory Enforcement Fairness Act, as well as the Paperwork Reduction Act.

This comment suggests a number of significant alternative approaches, assessment of which has been absent from the rulemaking, that the Department should implement in order to make the rule more acceptable.

We note that this SPR incorporates the final rule (which was enjoined), along with some additional explanation. Thus our comment is obliged to address the underlying final rule, as well as the SPR, and cannot be limited solely to the issues of the latter. Since the Department has incorporated its prior rule in this supplemental rule, it is necessary that we respond to the rulemaking in its entirety.

## **I. The final rule is arbitrary and capricious.**

DHS failed to offer any reason for changing the regulation to provide that constructive knowledge may be inferred solely on receipt of an SSA no-match letter. As noted by the District Court of the Northern District of California:

The final rule provides that constructive knowledge (CK) may be inferred if an employer fails to take reasonable steps after receiving nothing more than a no-match letter....DHS' new position is that an employer who receives a no-match letter can, without any other evidence of illegality, be held liable under the continuing employment provision. Needless to say, this change in position will have massive ramifications for how employers treat the receipt of no-match letters. DHS may well have the authority to change its position, but because DHS did so without a reasoned analysis, there is at least a serious question whether the agency has 'casually ignored' prior precedent in violation of the APA.<sup>1</sup>

## **II. DHS has not provided a reasoned basis for its changed position concerning the SSA no-match letter.**

The SPR merely reiterates that

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<sup>1</sup> American Federation of Labor v. Chertoff, No.C 07-04472 CRB, Order Granting Motion for Preliminary Injunction, October 10, 2007, p.14, ll.7-9 and ll.18-23.

Based on the rulemaking record and the Department’s law enforcement expertise, DHS finds that there is a clear connection between social security no-match letters and the lack of work authorization by **some** employees whose social security numbers are listed in those letters.<sup>2</sup>

DHS does not refute that the SSA database is not a **certain** indicator of one’s right to work in the U.S. In fact, DHS admits that there may be many causes for a mismatch, and only one potential cause may be the submission of a false SSN or one assigned to someone else. DHS reaffirms that the no-match letter merely calls into question the accuracy of the identifying information and places an employer on notice of the “possibility” that some of its employees may be unauthorized to work.<sup>3</sup>

Nevertheless, despite these uncertainties and the issuance of a preliminary injunction by the District Court citing DHS’ lack of reasoning, DHS again proposes that “an employer who receives a no-match letter can, without any other evidence of illegality, be held liable under the continuing employment provision.”<sup>4</sup> Accordingly, in failing to provide a “reasoned analysis” for the change contained in the SPR, DHS has persisted in repeating the shortcomings noted by the District Court, and has “‘casually ignored’ prior precedent in violation of the APA.”<sup>5</sup>

### **III. DHS incorrectly equates the ICE letter regarding suspect documents with the SSA no-match letter.**

Although ICE rationalizes that, “Like an SSA no-match letter, a ‘notice of suspect documents’ calls into question the validity of an employee’s identifying information, and thus places employers on notice that the subject employees might be unauthorized to work in the United States,”<sup>6</sup> the two letters are not comparable either in derivation or detail. An ICE letter regarding suspect documents is not “*like*” an SSA no-match letter.

As ICE concedes, a principal difference between the two letters is that the ICE notice “is issued upon ICE’s investigation and review of the specific, individual employment authorization documents”<sup>7</sup> in question. We can agree that such ICE notices may “... provide an employer with clear cause to investigate the work authorization status of the

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<sup>2</sup> 73 Fed.Reg. 15944, 15946 (Mar. 26, 2008) (Emphasis added).

<sup>3</sup> *Id.* at 15947.

<sup>4</sup> *Supra*, note 1.

<sup>5</sup> *Id.*

<sup>6</sup> 73 Fed.Reg. 15947.

<sup>7</sup> *Id.*

employees identified in the notice.” The reason for that, however, is the specificity of the ICE investigation on which the ICE letter is predicated.

In contrast, the issuance of an SSA no-match letter does not result from an ICE investigation or from any type of individual examination or review of employment authorization documents, and in fact it can be triggered by a myriad of factors, some of which are inexact or completely inaccurate. Moreover, while case law may support an inference and enunciate a duty to investigate when ICE has discovered questionable employment authorization documents in individual cases,<sup>8</sup> there is not a single reported case nor any reported indictment for an immigration-related crime in which employer liability is established, *per se*, based on no more than the receipt of a social security no-match letter and the lack of any follow-up by the employer. Rather, the reported cases<sup>9</sup> reflect that multiple circumstances were taken into account, and that employer liability did not turn on one single factor, as DHS now proposes.

#### **IV. DHS’ interest in eliminating ambiguity and clarifying an employer’s responsibilities does not justify its change in position.**

Implicitly conceding that it had no reasoned basis for setting forth a new standard for what constitutes “constructive knowledge,” DHS acknowledged the following true reason for its change in agency policy:

The most basic justification for issuance of this rule—and for the ‘change’ in policy found by the district court – is to eliminate ambiguity regarding an employer’s responsibilities upon receipt of a no-match letter.<sup>10</sup>

Rather than provide workable guidance concerning the other circumstances that together with receipt of an SSA no-match letter might trigger the need for an employer to exercise due diligence in ascertaining an employee’s eligibility for employment, DHS has imposed an inflexible course of action that employers must follow or risk liability based on a finding of constructive knowledge. According to DHS’s proposal, constructive knowledge that an employee lacks authorization for continued employment can – and will - be inferred on the basis of two factors: an employer’s receipt of an SSA no-match letter concerning that employee, and the employer’s failure to conform to the safe harbor process. Only by adhering to DHS’s proposed “safe harbor” requirements within the required timeline can an employer avoid the inference of constructive knowledge. Although the preamble to the August 15, 2007 final rule expressly states that the “safe harbor” provision sets forth steps a reasonable employer “might take” and that there may

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<sup>8</sup> *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9<sup>th</sup> Cir.1989); *see also* *New El Rey Sausage Co. v. INS*, 925 F.2<sup>nd</sup> 1153, 1158 (9<sup>th</sup> Cir. 1991).

<sup>9</sup> *See, e.g.*, *Mester Mfg. and New El Rey Sausage, id.*

<sup>10</sup> *Id* at 15949.

be others that DHS would find to be reasonable, DHS has made clear in the SPR that it will treat a no-match letter as imparting to the employer constructive knowledge of unauthorized employment by the named employees.

The imposition of such a rigid rule in response to an SSA no-match letter, *alone*, is unwarranted in light of the absence of individual investigation, such as occurs prior to issuance of a DHS/ICE letter, particularly given the documented level of inaccuracy in the issuance of SSA no-match letters. DHS's purported attempt to "provide greater predictability through a clear set of recommended actions for employers to take" by triggering an inference of constructive knowledge of illegality if those particular steps are not taken, elevates predictability over reason. The proposal to treat an SSA no-match letter as sufficient, without more, to support such an inference is contrary to the totality of the circumstances standard that has been employed effectively to support findings of constructive knowledge in the related contexts addressed in *Mester Mfg.* and *New El Rey Sausage*.<sup>11</sup> In contrast, imposing liability based on failure to respond to a notice that so often is inaccurate and unrelated to the constructive knowledge being inferred utterly ignores the unreliability of the SSA database and is patently unreasonable.

DHS repeatedly describes the "clear" and "reasonable" specific steps that "reasonable" employers should follow in response to the SSA letters. DHS promises that it will refrain from prosecuting those employers who follow its safe harbor steps:

...The August 2007 Final Rule sought to provide greater predictability through a clear set of recommended actions for employers to take, and assured employers that they would not face charges of constructive knowledge based on SSA no-match or DHS letters that had been handled according to DHS's guidelines.<sup>12</sup>

It reiterates this guarantee in the current rule as follows:

In the August 2007 Final Rule – as supplemented by this proposed rule—DHS limits its law enforcement discretion by committing not to use an employer's receipt of and response to an SSA no-match letter or DHS letter as evidence of constructive knowledge for those employers who follow the procedures outlined in the rule.<sup>13</sup>

In conditioning its non-reliance on the SSA no-match letter as evidence of constructive knowledge on compliance with the safe harbor procedures, DHS seriously disadvantages those employers who choose another method of responding. The absence of any rational reason for making these procedures the sole method by which an employer can respond without potentially incurring liability is arbitrary and capricious and a violation of APA

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<sup>11</sup> *Supra*, note 8.

<sup>12</sup> *Id* at 15949.

<sup>13</sup> *Id* at 15946.

due process standards. DHS fails to explain why the prescribed path is the sole path that a reasonable employer can follow in responding to the no-match letter and it fails to provide optional alternatives methods of compliance.

**V. DHS lacks the legislative authority to promulgate this regulation.**

DHS has exceeded its authority in promulgating the final rule, as the process that it imposes on employers contradicts the fact-specific standards established by IRCA and seeks to obviate the good faith defense available to employers by statute. DHS is stripping employers of their statutory affirmative defense against a charge of knowingly hiring or continuing to employ unauthorized workers. It is effectively subordinating the employer’s statutory affirmative defense – which is based on the good faith completion of the I-9 – and attempting to provide it with a new one, under the guise of a “safe harbor.”

**A. Existing Statutory Standards under IRCA and INA 274A**

In 1986, Congress enacted IRCA to conscript employers, for the first time, as active participants in the government’s objective of establishing a comprehensive system that would eliminate the “magnet” of continued illegal immigration to the United States. After more than ten years of debate on wide-reaching immigration reform, Congress finally passed IRCA with a carefully crafted balance of requirements and protections to meet its objective – deterring illegal immigration – while establishing an approach that “would be the least disruptive to the American businessman and would also minimize the possibility of employment discrimination.”<sup>14</sup>

In passing IRCA, Congress created two sets of requirements to ensure that employers would comply with the then-new system of employer sanctions – (1) a set of I-9 procedural verification requirements for all employers and (2) a set of standards and sanctions for employers who deliberately intended to hire and employ workers without proper work authorization.

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<sup>14</sup> Immigration Reform and Control Act, P.L. 99-603, Legislative History, House Report (Judiciary Committee) No. 99-682(I), July 16, 1986, to accompany H.R. 3810 (“House Judiciary Committee Report”), p. 56. There is extensive legislative history published for IRCA. However, all of the substantive legislative commentary regarding the new employer sanctions provisions is contained in this Report of the House of Representatives Judiciary Committee published with the original House of Representatives bill. As the subsequent changes in the legislation in the Conference Committee did not affect the substance of the provisions discussed in this comment, and as none of the other House, Senate or Conference Committee Reports added any substantive commentary on employer sanctions, all of the references to legislative history in this section of the comment draw from language in the House Judiciary Committee Report.

## 1. *I-9 Employment Verification System*

### (a) *Standard*

The statute sets forth the requirements for an employer to verify a new employee's identity and work authorization. As long as an individual provides a document that reasonably appears on its face to be genuine, no language in the law should be construed to require production of any other document.<sup>15</sup> In the legislative history, the House Judiciary Committee Report specifically distinguishes the employer's "reasonable man" standard in reviewing the documentation presented from the legal obligation and responsibility for fraudulent documents, which rests solely with the employee.<sup>16</sup>

### (b) *Good Faith Defense*

Congress had the foresight to anticipate the difficulties that law-abiding employers would have in complying with its complex paperwork requirements, so it enacted as part of IRCA a "good faith" defense for employers who inadvertently violated the requirements of the I-9 verification system.<sup>17</sup> While good faith is an intangible and abstract concept, it is generally considered to involve a finding of a subjective honest belief or absence of design to defraud,<sup>18</sup> and therefore a fact-specific determination.

In the House Judiciary Committee Report that accompanied IRCA, the Committee stated,

The Committee intends that the act of establishing "good faith" compliance could be shown by proof of the employer's . . . review of the documents specified in the legislation and retention of the verification [sic] forms, inclusive of the employee's attestation.<sup>19</sup>

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<sup>15</sup> INA 274A(b)(1)(A).

<sup>16</sup> "The 'reasonable man' standard is to be used in implementing this provision and the Committee wishes to emphasize that documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents. *In the event fraudulent documents are utilized, the bill does provide serious criminal penalties for such activities.*" House Judiciary Committee Report, p. 62 (emphasis added).

<sup>17</sup> "In order to protect both persons subject to penalties and members of minority groups legally in this country, the bill provides a system to verify that prospective employees are eligible to work in the United States. In the Committee's judgment, an effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential. Otherwise, the system cannot both be effective and avoid discrimination." House Judiciary Committee Report, p. 60.

<sup>18</sup> *Doyle v. Gordon*, 158 NYS2d 248, 259, 260.

<sup>19</sup> House Judiciary Committee Report, p. 57.

In response to complaints from employers who were suffering from the cumbersome burdens of complying with the rigid and highly procedural I-9 requirements, in 1996 Congress enacted a further expansion of the good faith compliance provisions with respect to paperwork violation to permit employers to correct certain non-substantive paperwork violations within 10 days without penalty.<sup>20</sup>

## 2. Sanctions for “Knowing” Violators

### (a) Standard

IRCA’s second critical component of employer sanctions was to establish a separate set of rules and of sanctions to punish employers who deliberately choose to flout the then-new I-9 employment verification system. Under IRCA, an employer is prohibited from hiring or continuing to employ an individual “knowing the alien is an unauthorized alien.”<sup>21</sup> With respect to continuing to employ an employee after gaining knowledge that he or she is unauthorized, the House Judiciary Committee Report clearly states that Congress did not intend to impose an on-going requirement to verify status, but only contemplated that the employer would become liable for a hiring violation if it obtained a clear, dispositive indication that the employee was not authorized to work:

The Committee does not intend to impose a continuing verification obligation on employers. However, if an employer has knowledge that an alien’s employment becomes unauthorized due to a change in nonimmigrant status, or that the alien has fallen out of a status for which work permission is authorized, sanctions would apply.<sup>22</sup>

Although the statute did not define the term “knowing” – and therefore what authority exists in this area has largely come from a patchwork of judicial precedent<sup>23</sup> and subsequently promulgated regulations – the legislative history provided unequivocally that the burden of establishing that an employer knowingly hired an unauthorized alien rests squarely with the government. The House Judiciary Committee Report emphasizes that the government must meet its burden in establishing the required standard for the various sanctions provisions:

... the burden of proving a violation of the hiring ... prohibition always remains on the government – by a preponderance of the evidence in the case of civil penalties and beyond a reasonable doubt in the case of criminal penalties.<sup>24</sup>

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<sup>20</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996. INA §§274A(b)(6)(B), (C).

<sup>21</sup> INA 274A(a)(1), (2).

<sup>22</sup> House Judiciary Committee Report, p. 57.

<sup>23</sup> *Infra*, text accompanying notes 47-49.

<sup>24</sup> House Judiciary Committee Report, p. 57.

Congress therefore established clear standards for hiring violations based on a fact-specific determination of the circumstances.

(b) *Good Faith Defense*

Congress also enacted in IRCA a separate provision establishing a defense to INA 274A(a) hiring violations for employers who had complied in good faith with the I-9 employment verification system. In other words, where the government already had met its burden to establish that an employer had knowingly hired or continued to employ an unauthorized alien, the employer *still* could raise the good faith defense available under the statute.<sup>25</sup> In the legislative history, the House Judiciary Committee Report further describes the inquiry related to an employer who has invoked the good faith defense against a finding of a hiring violation under INA 274A(a):

In other words, if the person or entity performs these [I-9] activities, a rebuttable presumption is established that he or she has acted in “good faith,” and the burden is shifted to the government to prove otherwise. It should be noted that this is not an absolute defense, and the government could rebut the presumption by offering proof that the documents did not reasonably appear on their face to be genuine, that the verification process was pretextual, or that the employer ... colluded with the employee in falsifying documents, etc.<sup>26</sup>

Therefore, the rebuttable presumption of the employer’s good faith based on compliance with the I-9 verification requirements should stand unless the government can establish sufficient facts that the employer failed to properly carry out the requirements of the I-9 system or showed some element of intent to subvert the verification system with the purpose of knowingly hiring an unauthorized worker.

(c) *No Intended Direct Obligations or Affirmative Requirements for Employers*

Significantly, Congress emphasized that, unlike for the I-9 verification requirements, it did not intend for the prohibition against knowingly hiring an unauthorized alien to create any “direct obligations or affirmative requirements for the employer.” The House Judiciary Committee Report states:

It should be emphasized that this penalty provisions [sic] described above<sup>27</sup> – unlike the recordkeeping requirements discussed below<sup>28</sup> – impose no direct

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<sup>25</sup> INA 274A(a)(3).

<sup>26</sup> House Judiciary Committee Report, p. 57.

<sup>27</sup> This clause refers to the prohibition against knowing hire of an unauthorized worker.

<sup>28</sup> This clause refers to the I-9 obligations.

obligations or affirmative requirements upon an employer. Instead, this section prohibits the employment ... of undocumented aliens, and it is the Committee's belief that by and large most employers will desist from hiring undocumented aliens when it is known that civil and criminal penalties will attach to such activity.<sup>29</sup>

Therefore, while Congress legislated a highly-detailed procedural scheme for all employers to verify their new employees' documentation, for the higher level of sanctions for knowing violators, Congress sought to establish a system that imposed a rigorous burden of proof on the government to show an employer violated the provision, provided the employer with the option of asserting the good faith defense and deliberately refrained from imposing any affirmative requirements on the employers related to this provision.

(d) *Constructive Knowledge and the Standard of Reasonable Care*

Before the issuance of the regulation, one other important development occurred: the requirement that the employer apply a standard of reasonable care with respect to the prohibition against knowingly hiring or employing unauthorized workers. The case law interpreting the INA 274A(a) knowledge requirement established the reasonable care standard of constructive knowledge, and the Department of Justice incorporated the concept into the immigration regulations in 1991.

However, the constructive knowledge concept has not, consistent with Congressional intent, imposed any specific procedures or processes on employers; rather, it has required that an employer exercise a duty of reasonable care when confronted with facts that would lead a reasonable person to *know* that a worker is unauthorized. In promulgating the new regulation, the DOJ defined constructive knowledge as follows:

The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.<sup>30</sup>

In keeping with Congress' intention to sanction employers who were flouting the employer verification laws, DOJ included several illustrative circumstances in the 1991 regulation which provided, in and of themselves, a basis that would likely provide a reasonable employer with sufficient basis from which to infer actual knowledge that the employee was an unauthorized alien: (1) an employer who does not complete, or who does not properly complete, an I-9 for an employee; (2) an employer who has available information that an alien is not authorized to work in the United States, such as a labor certification; and (3) an employer who allows another person to introduce an

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<sup>29</sup> House Judiciary Committee Report, p. 59.

<sup>30</sup> 8 CFR 274a.1(l)(1) (emphasis added).

unauthorized alien into the workplace with a “reckless and wanton disregard for the legal consequences.”<sup>31</sup>

All three of the examples, which exist to date in the regulations, indicate that the employer has behaved in a manner that indicates that he or she knows, or should know, that the employee cannot be authorized to work. The employer who fails to complete an I-9 altogether presumably is either specifically seeking to violate or recklessly disregarding the law by failing to comply with the basic requirements of the mandated employee verification system. The employer whose employee is the subject of a labor certification presumably must have sufficient facts on hand to know that the employee’s I-9 documentation is inconsistent with his or her request to the employer for sponsorship. The employer who imposes such lax controls over others who hire employees into his or her workplace such that it rises to the level of “reckless and wanton disregard” presumably is willfully turning a blind eye to what any reasonable person would conclude are illegal hiring practices. The three non-exhaustive examples in the current regulations support the basic element of the definition of constructive knowledge in the regulation and the case law – circumstances that involve an action on the part of the employer or employee that indicates a direct causation or result of an unauthorized worker in the workplace.

*(e) Good Faith Defense Applicable to Constructive Knowledge Situations*

Where the government has met its fact-specific burden of proof under law to establish that an employer has met the knowledge element of a hiring violation under INA 274A(a) – regardless of whether it is actual knowledge or constructive knowledge – the employer is still entitled to assert the good faith defense if it complied with the I-9 verification system. After defining constructive knowledge in its regulation, the DOJ invoked language emphasizing the continued applicability of the good faith defense regarding the type of knowledge implicated in the hiring violation:

... knowledge of an employee’s unauthorized status may be acquired directly or through notice of certain facts that would lead a person, through the exercise of reasonable care, to know of the unauthorized status. ... If the employer accepts documents that reasonably appear on their face to be genuine and are sufficient for purposes of section 274A(b) of the Act, and complies with all other requirements of the employment verification system, then he or she will indeed have raised a good faith defense to a charge of knowingly hiring an unauthorized alien in violation of section 274A(a)(1)(A) of the Act.<sup>32</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> 56 Fed.Reg. 41767.

**B. DHS exceeds its authority in proposing its “safe harbor” defense.**

**1. DHS exceeds the scope of the statute and its authority by imposing a new set of obligations on employers after receiving a no-match letter.**

It was clearly Congressional intent to limit the employer’s obligation to avoid liability for constructive knowledge to a reasonable care standard, not to have an administrative agency invent a new set of employer obligations. In fact, Congress specifically indicated in the House Judiciary Committee Report that while the I-9 obligations were specifically designed to establish specific procedures, the hiring violations provisions explicitly were not contemplated to give rise to any new affirmative employer obligations. The only requirement related to the hiring violations provisions is that, under the totality of the circumstances, the employer meets the “reasonable man” standard. This standard of care is, by definition, the actions that a reasonable man would undertake to avoid harm or liability given all the circumstances before him or her.<sup>33</sup> Given the innately calibrative nature of the reasonable man standard, DHS contradicts the statutory intent to invent a formulaic, prescribed, uniform response that purports to adequately respond to the factual circumstances of each employee.

For example, an employer receives a no-match letter that lists the Social Security numbers for two employees, both scheduled to be on personal leave for the length of the 90-day “safe harbor” period. After reviewing the first employee’s file and speaking to company personnel, based on the totality of the circumstances the employer believes that there are substantial indications that she is likely to be properly work authorized. The employer subjectively does not believe that the employee is unauthorized, and believes that it would be prudent to verify the administrative details after her return from leave. On the other hand, after reviewing the second file, she discovers copies of documents that appear to have been altered as well as copies of two years of Social Security no-match letters relating to him. Understandably, the employer believes that based on the totality of the circumstances, this employee is likely to be unauthorized and, as a reasonable employer, would be more likely to take aggressive action regarding the second employee’s work status during his leave. Clearly, the standard of care would justify an the employer’s differing approaches in these two situations, but the proposed regulation would force upon the employer the identical regime of actions, ultimately resulting in termination of both employees.

**2. DHS exceeds its authority in stripping the employer of its good faith defense and replacing it with a purported “safe harbor” provision.**

The DHS rule impermissibly seeks to alter the statute’s two-tiered legal analysis for a finding of employer liability for an INA 274A(a) hiring violation. Under the statute, first the government must meet its burden of proving a violation of the hiring prohibition by a preponderance of the evidence for civil penalties and beyond a reasonable doubt for

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<sup>33</sup> Black’s Law Dictionary.

criminal penalties. If the government has met its burden and alleged that the employer is liable for hiring violations, under the statute the employer then has the right to assert a good faith defense that it has complied with the INA 274A(b) I-9 requirements. If the employer is able to assert the good faith defense, under the law the burden shifts back to the government to prove that the good faith defense does not apply.

However, under the final rule, in a scheme that flatly contradicts the two-tiered legal analysis mandated by the INA, DHS would impermissibly shift the burden for proving a good faith compliance as an affirmative obligation back to the employer. This violates both the letter and the spirit of the law. In addition, if at the end of the 90-day process the employer is unable to conduct a successful verification of the employee, the proposed rule affords the employer two options: termination of the employee or the risk of liability for knowingly employing an unauthorized alien.

Specifically, DHS describes the employer's posture upon not terminating an employee after the conclusion of the proposed 90-day period as: "Facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2)." This characterization – which states that if DHS finds that the employer had constructive knowledge that the employee was unauthorized, the employer has committed a 274A(a) hiring violation – again highlights that the rule has the impermissible intent of eliminating the existing statutory good faith defense.

Unlike the agency's prior 1991 regulation which established the regulatory concept of constructive knowledge, but explicitly clarified its deference to the statutory good faith defense, the language of the final regulation and SPR can only be interpreted as an impermissible attempt to elevate the government's arbitrary and *ultra vires* scheme above the Congressionally mandated and historically established employer sanctions standards to which the government and employers are required to adhere.

## **VI. DHS has not complied with the Congressional notification provisions of INA 274 in making changes to the employment verification system.**

In passing IRCA after more than a decade of deliberation, Congress enacted a comprehensive, carefully crafted law that contained a number of interlocking pieces designed to meet a number of competing goals, including (1) a one-time legalization for foreign nationals with a history of residence and work in the United States; (2) a new process where employers would be required to verify identity and work authorization of every new hire (I-9); (3) a listing of acceptable documentation for the I-9 process, with the attempt to minimize employment disenfranchisement of vulnerable groups; (4) anti-discrimination provisions to protect work-authorized foreign workers; and (5) a new set of employer sanctions rules and penalties for intentional violators. Recognizing the fundamental value of a worker's ability to be employed in our country and the critical role the new verification system would play in our country's economy, Congress included in the IRCA legislation a heightened set of checks and balances to ensure that

any future changes to the system would adequately consider the potential impact on our country's employers and workers.

### A. Statutory Framework

In the statutory section entitled "Restrictions on Changes in the System," Congress mandated a highly deliberate set of steps for changing the employment verification system to protect all of the critical interests at play. The mandated steps include the following:

- a. The President shall provide for the monitoring and evaluation of the degree to which the employment verification system (I-9 system) provides a secure system to determine employment eligibility in the United States.<sup>34</sup>
- b. The President shall implement any necessary changes if the system is found not to be secure, subject to the notification requirements of the section.<sup>35</sup>
- c. Any proposed changes must meet a number of stated requirements, including reliable determination of identity, counter-resistant documents, and limitation of use of information and protection of privacy of information.<sup>36</sup>
- d. The President must provide notice to Congress of any changes to the employment verification system:
  - i. For a "major change" involving presentation of new documents or to establish a telephone verification system, the President must provide Congress with a written report setting forth the proposed change two years before implementation.<sup>37</sup>
  - ii. For a "major change" involving "any change" to a social security card, the President must provide Congress with a written report setting forth the proposed change one year before implementation.<sup>38</sup>
  - iii. For any other change, the President must provide Congress with a written report setting forth the proposed change 60 days before implementation.<sup>39</sup>
- e. Upon receipt by Congress of the President's proposed changes, the House and Senate Judiciary Committees shall print the substance of the change in the Congressional Record and hold hearings related to feasibility and report to their Houses the report and recommendations.<sup>40</sup>

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<sup>34</sup> INA 274A(d)(1)(A).

<sup>35</sup> INA 274A(d)(1)(B).

<sup>36</sup> INA 274A(d)(2).

<sup>37</sup> INA 274A(d)(3)(A).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> INA 274A(d)(3)(C).

f. No major change can be implemented without Congressional appropriation.<sup>41</sup>

**B. DHS has failed to follow the Congressional notification requirements mandated by INA 274A(d).**

DHS is required to comply with the Congressional notification requirements under INA 274A(d) because its proposed rule constitutes a change in the I-9 verification requirement.

Despite DHS's assertion in the final rule that "The safe-harbor procedure described in the present rule, however, does not concern the employment verification requirements under section 274A(b) of the INA, 8 U.S.C. 1324a(b)" but instead "relates to section 274A(a)(2) of the INA, 8 U.S.C. 1324a(a)(2),"<sup>42</sup> DHS refers numerous times to the verification procedure that is required at the end of the set of required steps of the "safe harbor" process.

In the introductory paragraphs of the final rule, DHS states, "The regulation also describes a verification procedure that the employer may follow if the discrepancy is not resolved within ninety days of receipt of the no-match letter."<sup>43</sup> Identical to the initial I-9 verification, this subsequent verification "would verify (or fail to verify) the employee's identity and work authorization."<sup>44</sup> In fact, the description that DHS provides later in the rule highlights the virtually identical forms and process that the employer must use to perform the I-9 verification: "The procedure to verify the employee's identity and work authorization described in the rule involves the employer's and employee's completing a new Form I-9, Employment Eligibility Verification Form, *using the same procedures as if the employee were newly hired, as described in 8 CFR 274a.2*, with certain restrictions."<sup>45</sup> The restrictions include:

- difference in timeframe (93 days within receipt of no-match letter under proposed regulation, vs. 3 days from hire for initial I-9 verification);
- employee in I-9 reverification is not permitted to present the Social Security card or other document bearing the disputed Social Security number to establish work authorization;
- employee in I-9 reverification cannot present a document without a photograph to establish identity;
- employers may store records of verified resolutions along with the employee's Form I-9, by updating the employee's Form I-9 or completing a new Form I-9; and

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<sup>41</sup> *Id.*

<sup>42</sup> 72 Fed.Reg 45620.

<sup>43</sup> *Id.* at 45613.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (emphasis added).

- the new Form I-9 will be retained for the same period as the original Form I-9.<sup>46</sup>

Therefore, despite its protestations to the contrary, it is clear that DHS has imposed a scheme that includes changes to the I-9 verification system without complying with the mandated Congressional notification. Under the statute, Congress mandates a minimum 60-day notification period for any changes to the I-9 verification system, unless the changes qualify as “major changes.” Arguably, some of the changes to the employment verification system may be “major changes,” as they require a change in the presentation of the Social Security card, which would further raise the Congressional notice period to one year. Therefore, DHS is impermissibly seeking to promulgate a rule in violation of its statutory obligation to notify Congress and follow the required steps relating to changes in the employment verification system. Indeed, these verification changes are “major changes” and require Congressional appropriation.

## **VII. DHS’ rule is a legislative rule, not an interpretive rule.**

The rule creates new duties, mandates new burdens and imposes new and additional compliance costs on employers. The rule creates a blanket presumption of constructive knowledge against an employer who fails to follow DHS’s arbitrary safe harbor formula. It fails to balance the use of an inaccurate database to reach so serious a finding against the collateral consequences that flow from a constructive knowledge finding.

The Court held that the safe harbor procedures set forth under the rule created compliance obligations and failure to follow these obligations exposed an employer to civil or criminal liability. DHS does not appear to refute this holding, yet it continues to argue that it is merely issuing a policy statement, letting the public know its current enforcement or adjudicatory approach.

DHS is not invoking its legislative rulemaking authority to mandate a specific action upon a certain event; rather this rulemaking informs the public of DHS’ interpretation of Section 274A of the INA and describes how DHS will exercise its discretion in enforcing the INA’s prohibition on knowing employment of unauthorized aliens.<sup>47</sup>

Although DHS continued to insist that its rulemaking is interpretive rather than legislative, the SPR purports to provide a Regulatory Flexibility Analysis termed an “Initial Regulatory Flexibility Analysis.” The analysis provided is clearly inadequate and seems to be only an offer of token compliance with a Court finding with which it disagrees.

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<sup>46</sup> *Id.*

<sup>47</sup> 73 Fed.Reg. 15951.

The proposed regulation is clearly legislative under the test articulated in *Hemp Industries Association v. Drug Enforcement Administration*<sup>48</sup> (“*Hemp II*”). In *Hemp II* the court stated: “As we did in *Hemp I*, we reject the DEA’s contention that the Final Rules merely ‘clarify that the longstanding placement of THC in schedule I includes both natural and synthetic THC.’ 68 Fed. Reg. 14116 (Mar. 21, 2003). The DEA’s action is not a mere clarification of its THC regulations; it improperly renders naturally-occurring nonpsychoactive hemp illegal for the first time.”<sup>49</sup> In the instant matter, DHS is reversing a position concerning the significance of no-match letters that the agency had consistently followed previously. It sets forth a new definition of constructive knowledge that is triggered when an employer receives an SSA no-match letter and fails to follow the regulatory “safe harbor” steps.

Moreover, as in *Oregon v. Ashcroft*,<sup>50</sup> the promulgation of the standard proposed by the DHS will, in effect, create a litmus test that Congress’ enactment does not authorize, effectively eliminating or significantly reducing the effect of Congress’ legislated “good faith defense.”

The agency fails to assess the significance of basing its changed standard of constructive knowledge on the failure of an employer to comply with its formula of performance in light of the agency’s other initiatives to criminally prosecute corporate violators and the recent enactments by states of laws and administrative policies imposing civil and administrative culpability on companies found to have knowingly employed unauthorized workers.<sup>51</sup>

The SPR does not compare the option of a more accurate, case-by-case analysis of the employer’s response to receiving a no-match letter, to the formula-based approach it adopts. There is legitimate cause for concern that the rule will result in an increase in employer conduct that may be found discriminatory. Instead of analyzing the increased risk of discrimination, the SPR simply rescinds the exception that it created to unlawful discrimination.

### **VIII. DHS has failed to amend the regulation to clarify that the regulation does not apply to employees hired before November 7, 1986.**

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<sup>48</sup> 357 F.3d 1012 (9<sup>th</sup> Cir. 2004).

<sup>49</sup> *Id.* at 1799.

<sup>50</sup> 368 F.3d 1118 (9<sup>th</sup> Cir.2004), invalidating the Attorney General’s administrative interpretation of Oregon’s “Physician Assisted Suicide” law, as violating the federal Controlled Substances Act, on the ground that it exceeded Congressional authorization.

<sup>51</sup> *See* “Navigating the Immigration Debate: A Guide for State & Local Policymakers and Advocates,” AILA InfoNet Doc. No. 08021975, at pp. 27-28.

DHS acknowledges that the regulation does not apply to any grandfathered employees – those hired before November 7, 1986. Although this concession is made in the preamble, DHS should have taken this opportunity to clarify the regulations, since not all employers have the sophistication to read the supplementary remarks to regulations, and those remarks do not become codified in the CFR. Moreover, the failure to do so directly undermines its purported intent to eliminate ambiguity in employers’ responsibilities.

**IX. The objective of the rule--to provide “clear guidance” for employers on how to limit their risk of liability under the immigration laws—has not been achieved in DHS’s “safe harbor” steps.**

The guidance lacks clarity, and the “reasonable steps” set forth are confusing and burdensome. The lack of clarity and transparency will exacerbate the burden of compliance on small business employers who are already overwhelmed with a plethora of federal and state regulations governing their business operations.

Examples of how the “safe harbor” procedures lack clarity and are burdensome include the following:

1. DHS has imposed an additional burdensome regulatory obligation. It defines what is meant by “prompt” notification to the worker regarding the no-match letter and states that the employer has the “obligation” to notify the employee within five days of receipt of the SSA letter. Why just five days? Isn’t it better to allow the employer to determine what is a reasonable time based on its own workload and production commitments? Clearly, such an important notification might trigger the need for advice of counsel. Immediate procurement of counsel is not guaranteed. Perhaps the employer wants to personally notify employees who are located in remote sites; perhaps there are a large number of employees who must receive notification; perhaps the only staff member who can communicate the notification in Spanish is on vacation; perhaps a written notification must be translated into Spanish and translation services are not readily available. What if the employer has a unionized workforce and the collective bargaining agreement mandates that an employer notify the union representative and that a union representative be present during this type of communication to employees? Clearly such a mandate will delay notification as labor counsel, counsel for the union, union stewards and others negotiate how notification will occur. One can think of a host of situations where five days is impractical. DHS’s attempt to micromanage the employer’s conduct is burdensome and irrational.

2. DHS guidance specifies that, in the case of an SSA no-match letter, if an employee is unable to resolve the mismatch of his or her social security number, an employer can achieve a “safe harbor” if the employee completes a new I-9 without using the social security card and with the presentation of a new work authorization document. A photo ID is required. What if a social security card was not the basis for work authorization on the current I-9? The employee relied on a List A document that contained a photo and evidenced employment eligibility, for example, a U.S. passport, a naturalization certificate, a permanent resident card or another DHS-issued work authorization card.

There should be no need to complete yet another I-9 if it will be identical to the current I-9 except for a new signature and date.

3. What if the employee completes a new I-9 using new identification and work authorization documents and alleges that these new documents evidence his or her right to work? Does the employer have a safe harbor from civil or criminal liability, as promised by DHS in its final rule and SPR?
4. Once a new I-9 is completed, is there an on-going responsibility to follow up to inquire whether the employee has clarified the no-match problem? If follow-up is required, DHS should clarify how often and in what manner, and this additional time should be factored in the RFA analyses; however, this issue wasn't addressed in the RFA at all.
5. DHS provided notice in the Federal Register<sup>52</sup> that it published a newly amended I-9 with an updated and much reduced list of acceptable identity and employment authorization documents. The Notice eliminates certain previously acceptable List A, I-9 documents and cautions that an employer can no longer accept the following documents as evidence of employment eligibility: (a) the certificate of U.S. Citizenship (Form N-560 or N-561); (b) the Certificate of Naturalization (Form N-550 or Form N-570); (c) the older version of Form I-151, the alien registration card; (d) the Unexpired Re-entry Permit (Form I-327); and (e) the Unexpired Refugee Travel Document (Form I-571). DHS will seek penalties under section 274A of the INA, 8 U.S.C. 1324a against an employer who uses the older form I-9 or relies on these documents after December 26, 2007.

The elimination of these documents will result in the inability of an immense number of lawfully authorized workers to present alternate, valid work authorization documents to establish their right to work. In order for the employer to gain "safe harbor," if the employee's social security number is problematic, the worker must complete a new I-9 and must not present the questionable social security card; rather, alternate work eligibility documents from the now-reduced list of acceptable I-9 documents must be presented. For example, a naturalized U.S. citizen who has a no-match problem will no longer be able to present his naturalization certificate. He would have to apply for a U.S. passport. Individuals born abroad to U.S. citizen parents often derive U.S. citizenship through their parents. They are issued certificates of citizenship. Unfortunately, this certificate was also eliminated as an acceptable List A document thus forcing these citizens to apply for a U.S. passport. A refugee will no longer be able to present an unexpired Refugee Travel document (USCIS Form I-1751) and will have to be processed for an Employment Authorization card which takes 90 days or longer for DHS to issue and costs \$340. It is also possible that certain individuals might not be able to present a photo ID as they lack state-issued identification such as a driver's license.

The DHS Notice mandates that the new I-9 form and the reduced list of documents be relied on for all re-verifications of employment authorization conducted on or after

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<sup>52</sup> 72 Fed.Reg. 65974, 65975 (Nov. 26, 2007).

December 26, 2007.<sup>53</sup> Thus, re-verifications under the “safe harbor” provisions are implicated. As will be discussed below, the RFA analysis totally fails to address the burden on job applicants and U.S. passport and Social Security Administration offices – a burden which has now been further exacerbated with the newly revised I-9.

6. DHS regarding the revised I-9 states: “The amended Form I-9 now instructs employees that providing a Social Security number in Section 1 of the form is voluntary, pursuant to section 7 of the Privacy Act (5 U.S.C. 552a note).”<sup>54</sup> Further guidance is provided to employers in DHS’s Employer Handbook where an employer is cautioned that it cannot insist on the presentation of a social security card for I-9 completion.

*NOTE: Providing a Social Security number on the form I-9 is voluntary for all employees unless you are an employer participating in the USCIS E-Verify Program, which requires an employee’s Social Security number for employment eligibility verification.*<sup>55</sup>

How will implementation of the safe harbor provisions be applied if an employee need not record a social security number on the I-9 yet the employer reported a social security number in its payroll submission and received a no-match letter? Once again, this presents a situation where no social security number was used for I-9 completion and presumably the worker and the employer should not have to complete another I-9.

7. DHS states in the SPR that the proposed rule “suggests” but doesn’t require that employers retain records of their efforts to resolve no-match letters.

This suggestion is based on the possible need of an employer to demonstrate the actions taken to resolve a Social Security no match if and when ICE agents audit or investigate that employer’s compliance with INA section 274A, 8 U.S.C. 1324a.<sup>56</sup>

This assertion is contradicted in the Final Rule where DHS states:

The employer should make a record of the manner, date, and time of such verification, and then store such record with the employee’s Form I-9(s) in accordance with 8 CFR 274a.2(b). The employer may update the employee’s I-9 or complete a new Form I-9.<sup>57</sup>

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<sup>53</sup> *Id* at 65975

<sup>54</sup> *Id* at 65975

<sup>55</sup> Form M-274, Rev. 11/01/2007, N, p.5

<sup>56</sup> 73 Fed. Reg. 15952.

<sup>57</sup> 72 Fed. Reg. 45624.

Further recordkeeping is mandated: “If the employee states that the employer’s records are incorrect, the employer must correct, inform, verify, and make a record as set forth in paragraph (l)(2)(i)(A) of this section.”<sup>58</sup> Of course, there is also the requirement to complete a new I-9 upon re-verification within 93 days, and presumably to monitor the continued re-verification for those unable to resolve the no-match. None of these recordkeeping responsibilities are addressed in the RFA.

**X. The DHS Initial Regulatory Flexibility Analysis is deficient.**

Section 603 of the Administrative Procedure Act (APA) mandates that federal agencies prepare an Initial Regulatory Flexibility Analysis (IRFA) to accompany any rule that requires a general notice of proposed rulemaking. The DHS no-match NPRM, published in June 2006, failed to comply with this critical obligation. APA Section 605 imposes a similar requirement in connection with the publication of a final rule. DHS likewise failed to comply with the RFA requirement in connection with the publication of the August 15, 2007 final rule. One may justly inquire why an agency that demands strict compliance with U.S. law is so cavalier with the laws that restrict its discretion in imposing new rules and mandates.

Now the Department seeks to comply with its preliminary obligation *after* Court challenge, and seeks to implement the Final Rule after a meager 30-day comment period *without preparing a final RFA that addresses economic impact issues and less burdensome alternatives that come to light through the public comment process*. Such action would clearly violate established law and justify judicial action remanding the rule to DHS for the purpose of completing the required final RFA and staying implementation pending completion of the RFA.<sup>59</sup>

The Regulatory Flexibility Act requires consultation with agencies and parties with knowledge of the agency’s program operations regarding the likely impact of major changes upon the public, and alternative measures that would be equally effective in achieving the agency’s objective but less burdensome to small business. As an example of DHS’s failure to follow this mandate, Econometrica, the vendor that conducted the economic analysis study on behalf of DHS, failed to consult with the American Immigration Lawyers Association, the professional association with arguably the greatest institutional knowledge of the Government’s employer sanctions programs -- having thousands of members representing employer and employee interests. Had such consultation taken place, Econometrica and DHS would have obtained valuable insights that would have informed the rulemaking process for the better as evidenced by these comments.

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<sup>58</sup> *Id* at 45624

<sup>59</sup> *See* U.S. Telecom Ass’n v. FCC, 400 F.3d 29, 42-43 (D.C. Cir. 2005).

In performing a final RFA, we urge DHS to consider the impact of the rule on the macro economy given the current economic crisis. Because of the economic downturn, it is particularly important that DHS be sensitive to burdening small employers with added costs, which may result in more business closings and job losses. AILA's call for a more thorough economic analysis is further supported by the Government's concession that some small employers may incur direct costs that are higher than average estimated costs and "could reasonably be expected to face a significant economic impact." This concession comes without factoring in the major costs associated with lost production, increased overtime, recruitment and training resulting from large scale employee turnover in sectors of the economy known to rely upon workers targeted by the no-match regulation. The current DHS response to the plight of these small employers is the legal equivalent to Marie Antoinette's response to the starving French peasants: "Let them eat cake!" It is not acceptable.

#### **A. "Direct" Cost of Compliance**

We also urge rejection of the Department's conclusion that the "direct" cost of compliance with the safe harbor rule will not impose a significant economic impact when considered on an average cost-per-firm basis. Governing law requires consideration of the economic impact of the mandate *in the aggregate, not per capita*. When the costs reported in the Econometrica Small Entity Impact Analysis are aggregated for all U.S. employers, the true economic impact of the rule would exceed \$1 billion.<sup>60</sup> Given the magnitude of this loss, DHS should return to the drawing board to consider the ripple effects upon all sectors of the U.S. economy in the interest of providing a realistic cost-benefit analysis.

#### **B. Employee Replacement Costs**

DHS contends that while employee replacement costs may be significant to some employers, the agency need not recognize them for purposes of reporting economic impact because such costs allegedly flow from compliance with IRCA itself, and not from the "safe harbor" rule. The argument is disingenuous because it assumes that the safe harbor rule does not impact the status quo. That is certainly not the case. DHS has dramatically raised the bar for IRCA compliance by mandating that employers challenge the identity and work eligibility of incumbent, trained workers when placed on an SSA no-match list notwithstanding the existence of a properly completed Form I-9.

For the past 20 years, legacy INS, DOJ, and DHS have been administering a law that, as previously discussed, balances verification and anti-discrimination interests, and have been cautioning employers to avoid inquiries regarding immigration status. DHS now attempts to turn that worksite enforcement policy on its head. The "safe harbor" rule constitutes the involuntary enlistment of every U.S. employer in the agency's crusade to

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<sup>60</sup> *Comments on DHS's Safe-Harbor Interim Regulatory Flexibility Analysis*, Richard B. Belzer, April 21, 2008, at p. 4.

rid the country of its unauthorized workforce, or else be condemned to potential prosecution, imprisonment, and loss of significant financial assets.

Sadly, DHS remains blind to the significance of this sea change in social and economic policy, and must not be permitted to move forward with instant implementation of the August 15, 2007 final rule without proper completion of an accurate RFA and small business entity analysis and a balanced analysis of the reasonable alternatives available to achieve the overall objective of respect for law. Such serious deficiencies impact the overall “reasonableness” of the rule, and provide grounds for denying implementation.<sup>61</sup>

### **C. Faulty Economic Assumptions**

In connection with preparation of the final RFA, we also urge DHS to revise its economic assumptions to correct the following deficiencies that we note in the Econometrica Final Report dated January 15, 2008, a 44-page report with 58 additional pages of appendices. Its stated primary objective is to provide DHS with information to prepare an Initial Regulatory Flexibility Analysis (IRFA). An IRFA contains five elements:

1. A description of the reasons why action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule would apply.
4. A description of the proposed reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that would be subject to the requirements and the type of professional skills necessary for preparation of the report or record.
5. An identification, to the extent practicable, of all Federal rules that may duplicate, overlap, or conflict with the proposed rule.

The Econometrica report states that it provides information to make findings under Items 3 and 4 only.

By necessity, the report relies upon numerous stated assumptions. Short of hiring an independent consultant to review the conclusions in the report, the public is left to rely upon common sense to evaluate the report.

The assumptions of the report are substantial and many of the “facts” upon which the report relies are inaccurate. A change in any of the stated assumptions means that the conclusions will differ. The following assumptions, which represent variables in analysis, are stated in the report:

1. That SSA will continue to use the current criteria for sending no-match letters. P. 4.

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<sup>61</sup> See *Thompson v. Clark*, 741 F.2d 401, 408 (D.C.Cir.1984); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C.Cir.1983).

2. That relatively larger firms will have an easier time absorbing costs than smaller firms because size is often used to gauge the ability of different firms to absorb compliance costs,. P. 5.
3. That the assumption in #2 above is generally made when there are fixed costs that are the same for all firms regardless of size. P. 5.
4. That in estimating direct compliance costs, it is assumed that none of the affected entities were previously using any procedures to address SSA no-match letters. P. 16.
5. That 100 percent of the firms that receive no-match letters will choose to follow safe harbor procedures. P. 16.
6. That given the complexity associated with tax submissions, all firms either utilize the services of an accountant or use electronic software. P. 18.
7. That unauthorized workers will not give rise either to the same sort of productivity costs (taking off work) or administrative costs (sending in corrected W-2s) as would authorized workers. P. 20.
8. That only 5 occupations will be responsible for implementing the “safe harbor” procedure (lawyer; accountant; compensation and benefits manager; compensation, benefits or employment specialist; and human resources assistant). P. 22.
9. That an attorney will spend an average of 24 hours (i.e. three work days) providing guidance. P. 24.
10. That only 50% of firms receiving no-match letters will seek legal counsel. P. 24.
11. That the average legal cost per firm will be \$945, based upon an hourly wage for lawyers of \$78.75 per hour. P. 24
12. That many employers will turn to the internet rather than hiring legal counsel to resolve no-match issues. P. 24 (footnote 39).
13. That for 98% of the current authorized employees an accountant will spend one-quarter hour completing a W-2c (i.e. corrected W-2). P. 25.
14. That only 2% of current authorized employees listed on a no-match letter will be terminated. Pp. 25, 26, 37, 38.
15. That all W-2cs will be submitted in batch. P. 25.
16. That one-third of the authorized employee no-matches will be identified and corrected during each of the first two stages. P. 26.
17. That employers will choose to be proactive in helping their employees navigate the process and thus will eliminate unnecessary terminations. P. 26.
18. That unauthorized employees will separate from the employer at the end of the 93 day period. P. 27.
19. That staff will write form letters to affected employees. P. 27.
20. That the Compensation and Benefits Manager will spend one-quarter hour in this endeavor. P. 27.
21. That the cost per firm of item 20 above does not depend upon the number of authorized or unauthorized workers in the company. P. 27.
22. That an HR Assistant will spend one-quarter hour comparing the SSNs on the no match letter against a list of current employees. P. 27.

23. That the cost of Item 22 above will be \$175 (the cost to generate a report of all employees plus the cost of the H.R. Assistant's one-quarter hour, assumed to be \$6.09). P. 27.
24. That a Compensation/Benefits/Employment Specialist will spend one-quarter hour per current no-match employee to conduct a review. P. 27.
25. That an HR Assistant (presumably without advice or direction) will complete a form letter and send it to the employee. P. 28.
26. That a 15 minute meeting will take place between the employee and a Compensation/Benefits/Employment Specialist. P. 28.
27. That one-third of the remaining authorized no-match employees will be unable to resolve the problem in the initial check. P. 28.
28. That it will take 1 hour for the Compensative/Benefits/Employment Specialist with respect to the authorized no-match employees. P. 28.
29. That the unauthorized employee will not seek HR assistance. P. 28 and p. 29.
30. That a visit to the SSA will take a full 8 hours for an employee. P. 31.
31. That the employee will also need to contact the SSA by phone but this will take an hour of work. P. 31.
32. That modes phone and mail costs will be incurred. P. 32.
33. That research time will be incurred within the company. P. 34.

The foregoing represents only some of the stated assumptions of the report. While the report appears to follow a painstaking course of analyzing every minutia of expense, down to pieces of paper, postage and phone calls, it is evident that the assumptions, even if they can be taken as accurate, rely upon incorrect and/or outdated information. A few of those examples are provided below.

The Econometrica Report, in assessing who will be responsible for carrying out the "safe harbor" process, contends that it will be left in the hands of five occupations: lawyer; accountant; compensation and benefits manager; compensation, benefits or employment specialist; and human resources assistant. (See Assumption 8 above). It then attempts to calculate the cost of those individual efforts by calculating wages and the time that it is anticipated that might be required to resolve the matter.

In calculating the hourly wages for each of these occupations, the report relies upon the U.S. Bureau of Labor Statistics (BLS) survey from 2006. The BLS Data is based upon survey conducted in November 2003, 2004, 2005 and May 2004, 2005 and 2006.<sup>62</sup> Thus, the survey data currently includes salaries that are almost 5 years old. Additionally, the Technical Notes for May 2006 OES Estimates indicate that the data was collected as a result of mailing forms to 200,000 establishments.<sup>63</sup> These included logging and agricultural support, state and local governments, the U.S. Post Office and the executive branch of the U.S. government and entities that produces goods or services, such as factories, mines and stores. One might reasonably question whether the five occupations

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<sup>62</sup> [www.bls.gov/oes/current/oes\\_tec.htm](http://www.bls.gov/oes/current/oes_tec.htm).

<sup>63</sup> *Id.*

deemed to be included in the work to be done were actually occupations that were included in sufficient number to warrant placement under the wage survey. How many of such 200,000 establishments, for example, had in-house lawyers and accountants?

Significantly, among the costs calculated are legal expenses. A substantial flaw exists in the report as it calculates the cost to the employer based upon the assumed *wage* of the lawyer. The wage rate of the lawyer cannot be equated with the *cost* charged to a client. In fact, overhead expenses at law firms, like every other employer, include the costs of support staff, rent and utilities, libraries, software, equipment, legal education expenses, benefits expenses, and taxes. While a professional may net \$X per hour in salary or draw, the cost of producing that net amount substantially exceeds that net amount, estimated to be between twofold and threefold, and these amounts are part of what the employer pays. The same analysis would hold true for accountants. Thus, the starting point of this portion of the report's analysis is dramatically flawed for every service provider, including lawyers and accountants, who are not in-house employees of the company.

Notably, many small businesses do not have an in-house HR staff or payroll administrators and many hire outside service providers for this service. Like any other service provider that is not in-house, services come at a higher "price tag." Potentially, small businesses will suffer even greater economic harm in this area than will larger companies.

The assumption that small firms will turn to "white papers" rather than legal counsel is baseless. It underestimates the reaction of employers as they evaluate the impact on their business by the loss of workforce, potential lawsuits for wrongful termination, issues involving collective bargaining agreements, and the threat of criminal sanctions. As the impact of this regulation is felt and reported, the quality of response level will increase. So too will the cost.

To limit the number of those who will be involved in problem resolution to the five stated occupations underestimates the response level of companies who receive no-match letters under the newly stated standards. With the more serious consequences articulated, it is not unlikely for additional occupations to be involved in the process. These would likely include Senior Human Resources Managers, the Chief Operating Officer, Chief Financial Officer, Chief Executive Officer, other attorneys with pointed expertise in labor and immigration, Company Compliance Officers, Paralegals, secretaries and other clerical workers.

It is likely that, where applicable, union representatives and the union's attorneys will also be involved. Provisions in many collective bargaining agreements prevent the termination of workers without following prescribed steps. If those processes should exceed 93 days, the employer is caught in a difficult bind between the regulations and the union contract.

The scope of the work of each participant is not fully described, nor is there sufficient consideration to the heightened level of effort required in light of the adverse ramifications to the employer. One can hardly imagine that the events noted above in the list of assumptions will take a mere 15 minutes.

Moreover, those in-house staff members who will be engaged in the process will turn their attentions from other duties, constituting a hidden cost of compliance: the loss of opportunity to be engaged in productive employment, including hiring, management, financial analysis, and production of other work.

#### **D. Visits to the SSA Office --Inaccurate Calculation of Lost Production Time**

The Econometrica Report severely undervalues the impact of lost production by employees who must take time from work to resolve the no-match with the Social Security Administration. Similar to when a tentative non-confirmation is issued when an employer is using E-Verify, an employee will be required to take time from work to contest a records non-confirmation.

In the calculation of employee lost production, the report states that no-matches may be resolved at three points: 1) The firm's initial review of the employee's records, which determines if the no-match is due to a clerical error (1 hour); (2) the employee identifying possible error in the employer's records (1 hour); (3) the employee resolving the no-match through a meeting with SSA (8 hours). "In the absence of any data on the subject," the report "assumes" that the number of employees who resolve their records are equally spread amongst all three points. This largely ignores the reality that most employees will not be able to resolve the no-match simply by submitting a corrected W-2. Instead more than the 1/3 estimated by the Econometrica will need to physically resolve the no-match at an SSA office. This reality is supported by the Westat Report, where only in 30% of the time were tentative non-confirmations caused by either solely an error with the date of birth or the name.<sup>64</sup> Because the Econometrica report has underestimated the percentage of workers who will need to take time off to visit a SSA office, the costs of employee productivity are significantly higher than represented.

The Econometrica report estimates that the "opportunity cost" to the employer of a no-match employee's time in visiting a SSA is the equivalent of the average employee wage rate at \$27.58. This is fundamentally flawed as few employers pay an employee the value of the labor provided. The lost production of an individual employee may be several times greater than the employee's hourly wage.

Most importantly the report neglects to consider the lost production or replacement costs of workers who are terminated in the process of following the No-Match Regulation. For instance, when Swift & Co. lost 1,282 workers overnight, Swift estimated that the lost production for one day was \$20 million or about \$1,560 per worker per day. This

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<sup>64</sup> Westat Report, p. 51.

enormous cost significantly outweighs the \$300 per worker costs of compliance estimated by Econometrica.

## **E Burden on Employees, DOS and U.S. Postal Offices**

As noted earlier, new I-9 rules mandate that employers only accept a reduced list of acceptable documents in order to complete an I-9. The reduced list of documents forces employees who have a problem with their social security card to present an alternate acceptable document. For naturalized citizens, citizens who derived their citizenship through birth abroad to American citizen parents, and certain refugees and asylees, this task will prove burdensome and will tax the resources at Social Security and U.S. passport and postal offices.

According to the SSA's Office of the Inspector General in 2007, 12.7 million of the 17.8 million discrepancies in SSA's database - more than 70% - belong to native born U.S. citizens. Up to an additional 12% are SSA discrepancies that occur because of lack of resolution in SSA's system after foreign nationals complete the naturalization process. Due to database errors, foreign-born lawful workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment. Foreign-born U.S. citizens feel the greatest impact, with almost 10 percent initially being told that they are not authorized to work (versus 0.1 percent for native-born U.S. citizens).

Prior increases in passport applications in late 2007 and in 2008 resulted in delays and an inability by DOS to meet its deadlines, as it became evident that DHS and DOS did not have time for efficient and effective implementation before enactment of the Western Hemisphere Travel Initiative (WHTI).

Slightly over 20% of U.S. citizens have passports. DOS saw an increase in passport demand from a base level of 7 million passports issued in 2003 to an expected more than 17 million issuances in fiscal year 2007.<sup>65</sup> The 2007 GAO Report on the cost of implementation of the WHTI and the cost borne by the DOS to implement this program<sup>66</sup> revealed that the total DOS most recent cost of service study, which estimated passport execution costs, lacked documentation of key decisions, requiring that a new study be performed. DOS was not able to provide documentation of critical components of the study's estimated execution costs calculation. For example, consular officials could not provide details regarding the survey of consular officers used to estimate the time it takes to execute a passport, including the survey's design or how the results were used to arrive at the final estimated time spent on passport execution--a key driver of costs.

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<sup>65</sup> GAO-08-63, "State Department: Transparent Cost Estimates Needed to Support Passport Execution Fee Decisions," November 2, 2007.

<sup>66</sup> GAO-08-63, "State Department: Transparent Cost Estimates Needed to Support Passport Execution Fee Decisions," November 2, 2007.

One of the cost drivers is the time and training of a DOS agent at a passport facility, who is required to, among other things, verify that the applicant's identification documents (driver's license, for example) and photo are authentic and match the person standing before the agent.<sup>67</sup> In a cycle whereby the applicant has already undergone a document verification challenge, the citizen will have to satisfy an additional agency with a separate set of requirements of his or her eligibility for a document in order to verify work eligibility within a short time - most likely at a post office, since those comprise approximately 2/3 of all passport facilities, executing 72% of all first time applications during the past fiscal year. In its most recent report, the GAO found that DOS lacks a program for oversight (training of agents, quality control, etc.) of passport acceptance facilities and made a number of recommendations to improve this oversight.<sup>68</sup>

In addition, the GAO was troubled by the fact that the timing associated with passport execution was not transparent enough to satisfy the GAO. Although later refuted by the GAO because of flawed data collection, the time estimates gathered at the post offices were used as a proxy (by DOS in determining its budget and the amount that it would pay for passport execution), concluding that it took 7.63 minutes for each passport execution.

If most of the U.S. citizens receiving no-match notification decide that a passport application is the swiftest method to re-verify their right to work, the sheer volume of first-time passport applications would pose an enormous burden on the agency and its contractors.

Passports may not be easily acquired by Americans who have never previously departed the United States. Records demonstrating proof of physical presence and/or birth in the United States for passport application purposes can take several weeks to acquire, if they are available at all. The inability of an employer and employee to resolve a SSA no-match within 90 days will cause unemployment amongst the citizen workforce. A DHS analysis detailed the 10-year time costs associated with acquiring identity documents for REAL ID purposes, estimating 161.9 million hours preparing applications; 26.5 million hours obtaining birth certificates; 15.8 million hours obtaining Social Security cards; 64.7 million hours on DMV visits.<sup>69</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Department of Homeland Security, "Regulatory Evaluation, Notice of Proposed Rulemaking, REAL ID," *Code of Federal Regulations*, Title 6, Part 37, RIN: 1601-aa37, Docket Number DHS-2006-0030 (February 28, 2007). p. 3

## F. Burden on Resources at SSA

One of the most glaring deficiencies of the RFA is the lack of analysis of the burden placed on employees who seek the services of the Social Security Administration as it executes its role in the DHS no-match rule.

The Social Security program is the largest domestic social program in the world. The Old-Age, Survivors, and Disability Insurance Trust Funds paid out over \$575 billion in benefits to over 49 million beneficiaries in 2007. The size and scope of the program represent enormous stewardship challenges for SSA. The Agency has core, ongoing stewardship efforts that are critical to the elimination of improper payments. The elimination of improper payments in the SSI program is heavily dependent on the availability of resources to conduct core stewardship functions, particularly redeterminations and continuing disability reviews.<sup>70</sup> Staffing to address these core responsibilities has been impacted by layoffs in recent years, and by SSA's performance of work in support of other agencies, such as DHS and Medicare program administration.

The Fiscal Year 2009 Budget press statement issued by the SSA itself states that it is facing "an avalanche of retirement and disability claims at the same time that [it] must address large backlogs due to years of increasing workloads and limited resources".<sup>71</sup> Alarming, SSA began FY 2008 with 135,160 cases which are or will become 900 days old in FY 2008. During FY2009, the SSA intends to reduce the hearing backlog by nearly 70,000 cases, process over 200,000 more retirement and survivors' claims, and handle 4 million more 800-number calls compared to FY2008. One of the greatest challenges now facing SSA is staffing. By 2015, almost 54% of current employees will be eligible for retirement. As a result, while workloads increase due to the disability and retirement needs of the baby boomers, the Agency is in danger of losing that segment of its workforce that is most experienced and knowledgeable about the administration of its programs. Layoffs nationwide, and repeated threats of SSA office closures, have plagued towns in New York and Kansas, as the SSA attempted to resolve its staffing crises by limiting public office hours.

SSA offices are already overburdened with the growing number of employers participating in the E-Verify program. With the additional workload responsibilities emanating from the no-match regulations, the resource problems currently faced by SSA will only multiply. As of November 2007, there were over 30,000 employers participating in the E-Verify program at nearly 125,000 employer sites nationwide.<sup>72</sup> It

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<sup>70</sup> SSA Annual Performance Plan for Fiscal Year 2009 and Revised Final Performance Plan for Fiscal Year 2008

<sup>71</sup> "Message from the Commissioner", SSA FY 2009 Press Release

<sup>72</sup> *Supra*, note 69.

is expected that participation in E-Verify will continue to rise.<sup>73</sup> Now one will need to factor in the increased workload required to resolve SSA tentative non confirmations.

The major cost of E-Verify for the SSA is the increased workload required to resolve SSA tentative non-confirmations.”<sup>74</sup> In FY2006 there were about 1.74 million verifications, which can take up to two weeks to resolve. Employers who participated in the Westat study complained that in some locations SSA offices were over 50 miles away, making in-person resolution difficult.<sup>75</sup> While the SSA’s FY2009 budget and strategic planning initiatives include plans to expand the agency’s use of video technology, nearly all documentation for E-Verify purposes requires an in-person review and verification, thereby excluding E-Verify from the agency’s “virtual SSA” business model for the foreseeable future. Similarly, the resolution of a no-match for an employee will require an in-person review.

Not only has DHS challenged job applicants and employers by changing its guidelines regarding its list of acceptable I-9 documents, SSA has *also* implemented stricter evidentiary standards for SSN card applicants by revising its list of acceptable documents that are required for proof of identity. Acceptable identification is evaluated on a case-by-case basis according to age and circumstances. Documents must have been issued after the birth record and be current and unexpired. And, although birth records are not considered proof of identity, new regulations require that verification of any birth record submitted by a U.S.-born individual age one or older when applying for an SSN, must be verified through the State Bureau of Vital Statistics (unless submitted through the Enumeration At Birth process).

The SSA itself concedes that the database contains inaccurate information that provides false results and increases the burden on the stakeholders during the resolution process. For example, for every 100 queries submitted to the E-Verify system, SSA field offices or phone representatives are contacted three times.<sup>76</sup> The anticipated increase in the burden on each SSA office is additionally troubling in light of the fact that, to date, no case managers have been assigned at either DHS or SSA to guide either E-Verify participants or no-match employees through the process. The enormous harm to an employee who faces a discrepancy in his SSA records is not reviewed at any agency, nor does there appear to be any plan to do so. There will be no ombudsman for the employee

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<sup>73</sup> *Id.*

<sup>74</sup> Richard M. Stana, Dir. Homeland Sec. & Justice Issues, GAO, *Testimony at a Hearing on Employment Eligibility Verification Before the Subcom. on Social Sec., H. Comm. On Ways & Means*, 110<sup>th</sup> Cong., 3 (June 7, 2007) .

<sup>75</sup> Westat, *Interim Findings of the Web-Based Basic Pilot Evaluation*, December 2006 and Westat, *Findings of the Web-Based Basic Pilot Evaluation*, September 2007.

<sup>76</sup> Frederick G. Streckewald, Assistant Deputy Comm’r, Disability & Income Sec. Programs, Soc. Sec. Admin., *Testimony at a Hearing on Employment Eligibility Verification Systems Before Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives*, 110<sup>th</sup> Cong. June 7, 2007

who seeks to resolve the no-match discrepancy. No studies have been commissioned to assess the burden on SSA resulting from the DHS no-match regulations. Clearly, this flawed system involving the re-verification of one's social security number with SSA presents a very real and *present* burden for the stakeholders.

## **XI. The Unfunded Mandate Reform Act of 1995**

Congruent with the stated purposes of the Unfunded Mandate Reform Act of 1995 (“UMRA”), the Federal government is required to assist Congress in its consideration of proposed legislation establishing or revising Federal programs containing Federal mandates affecting State, local, and tribal governments, and the private sector by providing for the development of information about the nature and size of mandates in proposed legislation; and establishing a mechanism to bring such information to the attention of the Senate and the House of Representatives before a vote on proposed legislation. In addition, the Act is designed to promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance; and to require that Congress consider whether to provide funding to assist State, local, and tribal governments in complying with Federal mandates. Congress is also required to analyze the impact of private sector mandates. The dissemination of this information enables informed and deliberate decisions by Congress and Federal agencies and helps retain a competitive balance between the public and private sectors.<sup>77</sup>

The DHS states boldly at the end of the no-match regulations that “This rule would not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in one year, and it would not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.” However, the impact on the Department of Motor Vehicles (DMV) offices in each State has not been addressed by the DHS in its analysis of this regulation. The regulation requires that each employee required to complete re-verification must do so within an expedited timeframe, using an identity document containing a photograph. For persons who did not originally produce an identity document bearing a photograph, the DMV is the primary location from which this document will likely be procured, creating an additional burden at the State level, that will be far in excess of the \$100 million permitted under the UMRA.

The imposition of these costs without adequate Federal funding will displace other essential State priorities. Heightened reliance by employers on DMV-issued documentation will engender direct costs -- purchase of the identity documents, additional training and employment of DMV staff to screen applicants and produce the card on an expedited basis. This enhanced burden will be borne by the States on a daily basis almost immediately after the implementation of the no-match regulations.

The DHS has evaded the UMRA process through its insistence that this rule is interpretive rather than legislative, thereby denying States and the private sector an

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<sup>77</sup> 2 U.S.C 1501

opportunity to bring cost information to Congress in a timely manner. Were the Congressional Budget Office (CBO) to undertake the much-needed analysis of these costs, it would find them to be troubling and “significant,” within the meaning of the Act. The CBO’s recent stab at estimating the costs of interagency cooperation,<sup>78</sup> where CBO identified legislation that may exceed the UMRA threshold, included “Immigration/ Employment Eligibility Verification,” described as “Requires employers to verify the work eligibility of employees”. The direct and indirect costs of this unfunded mandate remain largely obscured from view, whether the CBO believes that a cost estimate is feasible or not.<sup>79</sup> Of course, identification of any costs exceeding the UMRA limits will require the CBO to estimate the new amount of budgetary authority necessary to defray such costs for up to ten years, and to identify any increases in appropriations that have been provided.<sup>80</sup> Understanding that the role of the CBO is to represent the interests of the States before national lawmakers, the DHS has sidestepped the CBO’s participation to the detriment of all stakeholders.

## **XII. Small Business Regulatory Enforcement Fairness Act of 1996**

The Regulatory Flexibility Act of 1980 directed agencies to review the effects of rules on small businesses and other small entities. In March 1996, RFA was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which was intended to foster a government environment more responsive to small business and other entities and to require federal agencies to establish policies and programs to make their regulations more understandable to small businesses.<sup>81</sup>

The courts, agencies and the public are frequently left to reconstruct Congressional intent in analyzing, interpreting and implementing statutes. However, when it enacted SBREFA, Congress expressly articulated its intent. The statute included a statement of Congress’ findings, which included: “(1) a vibrant and growing small business sector is critical to creating jobs in a dynamic economy; (2) small businesses bear a disproportionate share of regulatory costs and burdens; and (3) fundamental changes that are needed in the regulatory and enforcement culture of Federal agencies to make

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<sup>78</sup> *A Review of CBO’s Activities in 2007 Under the Unfunded Mandate Reform Act*, March 2008

<sup>79</sup> A 2007 CBO report on the pertinent provision of Senate Amendment 1150 to S. 1348 estimated that the cost of complying with the requirements to verify work eligibility (assuming it includes those inevitably triggered by the No Match regulations) would “depend on regulations to be developed by the DHS”. Until the regulations are developed, CBO stated that it was unable to determine whether the total costs to state, local, and tribal governments would exceed the annual threshold established in UMRA (\$66 million in 2006, adjusted annually for inflation). *May 23, 2007 Letter from Director of Congressional Budget Office Peter R. Orszag, to the Chairman of the Senate Committee on the Budget, Hon. Kent Conrad.*

<sup>80</sup> 2 U.S.C 658c(c).

<sup>81</sup> P.L. 104-121 (March 26, 1996).

agencies more responsive to small business can be made without compromising the statutory missions of the agencies.”<sup>82</sup>

In furtherance of the above objectives, SBREFA requires agencies to advise whether or not a rule is “major” when promulgating regulations. 5 USC 804 (2) provides:

The term 'major rule' means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

When a rule is “major,” SBREFA is applicable. Under those circumstances, Federal agencies must make available a compliance guide to small businesses explaining government regulations which impact small businesses, and provide assistance on the implementation of regulations.

It requires the following: (1) judicial review of the Regulatory Flexibility Act; (2) preparation by Federal agencies of "Plain English" compliance guides to assist small entities in their efforts to comply with Federal regulations; (3) an Ombudsman to be established by the Small Business Administration (SBA), who will receive comments and complaints from small businesses concerning their experiences in dealing with Federal regulatory agencies; and (4) Regional Small Business Regulatory Fairness Boards, also to be established by the Small Business Administration, to review comments on Federal agency enforcement practices and make recommendations to the SBA Administrator and the head of affected agencies concerning those practices.

DHS’s declaration that this is not a “major” rule is a repetition of its position in the final regulations published on August 15, 2007. Saying it is so does not prove it so. This conclusion is apparently based upon the Econometrica report, discussed elsewhere in this comment. The Econometrica report states that its primary objective “is to provide DHS with information to prepare an Initial Regulatory Flexibility Analysis (IRFA), as required by the Regulatory Flexibility Act.”

The Econometrica Report lays out an agency’s obligation to take small entities into account when “developing, writing, publicizing, promulgating and enforcing regulations.” Among those requirements is that the agency prepare a Regulatory

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<sup>82</sup> *Id.*

Flexibility Analysis (RFA). When accompanying a proposed rule, an initial RFA (IRFA) must include five elements. The Econometrica Report indicates that its report provides information upon which findings can be based for two of those five elements, namely:

A description of and, where feasible, an estimate of the number of small entities to which the proposed rule would apply.

A description of the proposed reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that would be subject to the requirements and the type of professional skills necessary for the preparation of the report or record.

The limited scope of the report, hardly one which small businesses or other laymen can readily comprehend, is based upon numerous unsubstantiated assumptions. Although it does not contain any express conclusions, its thrust is that the proposed regulation will not affect a significant number of small entities and those small entities which are impacted will not incur significant expense in compliance. As discussed elsewhere in this comment, the conclusions of the report are based upon flawed assumptions and significantly flawed analysis.

The regulation does indeed affect small businesses. The costs that businesses will incur in complying with the regulation will have a substantial adverse impact on competition, employment, investment and productivity, and this impact, in turn, harms the ability of the United States to compete internationally.

### **XIII. Paperwork Reduction Act**

The Paperwork Production Act of 1995 stated its first purpose, among many, is to “minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.”

The proposed regulation recites that employers seeking to establish eligibility for the “safe harbor” are “encouraged to keep a record of their actions,” but that the rule does not “impose any additional information collection burden.” This statement is disingenuous at best. An employer who fails to keep such records faces significant liability upon a finding of constructive knowledge. While the rule may not explicitly “require” the keeping of such records and is merely a “suggestion,” the impact of the regulation is clear. As acknowledged in the preamble: “The suggestion is based upon the possible need of an employer to demonstrate the actions taken to resolve a Social Security no match if and when ICE agents audit or investigate the employer’s compliance.” The additional records to be kept by the employer will include:

1. The initial written notice of no-match from the relevant government agency.
2. A record of the steps that it has taken to resolve the error
3. A copy of the letter to the SSA to correct erroneous information.

4. Record of verification of correction (which, incidentally, is a mandatory record).
5. Updated I-9.
6. Written direction to employee of the error with request for correction.
7. Record of the employee's response verifying accuracy of records (also mandatory).
8. Request to SSA to correct records based upon information received from employee.
9. Written advice to employee of the date that employer received the SSA no-match letter and advising employee of duty to correct.
10. Additional reverification by employer if employee is unable to verify the correct information with the SSA.

A procedure similar to the above, with related record-keeping, is also "not required," but suggested by the DHS, if the DHS is the agency that advises the employer of the no-match issue. In each of the instances above, the employer will also be required to maintain a docketing system that will remind it of the specific number of days in which each of the steps must be completed.

Beyond the steps noted above, there will undoubtedly be internal conferences, consultation with counsel and similar events which the employer will seek to record, as these would likely be necessary documents to defend against a claim of constructive knowledge.

To simply say that the employer does not "need" to keep records if it doesn't want to in order to justify that this regulation does not impose another paperwork burden on employers is clearly without merit.

#### **XIV. Significant Alternatives To Be Considered**

While we do not believe that there exists any specific legal obligation under current Federal law with respect to immigration and the "no match" letter, should DHS continue to ignore this basic fact it must consider significant alternatives to the proposed rule scheme. Most of the comments relate to the strict time frames imposed on employers to qualify for the safe harbor or to the "one size fits all" nature of the rule. Employers in the United States range from "mom and pop" shops to multi-national employers with multiple hiring locations throughout the country. Yet each is treated the same with regard to the safe harbor. The safe harbor could easily be modified to take into consideration the vast differences in employer resources and factual situations by adopting one or more of the following alternatives.

1. Exempt small businesses and employers of short-term, intermittent and seasonal workers

Small businesses, as defined in 13 C.F.R. Part 121, Subpart A, are treated differently for various federal laws. For example, the Family and Medical Leave

Act of 1993 (“FMLA”),<sup>83</sup> does not apply to businesses that have fewer than 50 employees each working day during at least 20 calendar weeks in the current or preceding calendar year.<sup>84</sup> Similarly, the rule could exempt small businesses from compliance, at least in the initial roll-out phase. This exemption would recognize that small businesses have limited resources and limited ability to respond to no-match letters under the tight time frames set forth in the rule, and that imposing the same deadlines on small businesses as larger businesses with more resources is inequitable. The Small Business Administration has formalized definitions for small businesses in each NAICS code, so there would be no question about which businesses are exempted.<sup>85</sup>

Businesses with seasonal, short-term or intermittent workforces often will receive a no-match letter long after a worker has left employment. However, because of the nature of these businesses, this same employee may again be hired outside of the regulation. If that employee turns out to be unauthorized, the employer may be imputed with knowledge under the rule, but would not have been in a position to follow the rule’s steps. Therefore, employers who employ seasonal workers (such as those defined in the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”),<sup>86</sup> and others with short-term or intermittent workforces, should be allowed to qualify in another reasonable manner.

2. Allow additional time for small businesses and employers with multiple worksites.

Alternatively, for the same reasons articulated above, the rule could be amended to provide for a longer response time for small businesses, or a stepped response time keyed to the size of the business, to more accurately reflect a “reasonable” response for a particular employer. While any such scheme will necessarily entail definitional arguments at the edge of each category, it would be more fair and accurate with regard to the majority of the affected employers, and will provide certainty through a defined, mathematical equation easily determinable by both DHS and affected employers.

Similarly, employers with multiple worksites should be allowed additional time to respond as a resolution of the matter entails research to determine where the employee is stationed, which Human Resources office is charged with clarifying the employee’s work authorization status, and possible travel to the employee’s location for a meeting with the employee. Thus additional time for the internal investigation of company records should be allowed in this instance as well, such

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<sup>83</sup> 29 USC §2601 et seq.; 29 CFR Part 825.

<sup>84</sup> See also, Sarbanes-Oxley Act of 2002, 107 P.L. 204, § 1, 116 Stat. 745 (July 30, 2002).

<sup>85</sup> See <http://www.sba.gov/services/contractingopportunities/sizestandardsttopics/tableofsize/index.html>

<sup>86</sup> 29 CFR Part 500, as amended.

as providing a minimum of an additional 60 days for employers with multiple hiring locations.

3. Remove the artificial time frame imposed to resolve discrepancies.

The final and best alternative is to re-consider imposing a particular time frame for resolving the records discrepancy in light of the realities of the lack of integrity of the SSA database, lack of SSA resources to resolve database errors, and likely worker response to employer inquiries.

Employers' experience over the course of several years of no-match inquiries is that the employees who are unauthorized to work leave employment when confronted with a no-match letter inquiry. Those who stay and contest the discrepancy are most likely authorized to work and the source of the discrepancy is an SSA database error. SSA's acknowledged inability, discussed above, to keep up with its current workload calls into question its ability to resolve no-match discrepancies in 90 days. Documentation to re-verify employees who contest the no-match can take weeks or even months to obtain. Many birth and marriage records will be housed in a state in which the applicant no longer resides, or even in a foreign country. Other records will have been lost, such as in a natural disaster like Hurricane Katrina. Some employees, particularly those protected under the Americans with Disabilities Act, will need accommodations of more time or assistance to contact SSA or various record-keeping agencies. The rule does not provide any way in which these special needs can be addressed. Hence, the best solution would be to impose no specific time restriction for the resolution of records discrepancies.

We recommend that instead of the 90-day time frame imposed under the current rule and in lieu of having to complete a new I-9, the following steps be considered reasonable and provide a safe harbor to employers following them: (1) complete an internal investigation to determine that the source of the discrepancy was not its own clerical error, (2) inform the affected employee of the discrepancy, (3) if the employee challenges the discrepancy, require proof that the employee has been in contact with SSA to resolve it. Unless other adverse information arises in the course of implementing these steps, the employer could assume that the matter was being handled and would not be required to follow up unless another no-match letter was received.

This procedure is in accord with the way that similar records discrepancies are handled by employers contacted by the Internal Revenue Service regarding incorrect information on an employee's W-2.<sup>87</sup> It would allow DHS to delineate those employers who are not acting in good faith (i.e., those who completely

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<sup>87</sup> See "Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs (including instructions for reading CD/DVDs and Magnetic Media)" IRS Pub. No. 1586 (Rev. 09-2007), Catalog No. 13597U.

ignore no-match letters or who fail to notify affected employees), while refraining from punishing those who are trying to comply, as well as preventing unnecessary termination of authorized U.S. workers.

We therefore recommend that the rule be re-considered to delete set time frames for resolving the discrepancy as well as delete the requirement to complete a new I-9. Instead, the duty of the employer is to notify employees so that they can work with SSA to resolve the issue without the pressure of an artificially-imposed deadline and without the need to present alternate, acceptable work authorizations documents – many of which may not be readily attainable due to the reductions of acceptable documents made by DHS in December 2007 to the revised I-9

## **XV. Conclusion**

Rather than making a sincere effort in the SPR to address the many noted problems with the underlying regulation, DHS has chosen to present cursory and highly flawed “analyses” that fail to justify an approach destined to harm American businesses and the economy.

DHS has failed to articulate valid reasons for changing position with respect to constructive knowledge and for raising the bar for IRCA compliance by mandating that employers challenge the identity and work eligibility of incumbent, trained workers when placed on an SSA no-match list notwithstanding the existence of a properly completed Form I-9.

It also has failed in virtually all of its required analyses to justify its rulemaking under the governing laws. No Regulatory Flexibility Act consultation with agencies and parties with knowledge of the agency’s program operations has been seen to take place. Its economic assumptions under the IRFA are deeply flawed. The contractor it hired to make its analyses for it severely undervalued the impact of the regulation on employers. The potentially devastating impact on sister agencies and on the States goes largely ignored.

DHS has, despite its protestations, engaged here in legislative rulemaking in a setting in which a statutory scheme already exists and is being ignored. This has been done without complying with the mandated Congressional notification scheme. Indeed, these verification changes are "major changes" and require Congressional appropriation.

No other conclusion is possible but that this regulation is untenable and should be withdrawn.

**Respectfully submitted,**

**AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

**cc: Office of Management and Budget**