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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[ICE 2377–06; DHS Docket No. ICEB–2006–0004]

RIN 1653–AA59

Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission

AGENCY: U.S. Immigration and Customs Enforcement, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations by rescinding the amendments promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor from receipt of No-Match letters. DHS is amending its regulations as proposed on August 19, 2009, without change. Implementation of the 2007 final rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E–Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

DATES: This final rule is effective November 6, 2009.

FOR FURTHER INFORMATION CONTACT: National Program Manager Charles McClain, U.S. Immigration and Customs Enforcement, Office of Investigations—MS 5112, 500 12th Street, SW., Washington DC, 20536. *Telephone:* 202–732–3988 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Docket

Public comments on this docket may be viewed online at *http://www.regulations.gov* or in person at U.S Immigration and Customs Enforcement, Department of Homeland Security, 500 12th Street, SW., Room 1000, Washington, DC 20024, by appointment. To make an appointment to review the docket, call 202–307–0071.

II. Final Rule

After considering the public comments, DHS has determined, for the reasons stated in the proposed rule and in this final rule, to promulgate the rescission of the 2007 and 2008 final rules (referred to collectively as the ''No-Match rules'') without change.

III. Background

It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, an alien for employment in the United States knowing the alien is not authorized to work in the United States. Immigration and Nationality Act of 1952, as amended (INA), section 274A(a)(1)(A), 8 U.S.C. 1324a(a)(1)(A). It is also unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment. INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2).

All persons or entities that hire, or recruit or refer persons for a fee, for employment must verify the identity and employment eligibility of all employees hired to work in the United States. INA section 274A(a)(1)(B), (b)(1), (b)(2), 8 U.S.C. 1324a(a)(1)(B), (b)(1), (b)(2). Under the INA, this verification is performed by completing an Employment Eligibility Verification form (Form I–9) for all employees, including United States citizens. INA section 274A(b)(1), (b)(2), 8 U.S.C. 1324a(b)(1), (b)(2); 8 CFR 274a.2. The INA provides, however, that an employer may not conduct this verification in a manner that treats employees differently based on their citizenship status or national origin. INA section 274B(a), 8 U.S.C. 1324b(a). An employer, or a recruiter or referrer for a fee, must retain the completed Form I–9 for three years after hiring, recruiting or referral, or, where the employment extends longer, for the life of the individual's employment and for one year following the employee's departure. INA section 274A(b)(3), 8 U.S.C. 1324a(b)(3). These forms are not routinely filed with any Government agency; employers are responsible for maintaining these records, and they may be requested and reviewed by U.S. Immigration and Customs Enforcement (ICE). INA section 274A(b)(1)(E)(3); 8 CFR 274a.2(b)(2), (c)(2); *see* 71 FR 34510 (June 15, 2006) (Electronic Signature and Storage of Form I–9, Employment Eligibility Verification).

Employers annually send the Social Security Administration (SSA) millions of earnings reports (W–2 Forms) in which the combination of employee name and social security number (SSN) does not match SSA records. In some of these cases, SSA sends a letter, such as an ''Employer Correction Request,'' that informs the employer of the mismatch. The letter is commonly referred to as an employer ''No-Match letter.'' No-Match letters may be caused by many things, including clerical error and name changes. One potential cause may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or an SSN assigned to someone else. Such a letter may be one indicator to an employer that one of its employees may be an unauthorized alien; the letter itself, however, does not make any statement about an employee's immigration status. ICE sends a similar letter (currently called a ''Notice of Suspect Documents'') after it has inspected an employer's Employment Eligibility Verification forms (Forms I–9) during an investigation audit and after unsuccessfully attempting to confirm, in agency records, that an immigration status document or employment authorization document presented or referenced by the employee in completing the Form I–9 was assigned to that person. After a Form I–9 is completed by an employer and employee, it is retained by the employer and made available to DHS investigators on request, such as during an audit.

Over the years, employers have inquired of the former Immigration and Naturalization Service, and now DHS, whether receipt of a No-Match letter constitutes constructive knowledge on the part of the employer that he or she may have hired an alien who is not

authorized to work in the United States. On August 15, 2007, DHS issued a final rule describing the legal obligations of an employer following receipt of a No-Match letter from SSA or a letter from DHS regarding employment verification forms. *See* 72 FR 45611. That final rule also established ''safe-harbor'' procedures for employers receiving No-Match letters.

The rule has never been implemented in light of a preliminary injunction issued by the United States District Court for the Northern District of California. *AFL–CIO* v. *Chertoff,* 552 F. Supp. 2d 999 (N.D. Cal. 2007) (order granting motion for preliminary injunction). As a result of that litigation, DHS also issued a supplemental proposed and final rule providing to address specific issues raised by the court. *See, e.g.,* 73 FR 15944 (Mar. 26, 2008) (supplemental proposed rule), 73 FR 63843 (Oct. 28, 2008) (supplemental final rule). Neither the supplemental nor 2008 final rules, however, changed any regulatory text.

DHS proposed to rescind the No-Match rules on August 19, 2009, explaining that a more appropriate utilization of DHS resources would be to focus enforcement/community outreach efforts on increased compliance through improved verification, including increased participation in the U.S. Citizenship and Immigration Services (USCIS) E–Verify employment eligibility verification system, the ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs. The proposed rescission rule and this final rule are part of a Government-wide reexamination of regulatory processes. 74 FR 41801, 41802 (Aug. 19, 2009); Docket ICEB–2006–0004–0923. DHS requested public comments on the proposed rescission of the No-Match rules and provided a 30-day public comment period.

IV. Public Comments

DHS received 22 comments during the 30-day comment period. DHS received comments from individuals, professional associations, unions, trade organizations, and advocacy organizations. DHS received comments from the litigants in *AFL–CIO* v. *Chertoff,* No. 07–cv–4472–CRB (N.D. Cal.). Many commenters supported the rescission of the 2007 final rule and provided arguments why the 2007 final rule should be rescinded. Other commenters argued in favor of retaining and implementing the 2007 final rule. The substantive comments are addressed below.

A. Viability of the 2007 and 2008 Rules

One commenter suggested that the guidance provided in the No-Match rules clarified and interpreted existing law. The commenter suggested that the safe harbor provision provided valuable guidance to employers that need guidance in this area. The commenter further argued that removal of the No-Match rule will just create uncertainty and more room for unscrupulous employers to continue to hire and retain workers they know or should know are not authorized to work. Another commenter expressed concern that rescinding the No-Match rules will leave employers wanting to resolve discrepancies but having no guidance on what DHS would consider a good faith attempt to resolve the discrepancy to avoid a finding of constructive knowledge, as opposed to violating the anti-discrimination laws; and that E–Verify, IMAGE and other DHS programs identified in this rule do not provide guidance in dealing with No-Match letters or provide a safe harbor to employers.

DHS does not disagree that additional guidance would be valuable to employers. DHS disagrees, however, with the suggestion that if the No-Match rules are rescinded, employers will have no guidance on compliance with the Immigration and Nationality Act's employment verification requirements. As discussed in all of the proposed and final rules in this rulemaking, DHS and its predecessor agencies have provided guidance on the immigration implications and responding to No-Match letters. Similarly, the Office of Special Counsel for Immigration Related Unfair Employment Practices, Civil Rights Division, Department of Justice, enforces the anti-discrimination provisions of INA section 274B, 8 U.S.C. 1324b, and provides guidance to employers about responding to SSA no-match letters in a manner consistent with the anti-discrimination provision of the INA. The No-Match rules set out that advice and provided a safe harbor if employers followed specified steps to resolve the discrepancy. The commenter, a professional association, has provided similar advice to its members. DHS, in considering all of its options, does not believe that the addition of a ''safe-harbor'' to that guidance is as effective as other tools to assist in compliance with the employment restrictions of the Immigration and Nationality Act.

DHS continues to provide employer support through IMAGE. IMAGE is specifically designed to help the business community develop and implement hiring and employment verification best practices.

As of September 2009, more than 155,000 employers have signed an MOU with DHS to participate in E–Verify, representing more than 500,000 hiring sites; in fiscal year (FY) 2009, employers queried E–Verify nearly 8.6 million times. The Administration and DHS fully support the expansion of E–Verify and have taken steps to encourage use of E–Verify, including ensuring that federal contractors use E–Verify to ensure an employment eligible workforce.[1] USCIS also recently updated the Handbook for Employers (M–274) to provide more comprehensive guidance and instructions for completing the Employment Eligibility Verification Form (Form I–9). *http://www.uscis.gov/files/nativedocuments/m-274.pdf.*

These tools focus on more universal compliance with the employment eligibility verification requirements of the Immigration and Nationality Act than a safe harbor procedure for a limited number of employers who receive a No-Match letter. A No-Match letter is reactive, either one specifically guided to the employment eligibility issue from ICE or one indirectly pointing to a potential employment eligibility issue through social security number record mismatches on tax filings through SSA.

Furthermore, DHS has acknowledged that unscrupulous employers would continue to find ways to take advantage of the system, regardless of whether the No-Match rules were in place. DHS focuses criminal and civil enforcement against the most egregious violators: employers who use unauthorized workers in order to gain a competitive advantage or those who exploit the vulnerable, often engaging in human trafficking and smuggling, identity theft,

[1] A modest expansion of E–Verify will occur with the requirement that certain government contractors utilize E–Verify. See Executive Order 13,465, 73 FR 33285 (June 11, 2008); *Designation of the Electronic Employment Eligibility Verification System Under Executive Order 12,989,* 73 FR 33837 (June 13, 2008); *Proposed Employment Eligibility Verification Rule,* 73 FR 33,374 (June 12, 2008); *Final Employment Eligibility Verification Rule,* 73 FR 67651 (Nov. 14, 2008); *Chamber of Commerce of the United States* v. *Napolitano,* 2009 WL 2632761, D. Md. No. 08–civ–3444 (AW), Memorandum Opinion, Dk. No. 51 (Aug. 26, 2009) (denying plaintiff's motion for summary judgment and preliminary injunction; granting defendant's motion for summary judgment), appeal filed No. 09–2006 (Sept. 4, 2009. DHS also encourages States and other jurisdictions to utilize E–Verify. *Cf., Chicanos por la Causa, Inc.* v. *Napolitano,* 558 F.3d 856, 867 (9th Cir. 2009) (amended on denial of petition for rehearing) (holding that ''Congress could have, but did not, expressly forbid state laws from requiring E–Verify participation.''), pet. for cert. filed sub nom. *Chamber of Commerce* v. *Candelaria,* U.S. No 09–115 (filed May 28, 2009).

and social security number and document fraud; and employers in the Nation's critical infrastructure sites, including airports, seaports and power plants.

B. Issues Raised in the 2007 and 2008 Rules

Other commenters repeated arguments previously made in the 2007 and 2008 rulemaking, and in the subsequent litigation, that the No-Match rules created confusion among many small businesses, including farm businesses, and that the No-Match rules would have resulted in additional costs; and also that the process outlined in the No-Match rules would have resulted in additional labor, resource and personnel costs, which many small businesses would be unable to absorb.

The 2007 and 2008 No-Match rules were intended to clarify the obligations of an employer following the receipt of a no-match letter from SSA or a letter from DHS regarding employment verification forms. Further, as explained, DHS does not believe the No-Match rules imposed a mandate that forced employers to incur ''compliance'' costs. 73 FR 63863. Only small entities that choose to avail themselves of the safe harbor would incur direct costs as a result of the No-Match rules, and all entities are responsible for the wage statement (Form W–2) that creates a No-Match letter.

Commenters asserted that the No-Match rules should be rescinded because the correction period allowed in the final rules is inadequate. SSA, according to the commenters, would be unable to resolve mismatches presented by authorized workers within the correction period. One commenter further alleged that the No-Match rules would disproportionately impact authorized workers of color, transgender workers, and those who appear or sound ''foreign;'' the rules would lead to retaliatory firings.

Although DHS agrees with the commenters' suggestions that the rules should be rescinded, DHS disagrees with the suggestion that the No-Match rules would have generated additional costs or would have disproportionately impacted authorized workers or any discrete group. As stated above, the No-Match rules were intended to clarify the obligations of an employer following the receipt of a No-Match letter from SSA or a letter from DHS regarding employment verification forms.

Another commenter alleged that the No-Match rules were an unlawful expansion of the definition of ''constructive knowledge'' because the No-Match letters are sent out for reasons unrelated to immigration status. Similarly, another commenter supported the rescission of the No-Match rules arguing that the rules would have led to the termination of large numbers of United States citizens and other authorized workers because many of the ''no-matches'' in the SSA's Earning Suspense File have nothing to do with immigration status.

DHS disagrees. DHS has not changed its position as to the merits of the 2007 and 2008 rules; DHS has decided to focus on more universal means of encouraging employer compliance than the narrowly focused and reactive process of granting a safe harbor for following specific steps in response to a no-match letter. DHS has determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence. Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of ''constructive knowledge.'' A reasonable employer would be prudent, upon receipt of a No-Match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA.

Another commenter noted that employers are wrongly implementing the 2007 and 2008 final rules even though implementation of the 2007 rule was enjoined and that employees who receive no-match letters are being discriminated against and terminated if they are unable to resolve their discrepancies with SSA within ten days. DHS acknowledges that an employer who terminates an employee without attempting to resolve the issues raised in a No-Match letter, or who treats employees differently based upon national origin, perceived citizenship status, or other prohibited characteristics may be found to have engaged in unlawful discrimination under the anti-discrimination provision of the INA section 274B, 8 U.S.C. 1324b. That fact does not, however, warrant DHS changing its earlier position that receipt of a No-Match letter and an employer's response to a No-Match letter, in the totality of the circumstances, may be used as evidence of a violation of the employment restrictions of the Immigration and Nationality Act. 73 FR at 63848, n.2; 74 FR 41804, n.4. Employers should not use No-Match letters, without more, as a basis for firing employees without resolution of the mis-match, and DHS has never countenanced such a practice. DHS urges employers, employees, and other interested parties to contact the Office of Special Counsel for Immigration-Related Unfair Employment Practices, (800) 255–8155 or *http://www.usdoj.gov/crt/osc/,* for additional information and guidance about the application of the anti-discrimination provisions.

Another commenter alleges that the No-Match rules failed to address the concerns of the District Court that led to the injunction of the rules. This comment appears more attuned to the 2008 supplemental proposed rule, rather than the rescission of the 2007 final rule. Although DHS disagrees that the supplemental rule failed to address the District Court rationale in the order granting a motion for preliminary injunction, DHS is nonetheless rescinding the No-Match rule as the commenter urged.

C. Scope of No-Match Letters as an Enforcement Tool

Several commenters suggested that SSA discontinue issuing No-Match letters to employers and instead send them to affected employees. The commenters further recommend that, if sent to employers, DHS not use the no-match letters for immigration compliance purposes or, if the letters are obtained through audits or investigations, that DHS inform employers that they will have safe harbor from wrongful termination and Privacy Act charges. Another commenter further noted that No-Match letters are issued for administrative purposes; that they were not designed as an immigration enforcement tool and are, in fact, ill-suited for this purpose.

Whether the SSA will continue to provide employers and employees with written notice indicating that there is a discrepancy between the worker's name and social security number is a decision to be made by SSA. DHS believes that SSA notification is beneficial to the employer and the employee, and that the different letters to employers and employees serve different purposes for SSA. Employers and employees are made aware of discrepancies in their filings and that the discrepancy may affect employees' potential benefits, respectively, and the letters encourage corrective action to ensure that the employee's earnings are properly credited for retirement, disability, survivor and other benefits.

As discussed above, a finding of constructive knowledge of unauthorized employment may be based on the totality of the circumstances. Employers

remain liable where the totality of the circumstances establishes constructive knowledge that the employer knowingly hired or continued to employ unauthorized workers. An employer's receipt of a No-Match letter and the nature of the employer's response to the letter are only two factors that may be considered in determining the totality of the circumstances.

Another commenter argued that the use of social security numbers for immigration enforcement through delivery of No-Match letters turns employers into de facto immigration agents, which goes beyond the scope of SSA's mission. DHS strongly disagrees. DHS acknowledges that receipt of the No-Match letter, without more, does not mean that the employee is not authorized to work or that the employee provided a fraudulent name or social security number. The discrepancy may be based upon a number of reasons unrelated to immigration status, such as clerical errors or employees' name changes that may not have been reported to SSA. However, a No-Match letter may also be generated because the individual is unauthorized to work in the United States and provided fraudulent information to the employer at the time of hire.

With regard to the comment that DHS provide a safe harbor from wrongful termination and Privacy Act charges, such action is outside of DHS's authority. DHS, therefore, declines to accept the recommendation.

D. Viability of E-Verify and IMAGE

Several commenters suggested that E-Verify and IMAGE cannot replace the No-Match rules. One commenter argued that improvements in E-Verify and other DHS programs do not provide better tools for employers to reduce the incidence of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees, because IMAGE and E-Verify are voluntary, and unscrupulous employers will not sign up for either. The commenter further argued that E-Verify is deeply flawed and will confirm work authorization for individuals who claim to be a citizen and obtain identity documents using the citizen's name and social security number. Some commenters expressed reservations about expansion of E-Verify without significant modifications because of alleged reliance on databases that are flawed or riddled with errors that would result in denial of employment to authorized workers, including United States citizens, and in discrimination against immigrant workers. Another commenter supported the rescission of the 2007 and 2008 No-Match Rules, but opposes mandated participation in E-Verify or IMAGE.

Another commenter suggested that a mandatory or vast expansion of the E-Verify electronic employment verification system is not a solution to our nation's immigration problems. Further, the commenter suggested that the degree of inaccuracy in the E-Verify underlying databases means that large numbers of Americans will be denied employment and paychecks, at least temporarily, while they attempt to resolve the problem with relevant government agencies. Finally, the commenter suggests that evidence coming from those who have used E-Verify indicate that the current program is seriously flawed, ineffective, and could potentially cost thousands of United States citizens and legal residents their jobs due to database errors.

Other commenters suggested that E-Verify relies upon databases which are flawed or error-prone and have unacceptably high error rates that misidentify authorized workers; abuse of the program by employers is substantial and results in discrimination, profiling of a vulnerable segment of workers, and illegal employment practices by unscrupulous employers; the privacy and security concerns of the program have not been addressed; and expanded use of the program jeopardizes the labor rights and livelihoods of work-authorized immigrant and citizen workers.

Other commenters similarly expressed reservations about expansion of E-Verify without significant modifications to the program, its timely implementation with added employer safeguards, and fair procedures to ensure the system's accuracy and accountability. Another commenter supported the rescission of the 2007 and 2008 final rules, but opposed mandated participation in E-Verify or IMAGE.

DHS agrees that E-Verify and IMAGE do not replace the no-match rules per se—DHS never intended to suggest that its change in focus was a replacement for the No-Match rule. The E-Verify and IMAGE programs, and DHS enforcement priorities, are not a part of this rule and the proposed rule did not propose any action that would make E-Verify or IMAGE or any other program a replacement or mandatory. DHS stated only that it was changing enforcement priorities and focus. These comments address broader policy decisions, not the content of the rescission proposed rule. DHS continues to believe that E-Verify provides the best available method for employers to verify the employment eligibility of employees.

DHS strongly disagrees, however, with the commenters' suggestion that E-Verify contains a degree of inaccuracy that warrants not using E-Verify.[2] Although outside the scope of the proposed rule, DHS notes that many of the statistics used by commenters are out of date and some do not establish the point suggested by the commenter. As discussed above, the Administration and DHS are expanding the use of E-Verify because it is an accurate and effective tool for employers to verify employment eligibility.

In addition, the IMAGE outreach program and other initiatives, such as requiring all government contractors to utilize E-Verify, positively influence United States employers to exercise proactive immigration compliance, thus restricting the competitive field in which unscrupulous employers operate.

Several commenters suggested that relying solely on electronic verification of employment eligibility would disadvantage agricultural employers who are located in rural areas where modern internet capability is not readily available; these commenters further argued that the difficulty faced by these employers in using electronic verification may subject them to an imprecise interpretation of constructive knowledge. DHS has made clear that E-Verify is not a requirement and is one of many means to assure compliance. An employer who decides to use E-Verify, however, may choose, for example, to use an outside company or vendor to run E-Verify queries. Employers could also seek out other sources of internet access, such as public sites. Accordingly, DHS does not believe that it is impracticable for some employers to use electronic employment verification methods such as E-Verify in areas where internet capability may currently be limited. As discussed above, E-Verify is one of many tools available to employers, not the exclusive tool available or the exclusive focus of DHS' assistance to employers. To the extent that agricultural employers are located in rural areas that are not well served with modern

[2] Current statistics are available on the Internet at *http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f82d8557a487a110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD.* See Committee on Oversight and Government Reform, Subcommittee on Government Management, Organization and Procurement, *E-Verify: Challenges and Opportunities,* 111th Cong., 1st Sess. (July 23, 2009) (prepared statements available at *http://governmentmanagement.oversight.house.gov/story.asp?ID=2552*).

internet capability, employers may continue to complete the Employment Eligibility Verification Form I–9 in the paper format and comply with the employer verification requirements of the Immigration and Nationality Act by carefully examining the identification and employment eligibility documents presented by the employee at the time of hire.

E. Other Issues

A commenter suggested that the Employment Eligibility Verification Form I–9 process is flawed and that employers refer to it as the ''ten foot rule''—i.e. that if the documents presented look valid from ten feet away, then they are acceptable. DHS shares the commenter's concern that the Employment Eligibility Verification process can be abused by fraudulent document holders. The standard implicated in this comment by which employers are held to account regarding document verification is fixed by statute. INA section 274A(b)(1)(A), 8 U.S.C. 1324a(b)(1)(A) requires employers to verify an alien's work eligibility where a work authorization document presented ''reasonably appears on its face to be genuine.'' Accordingly the comment treats matters outside the scope of this rule. DHS is making improvements in the Employment Eligibility Verification Form I–9 to assist employers and improve the integrity of employment verification. *See,* e.g., *Documents Acceptable for Employment Eligibility Verification,* 73 FR 76505 (Dec. 17, 2008) (interim final rule with request for comments amending lists of acceptable documents); 74 FR 5899 (Feb. 3, 2009) (delayed effective date); 74 FR 10455 (Mar. 11, 2009) (correction).

A few commenters further suggested that this rescission rule should address guest worker programs. These comments are outside the scope of this rulemaking action and thus will not be addressed in this final rule. DHS may consider these issues separately.

V. Statutory and Regulatory Reviews

A. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this rule would have a significant economic impact on a substantial number of small entities. This rule would amend DHS regulations to rescind the amendments promulgated in the 2007 final rule and the 2008 supplemental final rule relating to procedures that employers may take to acquire a safe harbor from evidentiary use of receipt of no-match letters. Implementation of the 2007 final rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. This rule reinstates the language of 8 CFR 274.1(l) as it existed prior to the effective date of the 2007 final rule.

As explained at 73 FR 63863, DHS does not believe the safe-harbor offered by the 2007 final rule and the 2008 supplemental final rule imposed a mandate that forced employers to incur ''compliance'' costs for the purposes of the Regulatory Flexibility Act. Only small entities that choose to avail themselves of the safe harbor would incur direct costs as a result of the 2007 final rule and the 2008 supplemental final rule. As this rulemaking proposes to rescind the offer of a safe harbor, this rule does not propose any compliance requirements and consequently would not impose any direct costs on small entities if promulgated as a final rule. Therefore, DHS certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act of 1995

This rule will 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, Public Law No. 104–4, 109 Stat. 48 (1995), 2 U.S.C. 1501 *et seq.*

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104–121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). This rule has not been found to be likely to result in an annual effect on the economy of $100 million or more, a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or foreign markets.

D. Executive Order 12866 (Regulatory Planning and Review)

This rule constitutes a ''significant regulatory action'' under Executive Order 12866, and therefore has been reviewed by the Office of Management and Budget. Under Executive Order 12866, a significant regulatory action is subject to an Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

E. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order No. 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order No. 12988, 61 FR 4729 (Feb. 5, 1996).

G. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons set forth in the preamble, DHS amends part 274a of title 8 of the Code of Federal Regulations as follows:

8 CFR CHAPTER 1—DEPARTMENT OF HOMELAND SECURITY

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1624a, 8 CFR part 2, Public Law 101–410, 104 Stat. 890, as amended by Public Law 104–134, 110 Stat. 1321.

■ 2. Section 274a.1 is amended by revising paragraph (l) to read as follows:

§ 274a.1 Definitions.

* * * * *

(l)(1) 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. Constructive knowledge may include, but is not limited to, situations where an employer:

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) 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 274(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.

Janet Napolitano,

Secretary.

[FR Doc. E9–24200 Filed 10–6–09; 8:45 am]

BILLING CODE 9111–28–P

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 915

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1261

RIN 2590–AA03

Federal Home Loan Bank Boards of Directors: Eligibility and Elections

AGENCY: Federal Housing Finance Board; Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is adopting a final regulation on the eligibility and election of Federal Home Loan Bank (Bank) directors. The final rule implements section 1202 of the Housing and Economic Recovery Act of 2008, which amended section 7 of the Federal Home Loan Bank Act (Bank Act) as it relates to the eligibility and election of individuals to serve on the boards of directors of the Banks.

DATES: This final rule will become effective on November 6, 2009.

FOR FURTHER INFORMATION CONTACT: Thomas P. Jennings, Senior Attorney Advisor, *thomas.jennings@fhfa.gov,* (202) 414–8948; or Patricia L. Sweeney, Management Analyst, *pat.sweeney@fhfa.gov,* (202) 408–2872.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

The Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654 (2008), transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (collectively, Enterprises), and the Banks to FHFA, which is responsible for ensuring that the Enterprises and the Banks operate in a safe and sound manner and carry out their public policy missions. The Enterprises and the Banks continue to operate under regulations promulgated by the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board (Finance Board), respectively, until FHFA issues its own regulations.

Section 1202 of HERA amended section 7 of the Bank Act, 12 U.S.C. 1427, which governs the directorship structure of the Banks. The Finance Board regulation implementing section 7 was codified at 12 CFR part 915. Part 915 governed the nomination and election only of those directors who are chosen from among the officers and directors of members of the Banks, which this final rule refers to as member directors. Section 1202(1) of HERA amended section 7(a) of the Bank Act to give the members the additional right to elect all of the other directors on the boards of directors of the Banks, which this rule refers to as independent directors.

On September 26, 2008, FHFA published an interim final rule (interim rule) to implement the amendments made by section 1202 of HERA. *See* 73 FR 55710, September 26, 2008. FHFA retained the basic process of elections that existed in part 915 as applied to member directorships, making changes as necessary to comply with the amendments to section 7 of the Bank Act. FHFA also added new provisions to govern the process for nominating individuals for independent directorships and for conducting elections of independent directors in conjunction with the elections of the member directors.

FHFA adopted the rule on an interim basis because there was insufficient time after the enactment of HERA for FHFA to conduct a full notice and comment rulemaking that would have allowed the Banks to conduct their 2008 elections before the end of 2008. Nonetheless, the interim rule afforded interested persons the opportunity to participate in the rulemaking process by submitting written comments on the interim rule, which FHFA has considered in adopting this final rule. The comment period closed on November 25, 2008.

Section 1201 of HERA (codified at 12 U.S.C. 4513(f)) requires the Director of FHFA to consider the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability, whenever promulgating regulations that affect the Banks. In preparing this final rule, the Director considered these factors and determined that the rule is appropriate, particularly because this final rule implements a statutory provision that applies only to the Banks. *See* 12 U.S.C. 1427.

II. Analysis of the Public Comments and Final Rule

FHFA received 15 public comments on the interim rule. Eleven Banks and one Bank member submitted comments. Two trade associations and a member of the United States House of