

April 25, 2008

The Honorable Michael Chertoff
Secretary, Department of Homeland Security
Naval Security Station
Nebraska and Massachusetts Avenues, NW
Washington, DC 20528

Ms. Marissa Hernandez
Department of Homeland Security
U.S. Immigration and Customs Enforcement
425 Eye Street, NW, Room 1000
Washington, DC 20536
Electronic Address: <http://www.regulations.gov> (DHS Docket No. ICEB-2006-0004; RIN 1653-AA50)

Re: Supplemental Proposed Rule on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter; Clarification; Initial Regulatory Flexibility Analysis

Dear Secretary Chertoff and Ms. Hernandez:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Department of Homeland Security's (DHS) *Supplemental Proposed Rule on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter* ("No-Match" rule).¹ We are pleased that DHS followed our advice to issue a supplemental proposal in order to better consider the rule's impact on small entities.² The supplemental proposed rule also responds to several legal issues upon which the Federal District Court for the Northern District of California enjoined the prior, final "No-Match" rule,³ which was published on August 15, 2007.

As discussed below, Advocacy recommends that DHS consider broader, more flexible alternatives that will reduce the cost and impact of the rule on small entities. Also, Advocacy is willing to assist DHS in preparing its Small Entity Compliance Guides that are required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).⁴

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within

¹ 73 Fed. Reg. 15944 (March 26, 2008).

² Letter from Thomas M. Sullivan to The Honorable Michael Chertoff, dated September 18, 2007 (available at http://www.sba.gov/advo/laws/comments/dhs07_0918.html).

³ AFL-CIO v. Chertoff, D.E. 135 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

⁴ Pub. L. 104-121, Title II, § 212, 110 Stat. 857 (1996) (amended by Pub. L. No. 110-28, Amendment 103 (2007)).

SBA, so the views expressed here do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁵ as amended by SBREFA,⁶ gives small entities a voice in the rulemaking process. For all rules that are expected to have “a significant economic impact on a substantial number of small entities,” federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁷ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. The Executive Order details how the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, a response to any written comments submitted by Advocacy on the proposed rule.

I. Feedback From Small Entities

In response to the publication of the supplemental proposed rule, a number of small entity representatives contacted Advocacy and expressed serious concerns about the “No-Match” rule. On April 3, 2008, Advocacy hosted a small business roundtable to obtain small business input on the rule as well as to consider possible alternatives so that Advocacy could better advise DHS on how to proceed. The following comments and recommendations are reflective of the discussion during the roundtable and in subsequent conversations with small entity representatives.

- A. DHS should attribute additional costs to the proposed rule.** Because DHS attributes most of the costs of the rule to the underlying Immigration and Nationality Act (INA)⁸ rather than this rule,⁹ the rule appears far less costly than it otherwise would. This attribution of costs to the underlying statute appears to be at odds with OMB Circular A-4,¹⁰ which describes how to conduct a Regulatory Impact Analysis.¹¹ OMB Circular A-4 states that the entire cost of the rule and underlying statute should be considered when establishing the baseline cost of the new rule.¹² Advocacy notes that DHS justifies the shifting of costs from the rule to the underlying statute by arguing that the employer knew (or should have known) not to hire unauthorized employees in the first place. However, existing immigration law requires employers to verify the employment eligibility of all new employees through the Form I-9 verification process. Accordingly, each employer has already screened all of their employees and each employee is presumptively authorized at that point. The documentation is

⁵ 5 U.S.C. § 601 et seq.

⁶ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁷ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁸ 8 U.S.C. 1324a. This provision makes it illegal for any person to knowingly hire or continue to employ a person not authorized to work in the United States.

⁹ 73 Fed. Reg. 15953.

¹⁰ OMB Circular A-4, *Regulatory Analysis* (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>).

¹¹ See, Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (September 30, 1993).

¹² OMB Circular A-4, *Regulatory Analysis*, p. 15-16.

deemed satisfactory, and remains so even when the “No-Match” letter is received. Under the new rule, a new cost structure (i.e., compliance costs) would develop at this time. Small business representatives argue that it is not logical to attribute such costs to the INA, and that they should be added to the costs in the Small Entity Impact Analysis¹³ and the Initial Regulatory Flexibility Analysis (IRFA).¹⁴

- B. Small business representatives ask that DHS consider alternatives that would reduce the impact on small entities.** DHS raises several alternatives in its supplemental proposed rule, but unfortunately dismisses each one.¹⁵ Advocacy believes that DHS should carefully review alternatives received during this notice and comment period before summarily dismissing alternatives that would meet DHS objectives while minimizing the burden on small entities. The following alternatives may merit consideration:

Alternative 1: Exempt small entities, or phase in the rule over a period of years. In the proposal, DHS indicates that exempting small entities or delaying compliance dates would actually harm small entities by not providing them with the security of the safe-harbor.¹⁶ As such, no alternative is possible and the proposed rule becomes the only option. However, small businesses believe that DHS could revive the consideration of alternatives by acknowledging the rule is substantive in nature and that it could be implemented in a phased and orderly fashion. For example, by imposing the rule on large entities first, many of the errors in the SSA database could be corrected over time and best practices for resolving “no-matches” could be developed. These lessons could then be used to ease small entities into the compliance process. Large entities (including both private sector and governmental employers) that receive “No-Match” letters have sophisticated human resources departments that are capable of handling this new mandate; however, it will be highly problematic for small entities with limited human resources capacity to try to resolve these “no-match” issues. In Advocacy’s view, a “one-size-fits-all” regulation is particularly unsuited here given the tremendous variety of employers and the fact that millions of authorized “no-match” employees populate the SSA database.

Alternative 2: Provide additional time (such as a 180-day extension) for small employers, or at least suspend the running of the timeframes while an employee is actively working with SSA to resolve an issue. With thousands or even millions of employees suddenly contacting their local SSA offices to resolve “no-matches” under the new rule, small businesses believe that SSA will be inundated and overwhelmed with requests for corrections. According to some small business representatives, some employees trying to resolve “no-matches” have had to make several trips to their local SSA office and the documents they need to prove their identity may be difficult or impossible to retrieve, especially for foreign-born, naturalized citizens or U.S.-born citizens from rural or remote

¹³ *Small Entity Impact Analysis*, prepared by DHS’ consultant, Econometrica, Inc., January 15, 2008 (available in the docket at Docket No. ICEB-2006-0004, Item 0232).

¹⁴ 73 Fed. Reg. 15952-15954. The requirements for an IRFA are contained in 5 U.S.C. § 603.

¹⁵ *Id.*, p. 15954.

¹⁶ *Id.*

areas that do not have good records. Local SSA offices are also often located far from many small, rural, or remote employers, making travel to them difficult, time-consuming, and expensive. The proposed timeframes for small entities could be difficult or impossible to meet. Accordingly, small businesses recommend that DHS consider providing additional time for small entities to comply, such as a 180-day extension. Further, DHS should consider suspending the running of the timeframes when an employee is actively working with SSA to correct the discrepancy (the current rule provides no such provision). Finally, DHS might also consider a tiered approach where timeframes are established based on the size of the employer (with smaller employers receiving more time to comply). Provisions might also be developed that allow more time based on the distance to the local SSA office. Advocacy believes these approaches would more accurately reflect a “reasonable” response by a particular employer.

Alternative 3: Provide a simpler, more straightforward “safe-harbor” that reduces the burden on small employers. One small business representative suggested that DHS adopt a simpler, more straightforward rule that says that an employer who receives a “No-Match” letter should: 1) complete an internal investigation to determine whether the source of the discrepancy is the employer’s own clerical error; 2) if not, inform the affected employee of the discrepancy; and, 3) if the employee challenges the discrepancy, require proof that the employee has been in contact with SSA to resolve it. Under this scenario, the reasonable employer could assume that the matter was being handled and would not follow up unless another no-match letter was received (or some other adverse information arose). This approach would reduce the burden on small employers and leave it up to the employee and SSA to resolve the matter. It would be far less complicated and would eliminate the presumption that receipt of a “No-Match” letter puts the employer on notice that the employee may be unauthorized to work in the United States.

Alternative 4: Provide special provisions for employers with short-term, seasonal, or intermittent employees. DHS analysis indicates that the industries with the most “no-matches” are agriculture, construction, and the service sector (such as restaurants or hotels). This is no surprise since these industries employ many short-term, seasonal, or intermittent employees and have high turnover rates. Small business representatives in those industries have suggested that DHS consider industry-specific or special provisions for these industries. This is especially true in agriculture where many employees are hired for 60-day periods. Since “No-Match” letters are only sent by SSA on an annual basis, most of these letters will arrive long after the term of employment has ended. Since the employee no longer works for the employer, the employer’s responsibilities should end there. DHS should also specifically clarify that employers are not required to track and contact past employees for whom they receive “No-Match” letters. These employees no longer work for the employer and requiring employers to track past employees would create additional costs and burdens.

Alternative 5: Submit unresolved “no-matches” to DHS for investigation. Rather than placing the entire burden for resolving “no-matches” on the employer and the employee, small business representatives suggested that unresolved “no-

matches” involving small employers could be sent to DHS for investigation after the requisite timeframe has expired. This would put DHS on notice of the existence of the “no-match” discrepancy, but not require that the employee be terminated until DHS has had an opportunity to investigate the matter. Such a process would protect from automatic termination the thousands of authorized employees that DHS’ analysis shows would be unable to resolve “no-match” discrepancies each year.¹⁷

Alternative 6: Create a “no-match” ombudsman at DHS where unresolved “no-matches” could be sent after the employee has been unable to resolve a discrepancy at SSA. Some small business representatives believe that DHS should create a special office or appoint an ombudsman to assist employees in resolving “no-matches” where the employee has been unable to resolve within the requisite timeframe. Such an approach could lead to an efficient, inter-governmental correction process with direct lines of communication to investigate “no-matches” and correct the SSA database. This would relieve the burden on employers and protect authorized employees from automatic termination. Such a program might be limited to employees of small employers.

II. Final Regulatory Flexibility Analysis. Advocacy believes that the supplemental proposed “No-Match” rule, if finalized, will have a significant economic impact on a substantial number of small entities. As such, DHS should prepare and publish with any final rule a Final Regulatory Impact Analysis (FRFA) under the RFA.¹⁸ Advocacy notes that the FRFA must include, in addition to the economic analysis of the rule, a summary of issues raised in public comments on the IRFA, the agency’s response to them, and a statement of the changes the agency has taken to minimize the impact on small entities.¹⁹

III. Small Entity Compliance Guides. Advocacy is willing to assist DHS in preparing the small business compliance guides that are required to accompany the final rule. SBREFA requires DHS to prepare one or more compliance guides to assist small entities in complying with the rule,²⁰ and to set up a response system to answer inquiries from small entities about the rule.²¹ The information gained through this supplemental proposal’s comment period will aid the Department in drafting the compliance guides. Advocacy stands ready to help DHS prepare the compliance guides in the same manner in which we helped the Department meet its obligation to better consider the impact of the rule on small entities by issuing the supplemental proposed rule and IRFA.

¹⁷ *Small Entity Impact Analysis*, p. 26. The Small Entity Impact Analysis, which serves as the basis for the agency’s IRFA, finds that of the nine million “no-matches” submitted to the SSA database annually, 90 percent (or 8.1 million) involve “authorized” employees and that two percent of these authorized employees (or 162,000) would be unable to resolve the discrepancy within the specified timeframes, potentially leading to their termination.

¹⁸ 5 U.S.C. § 604.

¹⁹ *Id.*


²⁰ Pub. L. 104-121, Title II, § 212, 110 Stat. 857 (1996)

²¹ *Id.*, § 213.

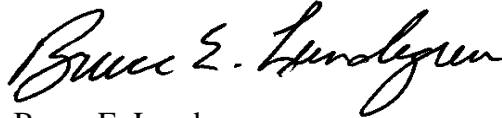
IV. Conclusion

Advocacy is pleased that DHS issued the supplemental proposed rule in an effort to generate constructive input from small business. We are confident that the suggestions made by Advocacy in this letter and in numerous comments submitted by small business will help DHS balance its obligations to recognize employers who are acting lawfully and to prevent the business community from employing unauthorized aliens. Please do not hesitate to contact us if this letter raises issues, questions, or concerns that must be addressed.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Cc: The Honorable Susan A. Dudley, Administrator
Office of Information and Regulatory Affairs, Office of Management and Budget