

American Immigration Lawyers Association

**918 F Street, N.W. Washington, D.C. 20004 (202)
216-2400**

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Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, N.W.
Washington, D.C. 20529

VIA E-Mail: rfs.regs@dhs.gov

Re: DHS Docket No. ICEB-2006-0004, Safe-Harbor Procedures for Employers Who
Receive a No-Match Letter

Dear Sir or Madam:

Introduction

The American Immigration Lawyers Association ("AILA") hereby submits comments on the proposal of Immigration and Citizenship Enforcement ("ICE") to amend 8 C.F.R. § 274a.1 to change the application of the principles of constructive knowledge and establish safe-harbor procedures for employers who receive a no-match letter from the Social Security Administration ("SSA") and similar letters from ICE. AILA is a voluntary bar association of approximately 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field.

We appreciate the opportunity to comment on the proposed regulation and believe we are particularly well qualified to do so. AILA members regularly assist foreign nationals in the process of applying for Social Security Numbers ("SSNs"), known as "alien enumeration." Additionally, we customarily advise clients on I-9 employment verification and compliance and in responding to SSA no-match letters. Further, through our SSA Liaison Committee, we enjoy a longstanding, positive and productive relationship with SSA and communicate regularly with that agency to resolve specific enumeration delays associated with discrepancies in federal databases. Accordingly, we have developed a special expertise in understanding the procedural aspects of

enumeration and the practical utility and limitations of the SSN as a worksite enforcement tool.

In sum, we believe that the SSN is ill suited to the sweeping worksite enforcement program proposed. SSA consistently states that there are many reasons for a no-match besides lack of work authorization. Moreover, there is great danger in basing worksite enforcement on a federal database that was not designed for this purpose and lacks even basic indicia of reliability, particularly when SSA has no established mechanisms for employers and employees to correct data discrepancies. We also believe that the proposal will promote discrimination and the termination of lawful employment if verification is not forthcoming within the safe harbor time limits, which is inevitable. This is particularly so in the current climate of increased criminal worksite enforcement. And, while the proposal gives employers little choice but to terminate employment, it provides no corresponding immunity from citizenship discrimination liability for good faith efforts to comply with the safe harbor provisions. Further, the proposal is premised on an overly broad interpretation of “constructive knowledge” that is patently inconsistent with the intent of Congress in enacting the Immigration Reform and Control Act of 1986 (“IRCA”). ICE should not implement its proposal without carefully consulting SSA, the Office of Special Counsel for Immigration Related Unfair Employment Practices (“OSC”) and the Internal Revenue Service (“IRS”), which have given employers conflicting guidance on responding to a no-match letter.

If ICE chooses to proceed with its proposal, at a minimum, it should eliminate the two-step safe harbor provision (14 and 63 days), which is unnecessary and confusing, and replace it with a single time limit. Further, the 63-day time limit proposed is impractical and impossible to meet from a file review and information processing perspective and should be extended to not less than 123 days. Implementation of the proposal will cause many businesses to lose large segments of their workforce and threaten the very existence of operations. Therefore, a longer time limit also is necessary to allow employers to recruit replacements and manage staffing needs. Finally, we are confident based on our experience that the proposal will impose extraordinary costs and paperwork burdens on the private sector.

While our comments primarily address the limited utility of the no-match letter as an enforcement tool and recommend specific procedural modifications to the proposal, we wish to emphasize our strong belief that the proposal reflects unsound policy. We believe that worksite enforcement is key to securing our borders. However, it must be coupled with comprehensive immigration reforms that give essential workers meaningful avenues to lawful status. If not, a program like the no-match proposal standing alone will only drive our country’s 12 million plus undocumented workers further underground and fuel the market for counterfeit identity documents, making it easier for true terrorists to go undetected. Moreover, the proposal is premature in light of pending legislation. It will have a dramatic and catastrophic effect on core industries and should await careful deliberation by both houses in Congress, which may result in yet another vastly different approach to employment verification. We also fear that the proposal will encourage unscrupulous employers to pay their workers “off the books” precisely to avoid potential

liability. Therefore, it is highly likely that the proposal will have the unintended effect of causing large numbers of work authorized individuals to lose their jobs while many unauthorized employees will continue working.

The SSN Is Not an Effective Worksite Enforcement Tool

SSA, which assigns and administers the SSN program, has emphatically and consistently stated that there are many reasons for a no-match other than lack of work authorization. SSA was established to administer the old age, survivors, and disability insurance program and the supplemental security income program.¹ To do so, it assigns a unique nine-digit SSN to each eligible individual and issues a Social Security card as evidence of the assignment. SSA maintains a record of the earnings reported for each person that has been assigned an SSN and identifies the record by that person's name and SSN.²

Pursuant to an agreement between SSA and the IRS, employers are required to report the taxable earnings of their workforce by filing annual wage reports with SSA on Form W-2 ("Wage and Tax Statement") and Form W-3 ("Transmittal of Income and Tax Statements"). A Form W-2 is filed for each employee and includes his name, SSN and annual wages, among other information. SSA uses the W-2 to maintain accurate earnings records and calculate Social Security benefits. It transmits this data to IRS and identifies employer-reporting errors for possible IRS penalty assessment action.³ IRS uses the W-2 report to ensure that information submitted by taxpayers is properly processed in IRS records and to verify filing and reporting compliance with tax laws. SSA matches the "name/SSN" reported against its "Numident" file. If the name/SSN matches, the wage item is posted to the Master Earnings File for purposes of benefits administration. If the name/SSN does not match, the wage item is placed in SSA's Earnings Suspense File.

The SSN was never intended as an enforcement mechanism, and Congress did not give SSA enforcement authority. In fact, contrary to popular belief, neither the immigration statute nor the federal tax statute even requires an individual to possess an SSN to begin work. An employer is not required to inspect an employee's SSN Card, and both the IRS and SSA make provision for employers to file employment tax returns for employees that do not possess SSNs. *See, e.g.*, 26 CFR §31.6011 (b) – 2 (c) (3).

Moreover, as explained repeatedly in SSA policies and guidance to employers and employees, there are many legitimate reasons for a no-match, including spelling

¹ 42 USC §901.

² 20 CFR §422.103(a). *See generally* Purpose and Disclosure of the Social Security Number (SSN), Record Maintenance ("RM") 00201.001, SSA's Program Operations Manual System. RMs constitute a subchapter of SSA's Program Operations Manual System ("POMS") and can be found on SSA's website at <http://policy.ssa.gov/poms.nsf/lnx>.

³ 20 CFR §422.114(a).

mistakes, inversion of date order in date of birth, name changes due to marriage, divorce, and other reasons, and cultural differences in name order. SSA's Program Operations Manual System directs SSA Field Officers in responding to an inquiry from an employer who has received a no-match letter to "[r]emind the employer that *there are a number of reasons why the reported information does not match our records, such as transcription or typographic errors, incomplete or blank name/SSN or name changes.*" Records Maintenance ("RM") 01105.027, Handling Inquiries Relating to SSA Letters on No-Match Names and Social Security Numbers (SSNs). It further directs Field Officers as follows:

- "You should tell the employer that a no-match between an employee's name and SSN **DOES NOT** mean that the employee lacks work authorization.
- You should also tell the employer that a no-match between an employee's name and SSN **DOES NOT** make any statement regarding a worker's immigration status."

Ibid. (emphasis in original). Therefore, SSA's own view indicates that its no-match data is not a predictable or reliable basis for a worksite enforcement program.

The Regulation Should Not Take Effect until ICE Works with SSA
to Establish Mechanisms for Employers and Employees to Correct Data Discrepancies

The problems that our members encounter on their clients' behalf with SSNs give us unique insight into the SSA processes implicated by the proposal and the issues related to conditioning employment authorization on federal databases, which are often fraught with error. We are extremely concerned about the accuracy of SSA's no-match data and the lack of an established mechanism for an employer or an employee to resolve a name/SSN mismatch with SSA in a timely fashion or at all. Such procedures should be worked out before the proposal is implemented, particularly in light of the many inquiries and correction requests that the regulation is expected to trigger

AILA spends considerable time and attention addressing delays in alien enumeration occasioned by errors and discrepancies in Department of Homeland Security ("DHS") databases. These delays occur routinely and can easily last six months or more. In most cases, the local SSA's inability to enumerate is based on its failure to verify immigration status by querying DHS's SAVE (Systematic Alien Verification of Entitlements) database or by mailing a hard copy G-845 request for verification. The databases used for verification are replete with error, which often can be impossible to correct. Indeed, reports over the last several years false-negative error rates as high as 35% to 50% for foreign-born workers. Moreover, SSA's Earnings Suspense File reportedly contains *\$519 billion*, illustrating the extent of data discrepancies in the SSA Numident database. See The Earnings Suspense File: Social Security's "Secret Stash," Consumer Affairs.com (Feb. 22, 2006).

Yet, the proposed regulation will force every employer in this country to use SSA no-match data to make termination decisions. This will result in hundreds of thousands of

cases where well meaning, intelligent, and diligent employers will perceive no choice but to terminate employees to avoid a finding of constructive knowledge, even if it turns out employment was authorized.

AILA has asked SSA for information on the procedures and time frames that it will use to correct data discrepancies and awaits a response. However, in light of our experience with SSA processing times and the deluge of inquiries expected from the regulation, the proposal should not be adopted until SSA agrees that its Numident database is sufficiently reliable for worksite enforcement and SSA establishes specific procedures and time frames for fielding inquiries and correcting errors.

The Two-Step Safe Harbor Provision (14 and 63 Days) In the Proposal
Is Unnecessary and Confusing and Should be Replaced by a Single Time Limit

The proposed regulation provides that an employer will reach safe-harbor if it checks its records and takes other action to obtain SSA verification within 14 days of receiving a no-match letter. It also provides safe harbor to the employer who re-verifies work authorization and identity in a limited I-9-like procedure if the discrepancy is not resolved within 63 days. However, the relationship between these two periods is unclear, and the two-step approach should be replaced by a single time limit.

The 14-Day Safe Harbor. As proposed, Section 274a.1(l)(2)(i)(A)(i) would allow a defense to constructive knowledge if the employer attempts to resolve the discrepancy within 14 days by checking its records to determine whether the discrepancy results from a clerical error. The employer is to correct the error, inform SSA, verify with SSA that the corrected information matches SSA's records, and memorialize the verification. If the employer does not detect an error in this internal check, under proposed Section 274a.1(l)(2)(i)(A)(ii), it is required to ask the employee to confirm the accuracy of the information in the employer's records. If this doesn't resolve the discrepancy, the employer should ask the employee to visit an SSA office and present documentation necessary to resolve the discrepancy, receive corrected information from the employee, and then verify the new information directly with SSA.

The 60-Day Safe Harbor. Under the second step of the safe harbor provision, if, within 60 days of receiving notice, the employer does not verify with SSA a name/SSN match, it must take reasonable steps within 3 more days to verify work authorization and identity such as by conducting I-9 re-verification. If the employee can provide sufficient documentation, the employer has reached a safe harbor.

While the two-step safe harbor gives clear guidance to employers at opposite ends of the continuum, the relationship between the two periods is vague and confusing for the many employers that fall in between. The preamble to the proposed regulation reviews the steps entailed in the 14 day safe harbor provision – from internal records check to verifying the correction with SSA – and states that "ICE would consider a reasonable employer to have acted promptly if the employer took such steps within 14 days of receipt of the no-match letter." Clearly, an employer who obtains SSA verification of

data within 14 days -- an unlikely scenario -- gains safe-harbor. The employer that uses the limited I-9-like procedure to verify employment eligibility within 63 days also will achieve safe-harbor. However, the two-step safe harbor provision gives no guidance to employers who fall in between. For example, does an employer reach safe-harbor if it takes one or two actions listed in the proposed regulation within the 14-day period and then is actually able to verify with SSA 45 days after having received the no-match letter? It has not completed even a majority of the 14-day period actions within the 14-day time frame and has also not needed to use the I-9 verification because it verified with SSA. It seems likely that, if SSA verified the SSN/name combination at day 45, the employee must be an authorized worker, and a claim of constructive knowledge would be foreclosed. But the proposed regulation does not make this clear.

We believe there is no enforcement benefit to be gained from the 14-day time limit and that it should be eliminated. It is clearer and more effective to establish one time-period during which an employer may take any or all of the steps deemed reasonable under the regulation, either through verification with SSA or through the I-9 process. We would hope and expect employers to appreciate the importance of acting early on a no-match letter. However, if the goal of the regulation is to set an outer time limit for employers to verify work authorization, then the regulation should do just that. Moreover, the two-step process muddles the document-abuse immunities and obligations of the employer who conducts the I-9 reverification step anytime before 60 days from receiving the no-match letter.

The Proposed Time Limits Are Impractical and Impossible to Meet from a File Review and Information Processing Perspective and Should be Extended

The 14 and 63-day time limits in the proposed regulation are impractical and unrealistic and should be replaced by a single 123-day time limit for employer compliance. Our conclusion is based on our collective experience advising clients who receive no-match letters and our conversations following issuance of the proposed regulation with employers and national and regional human resources associations. For the following reasons related to file review and employee notification, employers almost universally have extreme difficulty resolving mismatches within 63 days.

- The proposed limit of 63 days is neither sufficient nor reasonable for an employer to gather and review all the paperwork and take the other necessary steps to gain safe harbor. On receipt of the letter that could typically list hundreds of mismatches, an employer representative must identify the employees who are associated with mismatch items. To do so, the employer must start by gathering and comparing the SSNs in question against payroll records, which often will require a request for a report from a third-party preparer, such as ADP. The employer also must locate and gather W-4 and I-9 forms completed by the employees for purposes of comparing SSNs provided by the employees and copies of SSN cards, if any, in its records. This process can be particularly time-consuming for staffing agencies, manufacturing facilities, service industry establishments (restaurants, hotels, etc.), agricultural

organizations, and numerous other industries characterized by high turnover rates, which we believe receive a large percentage of no-match letters.

- If the employer does find an error in its records, there is no procedure to effectively notify SSA and obtain verification of the correction in the time limit proposed. The preamble to the proposal states that an employer should notify the SSA of an error and verify that the name/SSN item match agency records. However, as noted, there is no established mechanism for an employer to notify the SSA of an error. Indeed, RM 01105.027 states that the employer “should **NOT** send any background document to SSA. If a Form W-2c is prepared, the employer should send only the Form W-2c (Corrected Wage and Tax Statement), with a covering Form W-3c transmittal with **NO** supporting documents attached. If correct information cannot be obtained and a Form W-2c cannot be prepared, the employer should retain the documentation and should **NOT** send copies to SSA.” (Emphasis in original). This also underscores the importance of postponing implementation of the proposal until SSA establishes clear procedures.
- Employers also must schedule meetings with affected employees to confirm the correctness of information in the employer’s records. If this does not resolve the issue, the employer must schedule additional meetings with employees to review identity documents that may resolve the discrepancy. However, it is likely that many of these documents, such as marriage certificates and birth certificates, may not be readily available, further extending the period needed to achieve safe harbor.
- The proposed time limit should be extended because there is no established mechanism for an employee to resolve a name/SSN mismatch with SSA in a timely fashion or at all. Under the proposal, if the name/SSN item is correct according to the employee, the employer should ask the employee to bring documentation to an SSA office to correct the error. However, even assuming the employee can locate the necessary documents, such as a marriage certificate, within a week, our experience from accompanying clients to local SSA offices teaches that it can be difficult to speak with an officer on a same-day basis and time-consuming to resolve discrepancies. SSA’s own RM 01105.027 states that, under these circumstances, the employer “should give the employee a reasonable amount of time to rectify the situation with SSA. It may take *up to 2 weeks, and sometimes longer*, to get a new or replacement Social Security card.” (Emphasis added). Indeed, even the I-9 “receipt rule” at 8 C.F.R. § 274a.2(b)(1)(vi)(C) gives an employee 90 days to secure a replacement SSN card for I-9 purposes. Add to this the inevitable delays that SSA will face from thousands of inquiries and processing information corrections, and the 63-day deadline becomes totally unrealistic.

We provide the following typical scenarios to illustrate our point:

- ABC Inc. is a company with a fine-tuned I-9 compliance program and believes it has no undocumented workers among its 500 employees. ABC receives an SSA no-

match letter regarding 75 SSNs on day one, which is a Wednesday. An administrative employee opens the letter, which makes its way to the Human Resources (“HR”) department by day two.

- By day three, the HR staff realizes the need for guidance on how to respond and looks up information in reference materials and calls an attorney and leaves a message.
- The weekend comes and on Monday, day six, ABC receives a call from an attorney. The attorney advises the HR representative to take the first steps required by the regulations to achieve safe-harbor.
- The HR representative contacts the company that handles ABC's payroll and asks it to run copies of the latest payroll documents, including the SSNs ABC has been using to for payroll reporting.
- On day eight, when the payroll company e-mails copies of the latest payroll, the HR representative cross-references the 75 SSNs on the no-match letter to the SSNs on the payroll report in search of the names of the affected employees. However, given the high turnover in the company, this task takes several days. She makes a list of the names and then looks up copies of W-4 Forms completed by the employees in question. She also locates copies of the I-9 files for each of the identified employees.
- On day thirteen, following the weekend, the HR representative compares the documents for the 75 employees to the SSNs on the no-match letter. She is looking for any discrepancy that might have caused the SSN to appear on the no-match letter (typographical errors, misspellings, or birth date errors). She finds that 20 of the SSNs on the no-match letter were improperly transcribed from the W-4 Forms to payroll and then on the Form 941 payroll reports. She leaves a message with the attorney asking what she should do with this information.
- The HR representative prepares a letter to SSA explaining the problems found with the 20 employees. She sends the letter by return-receipt-requested to SSA so she has evidence that she made good faith efforts to comply with the safe-harbor requirements. The weekend comes.
- On Tuesday, day fourteen, the HR representative calls the SSA verification telephone line but finds that she is unable to verify any corrections yet.
- ABC's outside counsel calls the HR representative on that same day, day 14, to ask her if she has taken all the steps laid-out in the regulation. She explains what has happened. The lawyer does not know from the regulation if ABC has achieved safe harbor because ABC cannot verify that 20 of the SSNs with internal problems match the data in SSA's records.

- With respect to the 20 employees, the HR representative calls SSA's verification line but cannot obtain verification until SSA processes ABC's letter requesting a correction of SSN/name data.
- ABC also must address the SSNs on the no-match letter that appear accurate in company records. It has already taken ABC nine days to determine that it does not know why 55 of its employees' SSNs appear on the no-match letter. The company is very sensitive to what could happen legally or practically if it requests additional immigration-related documents from employees for whom I-9 verification was conducted at the time of hire. Therefore, on day ten, ABC's president, the HR representative, and a supervisor have a telephone call with their attorney to discuss how to ask for this information from employees without violating the anti-discrimination provisions of IRCA, how to request the information in a way to get maximum response in the shortest amount of time, whether to call in each employee or to send a memo to each one, and contingency planning for what would happen to ABC if all of the 55 employees did not report for work after learning of the inquiry, or worse, if more employees, hearing about the inquiry do not report. ABC decides to draft a memo to each of the 55 employees advising of the no-match letter and asking the employees to report to HR.
- On day 13, after the weekend, the lawyer and the company discuss the memo and then distribute it to the mailboxes of the 55 employees so they receive it on the morning of the 14th day.
- On day 14, the 55 employees in question receive the memo. They report to HR over the next few days but do not have in their possession the documents needed to resolve the discrepancy. Although some may be able to bring documents the next day, others need a week or more to locate or obtain the documents, such as a birth or marriage certificate.
- By day 20, 25 of the 55 employees produce documents that resolve the discrepancies. ABC's HR representative reviews them, discovers how the mistake occurred, drafts a letter to SSA and sends it return-receipt-requested. But, again, it could be weeks or months for SSA to process this information for employer verification, if at all. Meanwhile, according to the preamble, "the employer must choose between taking action to terminate the employee or 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 [the] INA... ."
- Of the 30 employees for whom discrepancies have not been resolved either through ABC's internal records check or through documents presented by the individuals, pursuant to the proposed regulation, ABC asks them to resolve the discrepancy directly with SSA. The proposed regulation suggests that the employees should go in person to SSA or send documents. However, based on our experience, they will have difficulty speaking to an SSA officer and must make multiple visits and wait long periods. Our experience also suggests that it will take SSA much longer than 14

days to process a correction. We acknowledge that some employees will be able to resolve inconsistencies in data by presenting marriage certificates, name change documents, or name spelling problems. However, we see hundreds of cases, in our limited universe of applicants, where employees visit local SSA offices and SSA cannot resolve a problem within 30 days, or even as long as 90-120 days. Once the issue is resolved, according to the proposed regulation, SSA must update its records and the employer must verify the new correct information directly with SSA.

- At this moment in the hypothetical, there is no point in counting the days because in a serious number of cases of employment eligible workers the 14-day period is long over and the 63-day period could be over as well. Without being allowed to use a document with an SSN, it is unlikely that a person could verify employment with an I-9, even if they were eligible to work but for the SSA data discrepancies.

The hypothetical of ABC, Inc., assumes that the letter was properly and immediately routed to an established HR department with established procedures. However, small businesses without an HR department could have particular difficulty meeting the proposed deadlines. Indeed, a small firm facing a no-match letter with only four or five items could be significantly challenged by the proposed time limits. For these companies, employees in the accounting office usually serve as the company representatives checking social security numbers. These employees are also typically responsible for accounts receivable and payable, payroll, and numerous other necessary accounting functions. No-match letters that arrive at times of financial audits, end of quarter reports, or tax reports could be ignored or necessary business functions would have to be abandoned to comply with the proposed regulation. Many employers, particularly smaller firms, will not have a designated HR officer and will lack the experience and staff to complete the safe harbor steps within the periods proposed.

Delays due to vacations, lost documents, sickness, misunderstanding, and language barriers, among others, could further delay an employer's ability to comply with the proposed time limits. Changing just a few simple facts of this hypothetical makes ABC's plight more dramatic. What if the HR representative was on vacation for one week when the no match letter is received? What if it took four days for the decision-maker who first opened the letter to realize what this letter meant because she was in the middle of negotiating a very important new contract for the company? What if the company administering the payroll had a computer problem and couldn't send copies of the payroll for three days? Or, what if the company was not as aware of its obligations and options as we hope it would be and took a few more days to get each of these steps accomplished or did not get sound advice or have access to experts on how to handle the situation? Any of these typical, real-life wrinkles would clearly prevent ABC from reaching safe harbor within the proposed time frames.

The Proposed Time Limits Are Impractical and Impossible to Meet from a Staffing Management Perspective and Should be Extended

Although we believe it is a flawed way to do so, the proposed regulation admittedly will “smoke out” many unauthorized workers. While this is an important part of immigration reform, it also underscores the importance of giving employers adequate time to make preparations to be ready to replace affected workers, if need be, often in huge numbers. During the same period of time that an employer is attempting to investigate and resolve discrepancies, being conservative and needing to be ready for the possibility that most if not all of the workers will not be able to resolve the issue or provide new documents within 63 days, the company has to recruit for and train potential replacement workers. While this is happening, the morale of even the foreign national workers not listed in the no-match letters can be negatively affected and some, afraid that they will be next, resign, disappear or admit that they are undocumented preemptively, leading to even greater employee losses in a short period of time. For instance, a 60-employee company facing a 40 item no-match letter might be able to handle the paperwork challenge at the expense of much other business but could be shut down by the possible loss of almost an entire workforce (keeping in mind that the company followed all of the proper and thorough I-9 rules at the time of hire). Extending the regulatory time limit is necessary to allow employers to investigate mismatches and discharge IRCA obligations, and at the same time, to regroup in a way that avoids business closure and an undue impact on the economy. Companies with particularly high mismatch rates should be given the opportunity to remain in contact with the government with a schedule for resolving the issues, facility by facility, for example, and provide updated information on the progress along the way at regular intervals. For this reason, the time limit in the proposed regulation should not be less than 120 days.

The Proposed Regulation Will Promote Discrimination
and Expose Diligent Employers to Liability for Citizenship Discrimination

As noted, absent established procedures to correct no-match errors and the refinement of federal databases, the proposal will leave many employers no choice but to terminate the employment of individuals who, in fact, may be work authorized. This, of course, could be actionable under Section 274B of the Immigration and Nationality Act of 1952, as amended, which prohibits citizenship and national origin discrimination and document abuse, as well as under Title VII of the Civil Rights Act of 1964. However, while the proposed regulation unfairly puts employers squarely on the horns of a dilemma – whether to terminate employment or lose safe harbor – it gives them no corresponding immunity from liability for their good faith actions.

SSA’s RM 01105.027 states:

Unfortunately, some employers have improperly used the EDCOR (Code V – No-match letter) to take adverse action against their employees. Based on concerns voiced by various interest groups, the letter includes the following paragraphs:

IMPORTANT: This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it make any statement about an employee's immigration status.

You should not use this letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her Social Security number appears on the list. Doing so could, in fact, violate state and federal law and subject you to legal consequences."

Similarly, the OSC at its website states:

9. If an employee's name and SSN don't match SSA's records, doesn't that mean the employee is not authorized to work?

No. Just because there is a mismatch between your records and SSA's records, you should not assume that the employee lacks work authorization. There are many reasons for a mismatch to occur, including:

1. A name change (e.g., due to marriage, divorce or other reasons) after the SSN was issued;
2. A typing or printing error; and
3. An error based on cultural differences in how surnames are used.

You should not use the mismatch letter by itself as the reason for taking any adverse employment action against any employee. Doing so may put you in violation of the antidiscrimination provision of the immigration laws, the equal employment opportunity laws, or the labor laws. The General Counsel's office of the former INS, and OSC, have opinion letters that may assist you on this issue. Please call OSC for more information.

For the reasons stated above, employers could be forced as a practical matter to terminate workers who, in fact possess work authorization, in violation of law. In so doing, they risk a charge of unlawful discrimination by terminating employees who are not able to explain and resolve SSN/name discrepancies. *See LULAC v. Pasadena School Dist.*, 662 F. Supp. 443 (S.D. Tex. 1987) where a school district was required to reinstate unauthorized aliens eligible for legalization under IRCA to custodial positions they occupied prior to termination for providing district with false SSNs. Therefore, the regulation should not be implemented without a companion provision immunizing employers from citizenship discrimination liability for terminating employment when it has not been able to verify in accordance with the safe harbor provisions.

The proposed regulation also promotes document abuse and conflicts with existing law. In an effort to avoid potential citizenship and national origin discrimination through document abuse, the proposed regulations provide:

- (3) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be

interpreted as permitting an employer to request more or different documents than are required under section 274A(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual, except a document about which the employer has received a notice described in paragraph (1)(I)(iii) of this section and with respect to which the employer has received no verification as described in paragraph (1)(2)(i)(B) or (1)(2)(ii)(B) of this section.

However, this provision further complicates an already confusing area for employers.

INA §274B(a)(6), 8 U.S.C. §1324b(a)(6) provides:

Treatment of certain documentary practices as employment practices.—A person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

Contrary to the statutory prohibition, the proposed regulation requires the employer to refuse to honor a “document about which the employer has received a no-match notice.” This places employers in a nearly impossible position. Under the statute, they must honor documents tendered (that reasonably appear genuine) but under the proposed regulations, they are required to reject specified documents. They cannot request more or different documents than required under section 274A(b) of the Act, and they cannot refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual. However, the proposal would require them to refuse to honor some documents, specifically a “document about which the employer has received a no-match notice.”

This proposed regulation will almost certainly lead to an increase in discrimination through document abuse. Such discrimination may arise in a number of ways that often seem innocuous to employers. For example, an employer engages in discrimination through document abuse by insisting that the employee provide an “INS issued card” evidencing continued employment authorization where the employee had other legally acceptable documents. Such action is illegal and contrary to the INA §274B(a)(6), 8 U.S.C. §1324b(a)(6). *U.S. v. Louis Padnos Iron & Metal Co.*, 3 OCAHO no. 414 (1992).

The Interpretation of Constructive Knowledge In the Proposal Is Inconsistent with Congressional Intent

The ICE proposal pushes the concept of constructive knowledge far beyond the outer limits intended by Congress in enacting Section 274a, which prohibits the knowing employment of unauthorized workers. This is clear from the decision in *Collins Foods Int'l, Inc. V. U.S. INS*, 948 F. 2d 549, 544-45 (9th Cir. 1991), which struck down a finding of constructive knowledge. The court cautioned that the concept must be “sparingly

applied” to avoid upsetting the delicate statutory balance to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. It said:

The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied. The statute prohibits the hiring of an alien "*knowing* the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A) (emphasis added). Insofar as that prohibition refers to actual knowledge, as it appears to on its face, any employer can avoid the prohibited conduct with reasonable ease. When the scope of liability is expanded by the doctrine of constructive knowledge, the employer is subject to penalties for a range of undefined acts that may result in knowledge being imputed to him. To guard against unknowing violations, the employer may, again, avoid hiring anyone with an appearance of alienage. *To preserve Congress' intent in passing the employer sanctions provisions of IRCA, then, the doctrine of constructive knowledge must be sparingly applied.*

The proposal’s broad reading of constructive knowledge is inconsistent with Congressional intent and improperly seeks to impose on the private sector the inherently governmental function of worksite enforcement.

ICE Should Not Implement the Proposal
until Coordinating with Other Interested Federal Agencies

In responding to a mismatch letter, employers must balance competing legal considerations and obligations to several different agencies, including DHS (to avoid employing unauthorized workers), IRS (to pay taxes using correct name/SSN items) and OSC (to avoid citizenship discrimination). For instance, IRS can impose a penalty for mismatches but has instructed that employers can avoid a penalty for reporting mismatched data by soliciting new W-4 Forms. OSC has instructed that employers should not terminate employment based on the mismatch letter. SSA has instructed employers to provide corrected information but not to terminate employment based on the letter. We believe that ICE should not implement the safe harbor proposal until it consults carefully with OSC, SSA, and IRS, which all have a stake in the outcome and have provided inconsistent guidance to employers. This is especially important given use of the no-match letter in criminal worksite enforcement.

The Proposal Will Impose Extraordinary Costs
and Paperwork Burdens on the Business Community

Based on our experience, the rule clearly will cost the private sector at least \$100 million per year. First, the actual cost of extra manpower and lost productivity on the part of companies attempting to comply with the proposed regulation will far exceed \$100 million annually. An HR representative with only 10% of the company’s workforce on the no-match list would spend significant amounts of time attempting to resolve these discrepancies. Racing against the clock, the HR representative might have to drop all

other more productive programs that could have been scheduled and must be abandoned and chalked up as lost opportunity costs.

Another hypothetical based on our experience illustrates the point. Increase the percentage of employees on the no-match letter at ABC Company to 30% or 40% and the lone HR representative would have 150 or 200 employees to usher through this procedure in 14 days. Or take a large company with 10,000 employees where only 2% or 5% of the employees are on a no-match list and the company must deal with these proposed procedures for 200 or 500 employees. Make it a 20,000-employee company and the numbers would be 400 or 1000. It would be truly impossible to reach the safe harbor without hiring experts.

The cost of recruiting, hiring, and training new replacement workers if workers leave voluntarily or if their employment is terminated based on this proposed regulation must also be factored into this equation. True, it may be said that employers never should have hired potentially undocumented workers in the first place. However, in our experience the vast majority of companies who employ undocumented workers do so unwittingly. Of course there are real and serious violators, and those employers should be stopped and punished. But we see well-meaning employers in our practices every day who follow every procedure to hire appropriately but could lose employees for all the reasons described herein if this proposed regulation is adopted.

The foregoing argument is also true for application of the Small Business regulatory Enforcement Fairness act of 1996. DHS should share its calculations in coming to the determination that this rule would not result in an annual effect on the economy of \$100 million or more.

Conclusion

For the foregoing reasons, we believe the proposed regulation is unsound and premature as a matter of policy and practice. At a minimum, implementation should await the adoption of clear SSA procedures for the correction of no-match information and careful consultation with other federal agencies on its implications. Additionally, the two-step safe harbor should be replaced by a single 123 day time limit.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION