

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 2, 22, and 52****[FAC 2005–29; FAR Case 2007–013; Docket  
2008–0001; Sequence 1]****RIN 9000–AK91****Federal Acquisition Regulation; FAR  
Case 2007–013, Employment Eligibility  
Verification****AGENCIES:** Department of Defense (DoD),  
General Services Administration (GSA),  
and National Aeronautics and Space  
Administration (NASA).**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to require certain contractors and subcontractors to use the E-Verify system administered by the Department of Homeland Security, U.S. Citizenship and Immigration Services, as the means of verifying that certain of their employees are eligible to work in the United States.

**DATES:** *Effective Date:* January 15, 2009.

*Applicability Date:* Contracting Officers should modify, on a bilateral basis, existing indefinite-delivery/indefinite-quantity contracts in accordance with FAR 1.108(d)(3) to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–29, FAR case 2007–013.

**SUPPLEMENTARY INFORMATION:****A. Background and Purpose***Employment Eligibility Verification  
Requirements*

As explained more fully in the proposed rule, the Federal Property and Administrative Services Act of 1949 (FPASA), authorizes the President to “prescribe policies and directives”

governing procurement policy “that the President considers necessary to carry out” that Act and that are “consistent” with the Act’s purpose of “provid[ing] the Federal Government with an economical and efficient” procurement system. 40 U.S.C. 101, 121. On June 6, 2008, the President exercised this authority and the authority vested in him under section 301 of Title 3 of the United States Code in issuing Executive Order 13465 “Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System.” 73 FR 33285, Jun. 11, 2008, amending Executive Order 12989 (signed February 13, 1996, published February 15, 1996 at 61 FR 6091), previously amended by Executive Order 13286 (signed February 28, 2003, published March 5, 2003 at 68 FR 10619). As amended, Executive Order 12989 now provides, at Section 5.(a), that “Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) All persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.” The Executive Order also requires, at Section 5.(c), that the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration “amend the Federal Acquisition Regulation to the extent necessary and appropriate to implement the \* \* \* employment eligibility verification responsibility \* \* \* assigned to heads of departments and agencies under this order.”

On June 9, 2008, the Secretary of Homeland Security designated the “E-Verify system, modified as necessary and appropriate to accommodate the policy set forth in the Executive Order \* \* \* as the electronic employment eligibility verification system to be used by Federal contractors.” (See 73 FR 33837, Jun. 13, 2008.)

This final rule responds to these requirements, and the Secretary’s designation, by amending the FAR to require certain Federal contractors and subcontractors to use the E-Verify system (E-Verify) administered by the Department of Homeland Security (DHS), U.S. Citizenship and

Immigration Services (USCIS) as the means of verifying that certain of their employees are authorized to work in the United States.

*E-Verify Program*

The E-Verify system, formerly known as the Basic Pilot/Employment Eligibility Verification Program, is an Internet-based system operated by DHS USCIS, in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify represents the best means currently available for employers to verify the work authorization of their employees.

Before an employer can use the E-Verify system, the employer must enroll in the program and agree to the E-Verify Memorandum of Understanding (MOU) required for program participants. The terms of the MOU are established by USCIS and are not negotiated with each participant. In consenting to the MOU, employers agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against in the use of the E-Verify program. Violation of the terms of the MOU by the employer is grounds for termination of the employer’s participation in the E-Verify program.

Current law (8 U.S.C. 1324a(b)) requires all employers in the United States to complete an Employment Eligibility Verification Form (Form I–9) for each newly hired employee to verify each employee’s identity and employment eligibility. Under this final rule, Federal contractors will additionally enter the worker’s identity and employment eligibility information into the E-Verify system, which checks that information against information contained in SSA, USCIS and other Government databases.

SSA first verifies that the name, social security number (SSN), and date of birth are correct and, if the employee has stated that he or she is a U.S. citizen, confirms U.S. citizen status through its databases. If the system confirms identity and U.S. citizenship, and there are no other indicators that the information is not correct, SSA confirms employment-eligibility. USCIS also verifies through database checks that any non-U.S. citizen employee is in an employment-authorized immigration status.

If the information provided by the worker matches the information in the SSA and USCIS records, no further action will be required. E-Verify procedures require only that the employer record on the Form I–9 the

verification identification number and the result obtained from the E-Verify query or print a copy of the transaction record and retain it with the Form I-9.

If SSA is unable to verify information presented by the worker, the employer will receive an "SSA Tentative Nonconfirmation" notice. Similarly, if USCIS is unable to verify information presented by the worker, the employer will receive a "DHS Tentative Nonconfirmation" notice. Employers can receive a tentative nonconfirmation notice for a variety of reasons, including inaccurate entry of information by the employer into the E-Verify Web site, and changes in the worker's name or immigration status that the worker has not updated in the SSA database searched by the E-Verify system. If the individual's information does not match the SSA or USCIS records, the employer must provide the worker with a written notice generated by the E-Verify system, called a "Notice to Employee of Tentative Nonconfirmation". The worker must then indicate on the notice whether he or she contests or does not contest the finding reflected in the tentative nonconfirmation that he or she appears unauthorized to work, and both the worker and the employer must sign the notice.

If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice generated by the E-Verify system, called a "Referral Letter," which contains information about resolving the tentative nonconfirmation, as well as the contact information for SSA or USCIS, depending on which agency was the source of the tentative nonconfirmation. The worker then has eight Federal Government workdays to visit an SSA office or call USCIS to try to resolve the discrepancy. Under the E-Verify MOU, if the worker contests the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he or she awaits a final resolution from the Federal Government agency. If the worker fails to contest the tentative nonconfirmation, or if SSA or USCIS is unable to resolve the discrepancy, the employer will receive a notice of final nonconfirmation and the worker's employment may be terminated.

Participation in E-Verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws. However, the following modified requirements apply by reason of the employer's

participation in E-Verify: (1) Identity documents used for verification purposes must have photos (except as discussed below with respect to accommodations); (2) if an employer obtains confirmation of the identity and employment eligibility of an individual in compliance with the terms and conditions of E-Verify, a rebuttable presumption is established that the employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of the individual; (3) the employer must notify DHS if it continues to employ any employee for whom the employer has received a final nonconfirmation, and the employer is subject to a civil money penalty between \$500 and \$1,000 for each failure to notify DHS of continued employment following a final nonconfirmation; (4) if an employer continues to employ an employee after receiving a final nonconfirmation and that employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of Immigration and Nationality Act (INA) section 274A(a); and (5) no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system.

Further information on registration for and use of E-Verify can be obtained via the Internet at <http://www.dhs.gov/E-Verify>.

#### *E-Verify Basis and Development*

##### 1. Legislative History

Laws pertaining to the control of illegal immigration have received serious attention from Congress and the Executive Branch since at least the early 1950s. Chief among the legislative approaches to these problems has been the proposed establishment of penalties for the employment of undocumented aliens and related laws requiring the verification of employment authorization. See INA Section 274(a), codified at 8 U.S.C. 1324(a). The House of Representatives Report filed with the Immigration Reform and Control Act of 1986 (IRCA), found at 1986 U.S. Code Cong. and Adm. News, p. 5649, clearly describes the basis for that legislation:

This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. The bill would prohibit the employment of aliens who are unauthorized to work in the United States

because they either entered the country illegally, or are in an immigration status which does not permit employment. U.S. employers who violate this prohibition would be subject to civil and criminal penalties. Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment. The logic of this approach has been recognized and backed by the past four administrations \* \* \*. Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens. While there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.

*H.R. Rep. No. 99-682(I), 99th Cong., 1st Sess. 46 (1986), 1986 U.S. Code Cong. & Admin. News, p. 5649.* INA Section 274A, as established by IRCA, thus prohibits any "person or other entity" from knowingly hiring, or knowingly continuing to employ, any unauthorized alien. INA section 274A(b) provides for an "Employment Verification System," which requires that employers attest, after examination of documentation presented by the employee, that the person being hired, recruited or referred for employment is not an unauthorized alien. INA section 274A also provides for the assessment of civil monetary penalties and cease and desist orders against any employer that has knowingly hired or continued to employ an unauthorized alien, or that has failed to comply with the employment verification system mandated by INA section 274A(b). 8 U.S.C. 1324a(e)(4)–(e)(5).

Employers who engage in a "pattern or practice" of violating the prohibition against illegal employment of unauthorized workers may face criminal sanctions. INA section 274A(f), 8 U.S.C. 1324a(f). DHS U.S. Immigration and Customs Enforcement (ICE) investigates complaints of potential violations of INA section 274A by inspecting employment eligibility verification forms maintained by employers with respect to their current and former employees, and compelling the production of evidence or the attendance of witnesses by subpoena. 8 U.S.C. 1324a(e)(2); 8 CFR 274a.2(b)(2).

### *Development of E-Verify*

E-Verify provides a modern means of verifying employment authorization information in addition to the traditional I-9 process. When Congress established the paper-based employment verification system in 8 U.S.C. 1324a(b), it directed the President to evaluate that system's security and efficacy and implement necessary changes, subject to congressional oversight. 8 U.S.C. 1324a(d). Congress also authorized the President to establish demonstration projects designed to strengthen the employment verification system. 8 U.S.C. 1324a(d)(4).

The first demonstration project, in 1992, included the Telephone Verification System (TVS) pilot program—a predecessor to the E-Verify system. 69 Interpreter Releases 702 (June 8, 1992); 515 (Apr. 27, 1992). In 1996, Congress established the Basic Pilot program—now called E-Verify—as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Public Law 104–208, Sections 401–405, 110 Stat. 3009–655–3009–666 (1996) (8 U.S.C. 1324a note).

On August 10, 2007, the Acting Director of the Office of Management and Budget instructed agencies to encourage their existing and future contractors to use E-Verify and attached a letter that DHS had sent to its major contractors encouraging their use of E-Verify and emphasizing E-Verify's ability to help contractors comply with immigration law. See “Memorandum for the Heads of Departments and Agencies M–07–21,” Stephen S. McMillin, Acting Director, Office of Management and Budget (August 10, 2007) (<http://www.whitehouse.gov/omb/memoranda/fy2007/m07-21.pdf>) attaching “Letter from Paul A. Schneider, Under Secretary for Management” (Aug. 10, 2007). The OMB Memorandum also announced that the Federal Acquisition Regulatory Council was developing appropriate Governmentwide regulatory coverage to apply E-Verify to Federal contractors. It also indicated that by October 1, 2007, all Federal departments and agencies should begin verifying their new hires through E-Verify.

### *Compliance Requirements for Federal Contractors*

The Executive branch has long recognized that the instability and lack of dependability that afflicts contractors that employ unauthorized workers undermines overall efficiency and economy in Government contracting. The first formal expression of this policy is found in Executive Order

12989, signed by President Clinton in February 1996. (See 61 FR 6091, Feb. 15, 1996.) That Order, which pre-dated Congress's enactment of IIRIRA authorizing what is now the E-Verify program, found that the presence of unauthorized aliens on a contractor's workforce rendered that contractor's workforce less stable and reliable than the workforces of contractors who do not employ unauthorized aliens:

Stability and dependability are important elements of economy and efficiency. A contractor whose work force is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose work force is more stable. It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ unauthorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons. Because of this Administration's vigorous enforcement policy, contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons. I find, therefore, that adherence to the general policy of not contracting with providers that knowingly employ unauthorized alien workers will promote economy and efficiency in Federal procurement.

*Executive Order 12989 (preamble), 61 FR 6091.* This finding is as applicable today as it was in 1996. The Government is aware, in particular, of recent instances where Federal Government contracts have been disrupted when the contractor's employees were identified as unauthorized workers. See, e.g., Tami Abdollah, “2 Sentenced for Hiring Illegal Migrants; Golden State Fence Executives Get Probation and Fines, and the Company is Ordered to Forfeit \$4.7 Million in Profits,” Los Angeles Times, March 29, 2007, (detailing the criminal prosecution of two Federal Contractor company executives for hiring illegal workers that resulted in a guilty plea; judgment of probation and combined \$300,000 in fines for the two individuals in addition to the forfeiture of \$4.7 million in company profits the company reaped by employing unauthorized immigrant workers); Karen Lee Ziner, “3 at Bianco Plant Indicted on Immigration Charges,” Providence Journal Bulletin, August 4, 2007, at A3 (reporting the indictment of company president along with two managers for “conspiring to harbor and hire illegal immigrants” to work on Government contracts valued over \$200 million); Mark Bowes, “U.S.

Immigration Agents Arrest 33: Workers at Richmond Site of New Federal Courthouse Alleged to be Here Illegally,” Richmond Times Dispatch, May 8, 2008, at B3 (reporting the arrest of 33 alleged illegal immigrant workers employed by a Federal contractor during a raid by immigration authorities at the construction site of a future Federal courthouse in Richmond, Virginia); Giovanna Dell'Orto, “Illegal Immigrants Arrested at Military Bases,” Press-Register, January 20, 2007, at B12 (publishing an article on the arrest of roughly 40 illegal immigrant workers over a three day period that were hired by Federal contractors to work at three different military bases including Fort Benning in Georgia and the Marine Corp Base Quantico in Virginia); Rob Bell, “Mills Manufacturing Corporation Raided by ICE,” Western Carolina Business Journal, August 15, 2008 (reporting that immigration officials raided a Federal defense contractor and arrested 57 illegal immigrant workers).

Consistent with the President's authority under FPASA, and to “ensure the economical and efficient administration and completion of Federal Government contracts,” Executive Order 12989 instructed the Attorney General of the Department of Justice to investigate to determine whether a contractor or an organizational unit thereof is not in compliance with the INA employment provisions, transmit that determination to the contracting agency and have the head of the contracting agency pursue debarment or other such action as may be appropriate under the FAR. (See Executive Order 12989, Sections 3 and 4.) With the establishment of the DHS, the Attorney General's investigative authority transferred to the Secretary of Homeland Security. See Executive Order 13286, Sec. 19, (Feb. 28, 2003), 68 FR 10623. Thus, as early as 1996, agencies were instructed to use provisions within the FAR to support economical and efficient Federal Government contracting by avoiding doing business with contractors that employ unauthorized workers.

On June 6, 2008, President Bush issued Executive Order 13465, amending Executive Order 12989 by adding an electronic employment eligibility verification requirement to strengthen the long-standing Executive branch policy of furthering economical and efficient contracting through only contracting with Federal contractors who employ persons in the United States who are authorized to work in the United States. Executive Order 13465 echoes the findings and conclusions stated in Executive Order 12989 and

builds upon the "economy and efficiency" justifications for the 1996 Executive Order in light of the significant advances in the technology for employment eligibility verification that have been made since the issuance of Executive Order 12989. As amended, Executive Order 12989 now states:

It is the policy of the Executive branch to use an electronic employment verification system because, among other reasons, it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce. \* \* \* I find, therefore, that adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm employment eligibility of their workforce will promote economy and efficiency in Federal procurement.

*Executive Order 12989, as amended by Executive Order 13465, 73 FR 33285.*

Executive Order 12989, as amended, further specifically directs the agency heads of DoD, GSA and NASA to implement this policy through amendments to the FAR. Executive Order 13465 at Section 3, 73 FR 33286. Accordingly, the Councils amend the FAR in this final rule in accordance with the President's direction, pursuant to his authority under FPASA to "prescribe policies and directives" governing Federal procurement that are consistent with the Act's aim of providing the Federal Government with an economical and efficient procurement system. 40 U.S.C. 101, 121.

## B. Final Rule

### *Summary of the Elements of the Proposed Rule That Are Retained in the Final Rule*

This final rule inserts a clause into Federal contracts committing Government contractors to use the USCIS E-Verify System to verify that all of the contractors' new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States. Consistent with the requirements first set forth in the proposed rule, the final rule—

1. Exempts contracts that are for—
  - Commercially available off-the-shelf (COTS) items; and
  - Items that would be COTS items but for minor modifications.
2. Requires inclusion of the clause in subcontracts over \$3,000 for services or for construction.
3. Requires contractors and subcontractors to use E-Verify to confirm the employment eligibility of

all existing employees who are directly performing work under the covered contract.

4. Applies to solicitations issued and contracts awarded after the effective date of the final rule in accordance with FAR 1.108(d). Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend—on a bilateral basis—existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule.

5. In exceptional circumstances, allows a head of the contracting activity to waive the requirement to include the clause. This authority is not delegable.

The rule is written to apply the above requirements in a manner that will ensure effective compliance by the contractor community, and is reasonably limited in certain circumstances to minimize the burden on participants in the Federal procurement process.

### *Changes Adopted in the Final Rule*

Below is a summary of changes made to the final rule:

1. Significantly Extended Timelines—The final rule amends the proposed rule to permit Federal contractors participating in the E-Verify program for the first time a longer period—90 calendar days from enrollment instead of 30 days as initially proposed—to begin using the system for new and existing employees. The final rule also provides a longer period after this initial enrollment period—30 calendar days instead of 3 business days—for contractors to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered Federal contract. Contractors already enrolled and using the program as Federal contractors will have the same extended timeframe to initiate verification of employees assigned to the contract, but the time limits will be measured from contract award date instead of from the contractor's E-Verify enrollment date. With regard to verification of new hires, a contractor that has already been enrolled as a Federal contractor for 90 calendar days or more will have the standard 3 business days from the date of hire to initiate verification of new hires. Those contractors that have been enrolled in the program for less than 90 calendar days will have 90 calendar days from the date of enrollment as a Federal contractor to initiate verification of new hires.

2. Covered Prime Contract Value Threshold—The final rule requires the insertion of the E-Verify clause for prime contracts above the simplified acquisition threshold (\$100,000) instead of the micro-purchase threshold (\$3,000).

3. Contract Term—The final rule clarifies that the E-Verify clause need not be inserted into prime contracts with performance terms of less than 120 days.

4. Institutions of Higher Education—The final rule modifies the contract clause so that institutions of higher education need only verify employees assigned to a covered Federal contract.

5. State and Local Governments and Federally Recognized Indian Tribes—Similarly, under the final rule, State and local governments and Federally recognized Indian tribes need only verify employees assigned to a covered Federal contract.

6. Sureties—Under the final rule, sureties performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond need only verify employees assigned to the covered Federal contract.

7. Security Clearances and HSPD-12 credentials—The final rule exempts employees who hold an active security clearance of confidential, secret or top secret from verification requirements. The rule also exempts employees for which background investigations have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD)-12, "Policy for a Common Identification Standard for Federal Employees and Contractors," which the President issued on August 27, 2004.

8. All Existing Employees Option—The final rule provides contractors the option of verifying all employees of the contractor, including any existing employees not currently assigned to a Government contract. A contractor that chooses to exercise this option must notify DHS and must initiate verifications for the contractor's entire workforce within 180 days of such notice to DHS.

9. Expanded COTS-related exemptions for:

- Bulk cargo—The rule will not apply to prime contracts for agricultural products shipped as bulk cargo that would otherwise have been categorized as COTS; and
- Certain services associated with the provision of COTS items or items that would be COTS items but for minor modifications.

10. Allows the Head of the Contracting Activity to waive E-Verify requirements after contract award,

either temporarily or for the period of performance.

11. Definitions:

- Employee assigned to the contract—The final rule clarifies that employees who normally perform support work, such as general company administration or indirect or overhead functions, and that do not perform any substantial duties applicable to an individual contract, are not considered to be directly performing work under the contract.

- Subcontract and subcontractor—Adds definitions derived from FAR 44.101.

### B. Response to Comments Received on the Notice of Proposed Rulemaking Docket

The Department of Defense (DoD), General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) published a notice of proposed rulemaking (NPRM) in this action on June 12, 2008. (See 73 FR 33374.) The NPRM directed the submission of comments to the Federal eRulemaking portal, <http://www.regulations.gov>, as well as by facsimile and by mail to the FAR Secretariat, with reference to FAR Case 2007–013, Docket 2008–0001; Sequence 1, on or before August 11, 2008. The agencies received more than 1,600 public comments on the proposed rulemaking from individuals, organizations, corporations, trade associations, chambers of commerce and Government entities.

Comments submitted to the docket for this rulemaking were distributed relatively evenly among various issues, with concerns about the Government's authority to promulgate the rule and questions about the DHS's and SSA's collective ability to administer the rule receiving the greatest number of comments. Eleven commenters stated that the 60-day public comment period was inadequate to evaluate, research, and prepare responses to a complex proposed rule. Those commenters asked the Councils to extend the comment period to allow more time to research and respond to the proposed rule.

The Councils declined to extend the public comment period after concluding that the period was adequate. The current web-based E-Verify system, which has been active and available to employers since 2004, has been the subject of significant public scrutiny, including in public hearings before Congress. This has, over time, disseminated considerable information about the program to the public. As a result, most commenters did not request additional time to gather information

and submit comments, and those that did request additional time failed to raise novel or difficult issues that could have justified an extension. Moreover, the comments received more than adequately provided substantial information on which the Councils could make a final decision. Accordingly, the Councils do not believe that there is a basis for extending the comment period related to this rule.

#### Support for the Rule

*Comment:* More than 600 commenters wrote in support of the proposed rule and strongly urged its adoption. One commenter noted that it has been illegal for more than 20 years, *i.e.*, since 1986, to hire an individual who is not authorized to work in the United States. Another commenter, who identified himself as a 30-year Human Resources professional, stated that this E-Verify system is not too burdensome for employers. A third commenter said that the “E-Verify program WORKS!” and that he has found it to work accurately 100 percent of the time.

The majority of these commenters expressed overall support for the Executive Order's instruction for Federal agencies to contract with employers that use E-Verify to check the employment eligibility of all persons performing work on Federal contracts and of all persons hired by the contractor. Some commenters applauded E-Verify because it will establish a level playing field and prevent some employers from obtaining a competitive advantage by exploiting unauthorized workers for lower pay. Many commenters noted that—for 22 years—it has been against the law to hire workers who are not authorized to work in the U.S. This is not a new requirement, they say; it merely puts some teeth into the existing law. Other commenters observed that E-Verify will help stem the problem of identity theft by requiring employers to check photo identification.

*Response:* The Councils appreciate these supportive comments for use of E-Verify in the Federal Government procurement system, but note that application of the system in this context is not meant to regulate immigration, but to provide the Federal Government with stable and dependable contractors which, ultimately, results in a more economical and efficient procurement system.

#### Requests for a More Comprehensive Solution

*Comment:* A number of commenters suggested that merely requiring the use

of the E-Verify system by Federal contractors was not a comprehensive solution. They strongly advocate “fixing” the “broken” immigration system. Some commenters see the solution as giving people a path to legal status, others see it as providing “tangible solutions for the over 7 million undocumented workers in our economy,” some see it as enabling swifter and earlier access to work permits, and still other commenters advocate improved ICE auditing teams. One commenter claims that, “[w]hile employer sanctions and a mandatory employment document verification system may be an appropriate part of an effective immigration reform package, standing alone they only exacerbate the problems they are ostensibly designed to address.”

*Response:* Comprehensive immigration reform is beyond the scope of this rulemaking and was not the purpose of Executive Order 12989, as amended. The mandate given to the FAR Councils was to implement the President's Executive Order of June 6, 2008, as a means of creating a more economical and efficient Federal Government procurement system. The employment of persons unauthorized to work in the U.S. has been against the law for 22 years. Completion of the Form I–9 is still required of all employers and this rule does not change that requirement. This rule merely provides a more convenient, faster, and more consistent means of determining whether an individual is, or is not, authorized to work in the U.S. to establish greater stability and dependability among the Federal contractor workforce.

#### Authority

##### 1. Immigration Statutes

##### a. Voluntary Participation in E-Verify

1. *Comment.* Many commenters challenge the Councils' authority to promulgate the Rule, arguing that the insertion of a clause into Federal contracts that commits Federal contractors to use E-Verify conflicts with the congressional intent expressed in the IIRIRA that participation in E-Verify be “voluntary.” Some commenters further argue that the E-Verify program is de facto mandatory because contractors who elect not to enter into Federal contracts on account of E-Verify will go out of business.

*Response:* The Councils disagree. Section 402(a) of IIRIRA states, in relevant part, that “the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.” 8 U.S.C. 1324a note,

Section 402(a). On its face, this statutory limitation applies only to the Secretary of Homeland Security and does not apply to the President or the Councils. Because the requirement to insert the contract clause set forth in this rule comes from a presidential action, Executive Order 12989, as amended, and from this rulemaking undertaken by the Councils, it is not a requirement imposed by the Secretary of Homeland Security and therefore does not run afoul of section 402(a) of IIRIRA.

Moreover, acceptance of a Federal procurement contract is, by definition, a voluntary act. The rule sets forth a performance requirement to be included as a contract clause in contracts entered into or negotiated anew after the effective date of the rule. In *AFL-CIO v. Kahn*, the D.C. Circuit Court of Appeals, sitting en banc, rejected the claim that the Carter Administration's insistence that Federal contractors agree to comply with wage and price controls rendered those controls "mandatory" in violation of the Council on Wage and Price Stability Act (COWPSA). 618 F.2d 784 (D.C. Cir. 1979). The Kahn Court analogized the procurement requirement at issue to "those Federal programs that offer funds to State and local governments on certain conditions. The Supreme Court has upheld such conditional grants, observing on one occasion through Justice Cardozo that 'to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.'" *AFL-CIO v. Kahn*, 618 F.2d at 794 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-590 (1937)). According to the D.C. Circuit:

Any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract. As the Supreme Court ruled in *Perkins v. Lukens Steel Co.*, "[The] Government enjoys the unrestricted power \* \* \* to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." Those wishing to do business with the Government must meet the Government's terms; others need not.

*AFL-CIO v. Kahn*, 618 F.2d at 794. If a contractor chooses to do business with the Federal Government, then the Federal Government can, and routinely does, impose contract performance requirements. Where, as with this rule, such requirements are imposed through contract terms included in contracts, a contractor's agreement to abide by those terms of the agreement is not "involuntary."

2. *Comment:* Many commenters suggested that IIRIRA and the INA limit the types of employers which can be

required to participate in the Basic Pilot Program. These commenters asserted that the proposed rule's promulgation of a contract clause committing Federal contractors to use E-Verify violates the congressional intent behind IIRIRA, because Federal contractors are not one of the classes of employers which can be required to participate in Basic Pilot. Some commenters suggested that Congress consciously chose to exclude Government contractors from the subset of employers for which participation in Basic Pilot would be mandatory. Many commenters also asserted that, because of this alleged violation of congressional intent, the Administration lacks the constitutional authority to promulgate this policy through Executive Order or through this rulemaking.

*Response:* The Councils disagree. IIRIRA requires participation in E-Verify by certain employers, including Executive departments and the legislative branch, as well as employers found to have violated INA section 274A. There is nothing in the text of IIRIRA that prohibits the President, acting pursuant to separate statutory authority, from requiring additional classes of employers to participate in E-Verify as a condition of contracting with the Federal Government. Nor is there any indication in the legislative history to suggest that Congress ever specifically considered and rejected a proposal to include Federal contractors in the E-Verify program. Here, the President has acted within his authority under FPASA and 3 U.S.C. 301 and issued an Executive Order to improve the dependability and stability of the Federal contractor workforce by requiring Federal agencies to contract with businesses that electronically verify the employment eligibility of their employees. In his Executive Order, the President tasked the Secretary of Homeland Security with designating an appropriate electronic verification tool and charged the FAR Councils with the responsibility to promulgate a rule to implement the requirements of the Executive Order. The Secretary of Homeland Security and the FAR Councils have acted in accordance with the President's directive, issued as an exercise of his authority under FPASA, and in so doing, neither the Secretary nor the Councils have taken any action in conflict with IIRIRA. Congress merely prohibited the Secretary of Homeland Security from requiring participation in E-Verify by other persons or entities, and this rule does not violate that prohibition, as described above.

#### b. Existing Employees

*Comment:* Many commenters asserted that because IIRIRA created the Basic Pilot program as a tool to confirm employment eligibility of newly hired employees, the contractual requirement—announced by Executive Order and implemented through this rulemaking—that existing employees assigned to Government contracts be verified (or re-verified) through E-Verify is contrary to law.

*Response:* The Councils disagree. Executive Order 12989, as amended, instructs executive departments and agencies to require, as a condition of contracting, that the contractor agree to use an electronic employment eligibility verification system "to verify the employment of \* \* \* all persons assigned by the contractor to perform work within the United States on the Federal contract." This Executive Order is based on the President's exercise of his authority under FPASA to prescribe policies that promote economy and efficiency in federal contracting. 40 U.S.C. 101, 121.

The Basic Pilot statute does not prohibit the verification of existing employees' work eligibility called for by this presidential directive. The Basic Pilot statute lays out a set of procedures that employers using the system must follow "in the case of the hiring (or recruitment or referral) for employment in the United States. \* \* \*" IIRIRA section 403(a). The statute also sets out the parameters for the "employment eligibility confirmation system" that the Secretary of Homeland Security must establish. IIRIRA section 404. Nothing in either of these sections, however—or in any other part of the Basic Pilot statute—prohibits the use of the confirmation system for existing employees or prohibits the President, acting pursuant to separate statutory authority, from requiring federal contractors to use the confirmation system for existing employees as a condition of contracting with the federal government.

#### c. Congressional Notification

*Comment:* Commenters noted that IRCA requires the Administration to notify Congress before implementing any changes to the employment verification system "established under subsection (b) of [INA section 274A]." INA section 274A(d)(1), (d)(3). These commenters suggest that this rulemaking amounts to such a change, and that it may not be implemented without notice to Congress called for in section 274A(d)(3).

*Response:* The Councils disagree. This rule instructs Federal contracting officers to insert the specified clause into future Federal contracts, thereby committing Federal contractors to use the E-Verify system as specified in the rule. It does not, however, constitute a change to “the requirements of subsection (b)” of INA section 274A, which established the paper-based Form I-9 employment verification process. The I-9 process that all employers must follow at the time of hire continues to apply to Federal contractors without any change. This rule, and the Executive Order on which it is based, promotes economy and efficiency in Federal contracting by assisting employers to avoid employment of unauthorized workers and by limiting the risk that Federal contracts performed in the United States will be staffed by persons unauthorized to work in the United States.

## 2. Executive Order Authority

*Comment:* As noted above, many commenters challenged the President’s authority to issue the Executive Order under FPASA. These commenters suggested that Executive Order 12989 does not promote “economy” and “efficiency” in Government contracting, and that the Executive Order is therefore not supported by FPASA’s statement that the President may enact procurement regulations which further those two ends. Commenters also contended that the main purpose of the Executive Order is to advance a social policy—a strengthening of the immigration enforcement relating to employment in the United States—in a way that is contrary to congressional intent, and that the President’s power recognized by FPASA cannot be employed by the Executive Branch to advance policies that conflict with the statutes passed by Congress.

*Response:* These challenges to the legal authority for Executive Order 12989 are outside the scope of this rulemaking. The Councils note, however, that Executive Order 12989 falls well within the established legal bounds of presidential directives regarding procurement policy. FPASA authorizes the President to craft and implement procurement policies that further the Act’s statutory goals of promoting “economy” and “efficiency” in Federal procurement. See, e.g., *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under FPASA to require federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights);

*Kahn*, 618 F.2d at 792–793 (upholding an Executive Order implementing procurement wage and price controls, noting need for a “nexus” between those wage and price controls and procurement economy and efficiency). The fundamental “economy and efficiency” principles underlying the Executive Order were first articulated in the original Executive Order 12989, issued in February 1996, which concluded that contracting with employers who hire unauthorized workers in violation of the INA undermines the economy and efficiency of the Federal procurement system. The 1996 Executive Order imposed debarment penalties on contractors found to have violated the immigration laws, and was never found by a court to be inconsistent with FPASA, the INA, or IRCA. Executive Order 13465 amends Executive Order 12989 to use new employment verification technology in order to advance the same goal of ensuring a stable and dependable Federal contractor workforce and more economical and efficient Federal Government contracting. See 73 FR 33285 (“This order is designed to promote economy and efficiency in Federal Government procurement. \* \* \* I find \* \* \* that adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce will promote economy and efficiency in Federal procurement.”) The President has determined that this rule will produce net economy and efficiency gains in Federal procurement.

The Councils also disagree with assertions that the proposed rule is a veiled attempt to modify immigration policy under the guise of procurement regulation. This rule implicates immigration, but does so in a permissible manner. The President may, under FPASA, promulgate procurement policies and directives touching upon policy matters beyond Government contracting, so long as there is a sufficiently close “nexus” between the policy or directive and the promotion of economy and efficiency in Federal procurement. See *Chao*, 325 F.3d at 366–67; *Kahn*, 618 F.2d at 792; *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (“[T]he President, in implementing the Procurement Act, may \* \* \* draw upon \* \* \* secondary policy views \* \* \* that are directed beyond the immediate quality and price

of goods and services purchased.”). In this case, the “nexus” is explained at some length in the text of Executive Order 13465. (See 73 FR 33285.)

## 3. The MOU Requirement

*Comment:* One commenter specified that “[t]he inclusion of an MOU in addition to, or as a supplement to, the contract performance requirements, is contrary to contract formation law in that it might create a separately enforceable (and potentially conflicting) obligation between the parties beyond the scope of the contract and could create confusion and result in problems with contract administration and/or lead to the submission of contract claims.”

*Response:* The Councils do not concur with these comments. The requirement in this clause for the contractor to comply with the requirements of a secondary agreement is no different than any other contract term that requires adherence to a standard or a specification. The clause merely requires adherence to the conditions of the MOU as part of the contractor’s performance duties. The terms of the E-Verify MOU are readily available to the public, and were included in the docket of this rulemaking on the [www.regulations.gov](http://www.regulations.gov) Web site so that commenters on this rule would have the opportunity to review and take into consideration the proposed terms of that agreement in providing comments on this rulemaking. Potential contractors have adequate advance notice of the ancillary agreement with which they must comply.

## 4. Consistency With Other Federal Regulations

### a. FAR Guiding Principles

*Comment:* Several commenters claim that the proposed rule contradicts many of the guiding principles used in the creation of the FAR, including (1) minimizing administrative operating costs, (2) conducting business with integrity, fairness, and openness, and (3) promoting competition.

*Response:* Commenters claim that administrative operating costs can include start-up, implementation, training, and maintenance costs; and the Councils agree. All of these costs were included, and evaluated, in the Regulatory Impact Analysis (RIA) released with the proposed rule. Some adjustments have been made to the RIA as a result of comments received in response to the proposed rule, and they are addressed in the Regulatory Flexibility Analysis section of this rule. Commenters claim that there are also

other direct and indirect costs to employers who use E-Verify—employers may perceive foreign-born workers as more expensive to employ than native-born workers due to the database inaccuracies. Commenters claim that resolving tentative nonconfirmations and correcting employee records costs time and money and affects other resources. In claiming that the costs associated with the proposed rule do not minimize administrative costs, however, the commenters overlook the costs already incurred by contractors as a result of the I-9 process mandated by the INA, and they overlook the gains in stability and reliability of the Federal contractor workforce that contractors' use of E-Verify will produce.

The Councils also disagree with the claim by some commenters that the proposed rule fails to advance integrity, fairness, and openness in the way business is conducted. While Government-commissioned reports have found some employer abuse of the program, discriminatory behavior and other such prohibited employment practices is not encouraged by the E-Verify system. Use of E-Verify cannot prevent all such illegal action, but the record created by use of the system does make it more difficult for an employer engaged in discrimination to conceal its unlawful behavior. If any employer engages in discriminatory practices, such abuses should be reported to the appropriate Federal and State agencies responsible for enforcement of the anti-discrimination laws.

Commenters claim that the proposed rule does not encourage competition because the harmful impact on small businesses (many of which are minority-, immigrant-, or family-owned) is disproportionate and makes the playing field for small businesses more uneven. The claim of a disproportionate impact on small businesses is addressed elsewhere in this rule (see the Regulatory Flexibility Analysis section of this rule). However, the Councils believe that there is an impact on competition, and it believes that the impact is positive rather than negative. Use of the E-Verify system will make it more difficult for firms to gain a competitive edge by hiring unauthorized workers at lower pay.

#### b. DHS Regulations

*Comment:* One commenter asserted that the proposed rule's requirement to re-verify certain employees violates existing DHS regulations.

*Response:* As the commenter did not identify the specific DHS regulations allegedly violated, this comment is not

susceptible to a response. Other commenters have made similar assertions that E-Verify is contrary to law and the Councils have addressed these specific concerns. The Councils are not aware of any DHS regulation violated by this final rule.

#### c. Verification of Federal Employees

*Comment:* Several commenters noted that OMB has directed all Federal departments and agencies to use E-Verify on their newly-hired employees, but not on their existing employees. These commenters asserted that the proposed rule is inconsistent with that OMB decision, because the rule requires Federal contractors to use E-Verify on not only new hires but also on existing employees working on Federal contracts, and argue that Federal contractors should not be held to a higher verification standard than is applied to the Executive branch.

*Response:* The Councils disagree. The rule is consistent with the policy announced in Executive Order 12989 requiring the Executive branch to contract with employers that agree to use E-Verify for their employees who are working on a covered Federal contract. The aim of the Executive Order is to promote economy and efficiency in Federal procurement by ensuring stable and dependable Federal contractors.

Furthermore, Federal employees are required to undergo background checks pursuant to HSPD-12, which mandates that a person must be suitable (minimum of a national agency check with inquiries (NACI)) in order to be issued an HSPD-12 card. HSPD-12 requires certain credentialing standards prior to issuing personal identity verification cards. These standards include verification of name, date of birth, and social security number (among other data points) against Federal and private data sources. The Councils agree that the degree of scrutiny applied to individuals granted HSPD-12 credentials provides sufficient confidence that any such person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary.

#### d. Appropriate Scope of Regulations

*Comment:* One commenter suggested that the proposed rule's goal was to "protect U.S. workers"—one that is beyond the scope of that which can rightfully be pursued under procurement authorities.

*Response:* The Councils do not agree with the premise of this comment. The goal of the proposed rule is not to "protect U.S. workers." Rather, the goal

of the rule is to implement Executive Order 12989, which aims to promote economy and efficiency in the Federal procurement system by ensuring that the Federal Government does not do business with contractors that hire or employ unauthorized aliens, thereby promoting the stability and dependability of contractor workforces and minimizing the potential for disruption to federal contracts. The President is well within his authority under FPASA to require the agencies to promulgate this rule, which has a clear nexus to promotion of economy and efficiency in Federal contracting, even if it might also have other impacts. Chao, 325 F.3d at 366 (affirming authority of the President under FPASA to require federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights.)

#### Relationship With States

##### 1. States Prohibiting Mandatory Use

*Comment:* Several commenters requested that the Administration clarify the effects of the proposed rule on employers conducting Federal Government contracting business in locations where State and/or local law prohibits the use of E-Verify. One of these commenters specifically asked if the requirements of the proposed rule would function as an affirmative defense in actions brought against employers which use E-Verify in contravention of State/local law. Two other commenters suggested that the proposed rule be modified to provide E-Verify participation waivers to employers located in States prohibiting E-Verify enrollment, to allow such employers to participate in Government contracting without violating State law.

*Response:* The Councils decline to provide an exemption to the E-Verify term in contracts covered by this rule for employers located in States that prohibit E-Verify enrollment, because such state and local laws would be preempted by Executive Order 12989, as amended, and by these rules implementing the Order. The Councils note that an Illinois state statute prohibiting use of E-Verify by employers within that state is currently in litigation, as a result of a lawsuit filed by DHS arguing that the state statute is preempted by Federal law. The state has agreed not to enforce its statute pending the final resolution of the litigation.

##### 2. Other States

*Comment:* Two commenters noted that they are concerned that the proposed rule's requirement that certain existing employees undergo E-Verify

verification could “embolden” States and localities to require the same type of verification for employees working under State/local contracts. These commenters fear that such an expansion would complicate employment verification legal requirements, to the detriment of both employers and employees.

*Response:* The commenters concerns are speculative and, in any case, State and local government action is outside the scope of this case.

#### *E-Verify System*

##### 1. E-Verify Procedural Issues

###### a. Burdensome

*Comment:* One commenter stated that the E-Verify enrollment process is cumbersome and difficult and that USCIS support for employers trying to enroll has been inconsistent and ineffective. Three commenters felt that tentative nonconfirmations and the subsequent efforts to resolve them place additional burdens on employers and employees alike. Two other commenters state that costs associated with E-Verify are burdensome to employers. One commenter considered that the vast scope of coverage in the proposed rule is contrary to the “economy and efficiency” argument that justified issuance of the rule, as compared to other labor requirements attached to procurement.

*Response:* The Councils have narrowed the coverage to the extent possible yet still meeting the purpose of the Executive Order. The Councils are not charged with administration of the E-Verify program and this process is not within its rulemaking authority or the scope of this final rule. The Councils have considered the burdens and costs associated with E-Verify in the RIA and Regulatory Flexibility Analysis.

The E-Verify registration process is an automated process that uses a registration wizard to assist employers in determining which access method will best suit their company needs. Once that is decided, the individual registering the company is required to enter the company contact information, including the number of company locations for which E-Verify will be used and the address of these locations. Within 24 hours, that individual will receive an email from E-Verify that includes their username and password which they will use to log on to the system. In mid-FY08, the E-Verify program launched a registration reengineering effort aimed to streamline the E-Verify registration process and shift to a profile based registration system. The program has been working

with various stakeholders to determine and address the biggest concerns with the process, and hopes to conduct focus groups on ideas for improvement. The program has also undertaken a Plain Language Initiative, designed to simplify the language associated with the program and to update the materials associated with the program once the new verbiage has been finalized. Within this effort, the program also intends to conduct focus groups to determine the best response to various word choices.

With regard to the burdens or costs to employers to register and participate in E-Verify, DHS has informed the Councils of a report entitled the “Findings of the Web Basic Pilot Evaluation” that was prepared by Westat in September 2007. The report may be found at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>. The report found that 96 percent of long-term users indicated that E-Verify was not burdensome. The Westat report also stated that approximately 97 percent of long-term users reported that the indirect set-up and system maintenance costs were either no burden or only a slight burden and that the majority of employers reported that they spent \$100 or less in initial set-up costs. The Councils recognize that costs to employers will vary depending on employer characteristics and practices.

###### b. Data Accuracy

*Comment:* Numerous commenters focused their concerns primarily on the reliance of the E-Verify system on DHS and SSA databases that contain high percentages of errors. Many commenters, in particular, specifically call out the reported 4.1 percent error rate of the Social Security Administration’s database as a large source of inaccurate data. Several commenters stated concern that DHS databases are not updated in real-time.

Many commenters also believe the inaccurate data in the database leads to the misidentification of workers and to denial of employment for work-authorized individuals, especially naturalized citizens and foreign-born authorized workers. Many commenters stated concerns that naturalized citizens or foreign-born authorized workers are considerably more likely to receive erroneous tentative nonconfirmations than native-born U.S. citizens. One commenter questions the 0.5 percent “error rate” claimed by E-Verify when the system is based on SSA databases with a 4 to 5 percent error rate.

One commenter feels data entry or “human” errors on the part of employers are of concern as well since

they cannot be completely eliminated. Many commenters feel this issue especially affects employees with nontraditional or complex names.

*Response:* The improvements made to E-Verify over the last few years have decreased the incidence of data mismatches, which is referred to as a “tentative nonconfirmation” in the E-Verify program, and often referred to as the “error rate” by the public. DHS and SSA continue to analyze and implement improvements to reduce data mismatches as part of ongoing management of the E-Verify program. The majority of mismatches are with SSA data, since the SSA database is the only source for citizen data, against which the large majority of E-Verify queries are run. Instances of data inaccuracies include name changes due to marriage or divorce not reported to SSA, or, in the case of naturalized U.S. citizens, unreported changes in citizenship status. Most citizenship status mismatches that resolve as “work authorized” do involve naturalized citizens who have failed to notify SSA of their change in citizenship status. To reduce the number of SSA mismatches due to this situation, USCIS developed an automated check against the USCIS naturalization database for U.S. citizen new hires and provided employees who receive an SSA citizenship status mismatch notice the option of calling DHS directly to resolve it rather than resolving the mismatch with an in-person visit to an SSA field office. This has significantly reduced the burden of resolving tentative nonconfirmations for naturalized citizens. The changes went into effect in May 2008, and preliminary data show a 30 percent decrease in the number of SSA tentative nonconfirmation for naturalized citizens.

It is important to clarify that if the E-Verify program issues an initial mismatch to an employee, the employer cannot fire, prevent from working, or withhold or delay training or wages for that employee during the mismatch process. All employees receiving an initial mismatch are given the opportunity to contest to ensure that every employee who has a work authorized status is not prevented from working. All employees must be given the opportunity to contest and correct their records.

The Government recognizes the concerns over the SSA Office of the Inspector General Congressional Response Report (2006) estimates that 4.1 percent of their NUMIDENT database may contain discrepancies that could potentially affect 12.7 million individuals. The E-Verify program,

however, provides due process for correcting any errors with SSA, which will help to reduce the NUMIDENT discrepancies over time and provides an opportunity for an individual to correct an error they may not have been aware of otherwise. The E-Verify MOU makes clear that employers are prohibited from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound "foreign" or have received tentative nonconfirmations. If an employee elects to challenge a tentative nonconfirmation, the employee may not be terminated or suffer any adverse employment consequences based upon the employee's perceived employment eligibility status (including denying, reducing, or extending work hours, delaying or preventing training, requiring an employee to work in poorer conditions, refusing to assign the employee to a Federal contract or other assignment, or otherwise subjecting an employee to any assumption that he or she is unauthorized to work) until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued. Employers are further notified that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. Moreover, the MOU states that violations of either section 274B of the INA or Title VII may also lead to the termination of its participation in E-Verify. If the Employer has any questions relating to the anti-discrimination provision, it may contact the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) at 1-800-255-8155 or 1-800-237-2515 (TDD).

The ability to identify and fix any errors will help them maintain accurate records with SSA, which is beneficial to them in the future, particularly when applying for SSA benefits. The report also indicates that the majority of the discrepancies (64 percent) in the Numident are in the "Death Indication" field, which would not affect new hires. However, the E-Verify program can detect instances in which an individual is fraudulently using the SSN of a deceased person to gain unauthorized employment.

In response to data entry error, the independent report by Westat does state that employee and employer data entry

errors cannot be completely eliminated but the E-Verify program has worked to minimize and catch those errors before verification query results are returned. In September 2008 E-Verify instituted a pre-mismatch typographical error check that asks the employers to double-check the information they entered into the system with the employee's documents in the case of a mismatch. Preliminary data show that this enhancement has reduced SSA mismatches by 30 percent. In response to the issue of employees with nontraditional or complex names, the system provides guidance to employers on the system page where the name is entered into the field. There is a box that appears when an employer scrolls over the name field and there is also a help button next to the field that opens up a document that provides detailed guidance on how to enter complex surnames such as multiple last names or hyphenated names.

#### c. Technology Issues

*Comment:* Many commenters stated that the E-Verify system remains a paper-based system which still requires a contractor to complete the paper Form I-9 after analyzing up to 25 different documents that an employee could present and is not an entirely electronic system. One commenter stated that the system should provide an electronic export or reporting functionality for Case Verification Numbers. They state that the transfer of the verification case number to paper or on-line I-9 forms is now a manual, case-by-case "pen and paper process" that would fail under high volume. Another commenter stated concern over the degree of knowledge the personnel managing the toll free E-Verify phone number has on the myriad of complex immigration documentation and state that the USCIS National Customer Service (NCS) lines have been unable to provide accurate and timely information which can lead to confusion, multiple calls, and case resolution delay.

*Response:* Completion of the Form I-9 is required regardless of whether an employer is a participant in E-Verify. DHS rules permit the completion and storage of the I-9 electronically rather than on paper. See e.g., 8 CFR 274a.2(a)(2). E-Verify provides Form I-9 support materials for employers on the system's website including the Form I-9, in English and Spanish, and the Handbook for Employers, Instructions for Completing the Form I-9 (M-274), as well as many immigration-related materials such as a Guide to Selected Travel Documents. The Councils and DHS recognize the preference some employers have to utilize electronic

sources for required paperwork, and DHS is continually working towards more paperless systems, but is still within that process.

With respect to telephone inquiries, the E-Verify program has a Tier system when addressing phone calls. While most calls go directly to the first level, Tier One, for general program information or employer questions, there is a system in place to escalate calls to other Tiers depending on the complexity of the case. The program has subject matter experts on staff to address phone calls that require further attention. For cases that they are unable to resolve, USCIS has a Special Case Resolution unit in the Washington, DC Headquarters office that the cases can be referred to for further review. The average wait time is less than 20 seconds for a phone call to transfer from Tier 1 to Tier 2 and calls to the program are currently answered within 0.2 minutes or 12 seconds on average. The E-Verify program has substantially increased its customer service and program staff over the past two years in an effort to work with employers and ensure that every question or difficulty that arises is addressed.

In any specific case where additional time may be needed to address an issue or research the case information before a verification query can be resolved, it is important to note that the employer would receive a "case in continuance" response and cannot take any adverse action on an employee during this time.

DHS and SSA are constantly exploring ways to make the system more efficient and effective. However, the suggestion made here, that the system can be made totally web based so that individuals receiving a tentative nonconfirmation could prove that some factor generating the nonconfirmation was in error, is unrealistic. Generally, SSA requires documented proof of the factors that might be in question, SSN, date of birth, name, citizenship; and that the documents used be originals. The documents used to prove these elements (driver's licenses, birth certificates, etc.) are subject to forgeries, which are much easier to detect when a human being inspects original documents. Use of photocopies or fax copies, which would be necessitated by a totally Web based process, would make the process much more susceptible to fraud.

If an employee believes that s/he has been discriminated against during the employment eligibility verification process, he or she should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD). Employers that have questions relating to the anti-discrimination

provision should contact OSC at 1-800-255-8155 or 1-800-237-2515 (TDD).

d. Photo Identification

*Comment:* Many commenters stated that there is an estimated 11 percent of the population that does not have a Government-issued photo identification. Some of those same commenters also stated that studies have indicated members of minority populations such as African Americans, Latinos, Women, and Senior Citizens are less likely to have photo identification as well as many lawfully present immigrants such as refugees and asylees. These commenters also state that there are situations where an individual may have the right to work but has not yet received a physical Employment Authorization Document (EAD) and that the proposed rule fails to make exceptions for cases where photo identification has been lost or destroyed due to crime, accidents, natural disasters, or other causes.

*Response:* The Councils recognize the concerns of the commenters in regard to the percentage of the U.S. population that do not have photo identification, but note that there is no evidence from the extensive operations of the E-Verify program to date that this has been a significant problem. There are also cases and studies that find a far lower percentage of individuals lack a photo identification, at least in the context of evaluating photo identification requirements for voting. See *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 803 (S.D. Ind. 2007), *aff'd sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S.Ct. 1610, 553 U.S. — (2008); see also *Voter IDs Are Not the Problem: A Survey of Three States*, American University Center for Democracy and Election Management, January 9, 2008, found at <http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf> (finding that 1.2% of registered voters lacked a government issue photo identification). Photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing a contractor to immediately compare the picture embedded in the document against the employee. IIRIRA Sec. 403(a)(2)(A)(ii), 8 U.S.C. 1324a note, thus requires photo identification from employees of employers participating in the E-Verify program. In order to be consistent with these standards, the E-Verify MOU requires all employees of Federal contractors participating in E-Verify to present a photographic identification document.

Moreover, the documentation requirement is a basic requirement for the I-9 process that has to be completed regardless whether or not the employer is in E-Verify. The E-Verify photo identification requirement does limit the scope of acceptable "List B" identification documents somewhat, but we are not aware of a basis to conclude that the non-photo identity documentation that is currently permitted for the I-9 is broadly available to, or used by the referenced populations. In other words, the effect of limiting the non-photo documents would appear to be marginal.

USCIS has taken substantial steps to expedite EAD issuance, especially for refugees and asylees. The non-photo List B documents are not normally available to aliens who need EADs in any case. Those that reasonably might be available, especially the driver's license, contain photographs and thus are acceptable for E-Verify. Thus, this is not really an E-Verify issue per se; rather, it is a general issue about the I-9 compliance that employers are responsible for whether or not they participate in E-Verify.

To address situations of lost or stolen documents, the DHS regulations permit temporary presentation of a receipt for the application for a replacement document, and this is permissible for E-Verify employers as well as those just using the paper I-9.

For the six commenters who assert that employees need to show an EAD, the Councils note that there is no requirement to states that if an employee has an EAD card they must provide it for purposes of the Form I-9. Employees may choose to provide any approved List B document with a photo for the purpose of verification through E-Verify. It is true that many aliens who apply for an EAD card would not normally have List C evidence of work authorization and thus cannot comply with Form I-9 requirements until they receive the EAD. But this is a concern generally applicable to Form I-9 compliance and E-Verify participation would not affect it one way or another.

e. SSN Number

*Comment:* One commenter noted that the SSN is not required for the Form I-9.

*Response:* The Form I-9 (Rev. 06/05/07) states "[p]roviding the Social Security number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify)." Additionally, providing an SSN to employers is

generally necessary to comply with the IRS statutes and regulations that already require every employee in the United States to have an SSN.

f. Privacy

i. System Security

*Comment:* Several commenters suggested that E-Verify has ongoing system security problems that jeopardize the privacy and security of individuals' personal information. These comments focused on (1) general concerns with DHS, and more generally the U.S. Government, in the handling of personal information, and (2) general concerns about the potential for cyber attacks.

*Response:* The Councils disagree with these comments. Any database of personal information would be attractive to hackers or cyber attacks. That is why USCIS has developed a robust security program to protect the Verification Information System (VIS), the technical system that supports the E-Verify program, from such attacks. This security program fully complies with Federal Information Security Management Act (FISMA) requirements and has been certified and accredited as secure. The security measures in place include among other things both strong and limited access controls, transmission encryption, and extensive audit logging. Accordingly, the Councils have no reason to believe that these systems are not secure enough to ensure the effectiveness of the rule.

ii. Privacy Protections

*Comment:* A number of comments stated that E-Verify does not adequately protect the privacy of individuals' personal information. These comments focused on (1) general concerns with E-Verify handling of personal information, (2) specific concerns about potential for employer misuse of E-Verify for pre-screening and other misuse, (3) specific concerns about the potential for misuse of E-Verify by those falsely claiming to be employers, and (4) specific concerns with E-Verify relying on external databases.

*Response:* The Councils disagree in part with these comments. Several comments addressed non-specific privacy concerns about the handling of personal information. USCIS fully appreciates the significant responsibilities of handling this large amount of personal information. DHS, and specifically the E-Verify program, has developed a robust privacy program to not only ensure that the privacy of this information is respected but also to ensure that the public is made aware of

how their information is being treated. There is a dedicated staff of privacy professionals who work at the operational, tactical, and strategic planning levels and every significant change to E-Verify is documented in a system of records notice (SORN) or privacy impact assessment, as appropriate. USCIS continuously seeks to improve security and privacy protections as the E-Verify program develops.

Several commenters noted that E-Verify could be misused by employers, either by pre-screening applicants or by treating differently employees who have received a tentative nonconfirmation. The Westat report suggests that this indeed does take place. Unfortunately, some employers do not follow the requirements and guidelines for participating in E-Verify. Those requirements and guidelines address these concerns in several ways. First, E-Verify is educating employees and job applicants about how E-Verify should work and what their options are to address perceived misuse or abuses of the program. To this end, the E-Verify MOU requires that E-Verify informational posters be placed in the work site where employees can see them. These posters provide employees with a concise statement of their rights and contact information for submitting complaints regarding misuse and abuse of the program. In addition, E-Verify conducts outreach to educate employers and the general public about the program. Moreover, E-Verify requires user training and testing in addition to providing users with guidance on the appropriate use of the E-Verify program. Finally, USCIS has developed a monitoring and compliance capability to assist in identifying when an employer may be misusing the E-Verify program.

Several commenters noted that E-Verify does not currently screen employers who register with E-Verify, therefore it is possible that some may not be actual employers, but rather groups or individuals seeking to "phish" E-Verify to validate personal information for identity theft purposes. E-Verify does capture information on employers and, as part of the program's monitoring and compliance activities, researches on an ad hoc basis whether E-Verify users are actually employers. E-Verify has sought authority to verify employer authenticity directly from other Government sources but has not, as of yet, received that authority. Last year, in particular, the Administration sought a statutory change to the current prohibition on Internal Revenue Service sharing of Employer Identification

Number data with other Government agencies, such as USCIS. In advance of such a statutory change to that prohibition, USCIS is currently undertaking a robust reengineering of the employer registration process, including exploring ways of verifying the authenticity of employers registering for E-Verify.

Finally, commenters noted that E-Verify relies to a large extent on databases external to DHS. The commenters questioned the integrity of the data in these external databases and specifically recommended that they be made to provide full Privacy Act protections without being exempt from any of the Privacy Act requirements. The SORN and privacy impact assessments for VIS, the underlying E-Verify system, can be found at the DHS Privacy Office Web site <http://www.dhs.gov/privacy>. The SORN and privacy impact assessments describe more fully what information is collected and how it is used, protected, and shared. The particular Privacy Act exemptions and the extent to which the external source systems apply the Privacy Act vary based on the type of system and reason for collection. USCIS has asserted no Privacy Act exemptions and fully embraces the Privacy Act protections for the E-Verify VIS. E-Verify fully appreciates that because it is making such significant decisions based on information over which it does not have direct authority, it must be very careful to ensure that these decisions are made as accurately as possible. E-Verify will often check more than one database for verification of a single data element acknowledging that data may occasionally be wrong. In any event, individual employees are not deemed unauthorized to work as long as they are contesting a tentative nonconfirmation from E-Verify.

### iii. Identity Theft

1. *Comment:* Several commenters addressed E-Verify's current ability to combat identity theft. One commenter stated that there is no rational relationship between the E-Verify mandate on Federal contractors and the aim of having more efficient and dependable procurement sources because E-Verify does not prevent identity theft. The same commenter also stated a concern that the use of E-Verify would encourage identity theft. Another commenter stated that E-Verify could not prevent the hiring of unscrupulous workers because it does not check identity. A third commenter stated that E-Verify is inadequate because it does not prevent identity theft.

*Response:* The Councils disagree. E-Verify has had remarkable success preventing those from maintaining employment who are not authorized to work in the United States. When Congress established E-Verify, one of its goals was to prevent employment of those who are not authorized to work by detecting document fraud during the hiring process. Information matching and the photo identification requirement, while not airtight, are parts of this process. When an individual has presented fraudulent documents to an employer, the E-Verify program is more likely to identify that fact than the paper I-9 process and, is thus an improved process in relation to document fraud.

Criticism has arisen from E-Verify's limited ability to detect identity theft, *i.e.*, when legitimate documents are presented but have been stolen from another individual. A concern also has been stated that identity theft may increase as more employers use the E-Verify program. The Councils note that E-Verify was not established to prevent identity theft, but increasingly has the effect of doing so.

First, while document fraud requires some level of ingenuity, identity theft requires far more ingenuity. E-Verify continually forces unauthorized workers to resort to more and more difficult methods to obtain unauthorized employment. USCIS anticipates that this increased burden and the increased danger of involvement in identity theft criminality causes a significant number of unauthorized workers not to seek employment with employers who use E-Verify.

Second, E-Verify introduced a photo screening capability ("photo tool") into the verification process in September 2007. When an employer is presented with an employment authorization card or permanent residence card during the Form I-9 documentation process, the employer can match the photo on the documents to the photo which appears on the computer screen during the E-Verify process because the two should be the identical photo. Fifteen million photographs are contained within the USCIS databases. This has led to instances where employees who have either used photo substituted documents or have created entirely counterfeit documents have been identified. USCIS is currently in discussions with the Department of State to add United States passport and visa photographs to the E-Verify process as well. It is USCIS's long-term goal that the E-Verify photo screening process will be able to verify photos on all identity documents that an employee may present during the Form I-9

process. The photo tool has identified numerous cases of document and identity fraud and prevented unauthorized workers from gaining employment. Accordingly, the Councils consider the E-Verify process superior to the current I-9 process for identifying and deterring document fraud and identity theft.

2. *Comment:* Many commenters stated a concern that E-Verify's inability to prevent identity theft leaves employers that use E-Verify vulnerable to sanctions. Additionally, many commenters stated that the threat of penalties resulting from the use of E-Verify or pressure to comply with the system would encourage employers to forego hiring certain workers.

*Response:* The Councils disagree with these comments. As explained above, the E-Verify system makes an employer more, not less, able to prevent document fraud and identity theft. If a Federal contractor participating in the program obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program the contractor will have the benefit of establishing a rebuttable presumption that the contractor has not violated INA 274A(a)(1)(A) with respect to the hiring. See 8 U.S.C. 1324a, note, Sec. 402(b). Moreover, no Federal contractor participating in the E-Verify program can be held civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the E-Verify system. *Id.* at 403(d). USCIS and ICE may also use law enforcement discretion in relation to specific instances of good faith operation of the program. Accordingly, the Councils do not view the stated concern over employer sanctions resulting from identity theft as an impediment to implementing this final rule.

With respect to the comments regarding selective hiring, an evaluation of the E-Verify program, publicly available on the Internet at <http://www.dhs.gov/E-Verify> under "Program Highlights"/"Findings of the Web-Based Basic Pilot [E-Verify] Evaluation—September 2007," included an analysis of employer's confidence in hiring certain workers with information collected directly from E-Verify employers. Most employers who use E-Verify stated that they are neither more nor less willing to hire immigrants. When use of the program was reported as impacting employer hiring practices, employers almost always stated that the provision of an additional means to determine work authorization through E-Verify resulted in increased confidence and security in the

employee's work status and therefore, made the employer more likely to hire immigrants.

3. *Comment:* One commenter stated that DHS needs to reduce the number of documents acceptable to prove authorization to work to reduce identity theft and confusion. The same commenter also stated that E-Verify does not have the ability to determine if an SSN is being run through its system multiple times.

*Response:* The number of documents acceptable for demonstrating authorization to work is governed by the INA and by the regulations on the Form I-9. The E-Verify program requires documents with a photograph when the employee presents a "List B" document for Form I-9 purposes. See 8 U.S.C. 1324a note, Sec. 403(a)(2)(A)(ii). The requested change to further restrict the documents that may be used for the Form I-9 or for E-Verify would be better directed to DHS than to the Councils, and is outside of the scope of this rulemaking.

E-Verify is fully capable of detecting multiple uses of SSNs. Through the USCIS Monitoring and Compliance unit, steps are taken to identify those instances where suspected fraud has occurred and corrective action is taken where appropriate. Additional methods to combat identity theft, including methods to determine if a single SSN is being used in different geographic locations, are under investigation with a focus on suspected or clearly identified fraudulent use of SSNs, based on the number of times and geographic areas in which a number has been used. The Councils note that an employee could have more than one job, in different locations.

#### g. Communications

*Comment:* A professional association commented that certain materials should be made available prior to enrollment (e.g., user manual) and that E-Verify should create a list of items for employers.

*Response:* Currently, E-Verify does provide many materials on the program's Web site at <http://www.dhs.gov/E-Verify> including the E-Verify Users Manual, a "How Do I Use E-Verify" guide, and a copy of the E-Verify MOU among other informational materials. E-Verify continues to engage in employer outreach to further educate employers regarding their responsibilities under the program.

#### 2. User Liaison Organizations and Other Assistance to Contractors

*Comment:* One industry association requested establishment of a user liaison

organization to solicit, assess, and prioritize with the user community implementation of needed system enhancements and corrective actions.

A university requested establishment of an E-Verify Ombudsman to assist with the expected higher than average error rates for foreign nationals on college and university campuses.

Another university commented that DHS should provide Federal funding assistance to employers for initial setup of record retention capabilities and staff training and initial and ongoing verification of expenses.

*Response:* DHS has informed the Councils that it is continually looking at ways to improve the E-Verify system, and believes that support is already provided to employers in a consistent and effective way. E-Verify provides general assistance through information found on the Web site and trained staff to address questions before or during the registration process in addition to continued support after an employer registers as an E-Verify participant. The MOU provides points of contact. The program also goes beyond this general support to provide presentations and system demonstrations to individuals or groups such as employers, Federal, State and local governments, community-based organizations, and various industry associations. The E-Verify program has participated in outreach events designed to provide information to the public and interested stakeholders regarding the program. The program conducts demonstrations, participates in conferences and outreach events, hosts webinars for interested parties, and created public awareness campaigns nationally and on the web and on radio, print and billboard in the states of Arizona, Georgia, Mississippi, and the metro Washington, DC area. The E-Verify Outreach branch has coordinated closely with the Small Business Association since April 2008 to conduct outreach events to ensure specific concerns relating to small businesses are heard and addressed.

With regard to the request for financial assistance, the Westat evaluation reports that the majority of employers reported that they spent \$100 or less for initial setup costs for E-Verify and a similar amount annually for operating the system. There is no additional record retention beyond Form I-9 requirements, with the exception of those employers who are presented with green cards (I-551s) or EADs (I-767) and need to retain photocopies of these documents for the photo tool as long as they are retaining the Form I-9.

### 3. Staffing

#### a. SSA and DHS Staffing for E-Verify

*Comment:* Many commenters raised various concerns over the overburdening of both SSA and DHS if E-Verify is expanded. Many commenters commented that the rule would overwhelm DHS and SSA as neither organization is adequately staffed to deal with the increased number of tentative nonconfirmations expected. Some of these commenters wrote that there is a substantial difference between the current number of E-Verify employers and the number of E-Verify employers that would use the system as a result of the rule. Those commenters were concerned with the scalability of staff to handle the increased number of employers.

*Response:* The Councils disagree with these comments. DHS (and its predecessor agencies) and SSA have worked closely for more than a decade to improve the E-Verify process. Since SSA does not receive appropriated funding for E-Verify, it is reimbursed by DHS for labor costs associated with resolving mismatches with SSA field offices. These costs include salaries and overhead for SSA field office employees who resolve mismatches in the field, and salaries and overhead for SSA employees who staff the SSA 1–800 number to answer calls from employees and employers. DHS has worked hard to decrease E-Verify related work undertaken by SSA field offices.

In May 2008, the E-Verify program launched the inclusion of naturalized citizen data as part of the initial E-Verify check. E-Verify now automatically performs an initial query to check information against the USCIS naturalization databases for all U.S. citizen new hires. In the short time since this new routine was put into place, E-Verify tentative nonconfirmations for naturalized citizens have decreased by 30 percent. In the event a naturalized citizen receives a SSA tentative nonconfirmation due to citizenship status, that individual now also has the option of calling DHS to reconcile the citizenship status mismatch rather than physically visiting SSA. DHS's efforts in this area will further reduce the number of E-Verify mismatches for naturalized citizens, thus reducing the instances of "walk-ins" to SSA offices for naturalized citizens.

Many commenters in addressing this issue did so in terms of a nationwide mandatory expansion of E-Verify to all employers and cited statistics that would apply to such an expansion. It is likely that SSA would need to increase

its own workforce to meet the demands of a nationwide mandatory system that would be used by approximately 7 million employers. However, the SSA reports that the numbers of employers and the workloads associated with this FAR rule would be far less than they would be under a nationwide mandatory system. This is especially true given the recent improvements made to the E-Verify system and the effect those have had in reducing the numbers of people contacting SSA.

#### b. Effect on Other Agency Functions

*Comment:* Some commenters were specifically concerned with the effect that the rule would have on SSA's ability to fulfill its primary mission of administering benefits.

*Response:* Since E-Verify uses a system separate from other SSA verification services, increases in E-Verify queries would have no effect on disability claims. As stated above, SSA and DHS are sufficiently staffed to handle E-Verify, therefore there should be no adverse impact on carrying out any of the other core functions of these agencies.

### 4. System Technology Issues

*Comment:* Many commenters suggested that the E-Verify program would be unable to handle the increased strain on its system, and specifically on the transactional database. Several of those commenters stated that the requirement to check all new hires will overwhelm the current system and lead to an increase in workforce disruption. Several other commenters argue that E-Verify is ill-equipped to handle a vast increase in users, queries, transactions, and communications volumes. Some commenters suggested that the E-Verify program and its system needs further study of its capabilities and needed functionalities, that problems with the present technology have not been addressed, that the requirements of the rule would require major E-Verify system changes, and that the system is unable at present to handle the anticipated increases in usage absent the rule. Another commenter was concerned with the availability of an Internet-based system in the event of a natural disaster that would inhibit the ability of an affected company to access a computer and Internet access to use E-Verify.

*Response:* The commenters are correct that the FAR rule is expected to significantly add to the number of queries run through the E-Verify system. However, many commenters in addressing this issue did so in terms of a nationwide mandatory expansion of

E-Verify to all employers and cited statistics that would apply to such an expansion. Based upon their exaggerated projections, the commenters assert that there is a high probability that disputes will not be resolved in a timely manner. But the numbers of employers and workloads associated with this FAR rule would be far less than they would be under a nationwide mandatory system, and they would not be difficult to absorb. The Councils, in consultation with DHS and SSA, are confident that the system will be able to accommodate the required greater volume of enrollments and queries within the time allotted. The Verification Information System (VIS), which is the database that supports E-Verify, underwent vigorous load testing in July 2007 in partnership with the SSA data systems. Those tests conclusively showed that the existing VIS will scale to meet even the most demanding current estimate of VIS operation, considering peak volumes for both queries and registrations. Currently, VIS is capable of handling 40 million queries annually. The testing found that the E-Verify system has the capacity to accommodate at least 240 million queries annually, four times the projected 60 million new hire queries per year that would result from mandatory E-Verify legislation applicable to all U.S. employers. It is also worth noting that the employer registration process is automated, and testing indicates that E-Verify is capable of handling up to 145,500 registrations per day, well over the estimated 4,000 per day that would occur under a nationwide all U.S. employer use scenario.

As of September 13, 2008, over 85,500 employers representing over 446,000 sites are registered for E-Verify. This calendar year, approximately 10 percent of all new hires nationwide have been run through the E-Verify system. In fiscal year 2008 to date, E-Verify has run over 6.2 million new hires through the program, which is nearly double the 3.2 million new hires run through the program in all of fiscal year 2007. Both SSA and DHS agree the current system is more than adequate to handle the volume increase associated with the FAR rule.

With respect to comments regarding contingency plans in the event of a failure of information technology systems in a natural disaster, the Councils believe that the agencies and the Government generally have standards and requirements for such circumstances. USCIS and SSA are required to follow Federal Government policies and procedures related to

information technology continuity of operations and emergency planning. In any event, section 403(a)(3)(B) and the MOU provide for an extension of the three day period if E-Verify systems are down.

## 5. Other Impacts on Society

### a. Macroeconomic Impact

*Comment:* Many commenters, notably community organizing groups and religious societies, an agricultural employer, trade associations, a human resources society and several individual employers stated that the rule will have a “devastating effect” on the United States economy, will lead to increased discrimination and an unwillingness to hire workers who look or sound foreign, and will lead contractors who need workers to hire them “off the books.” One commenter stated that “the economic impact of this regulation could be devastating to the point where agriculture in the United States will cease to operate as it does today.” In this same vein, several commenters stated that this is not an appropriate time for this rule, given a recent “meltdown” of the American economy, the mortgage crisis, and the resulting difficulties currently faced by United States employers and employees.

*Response:* The Councils consider these comments as outside of the scope of this rulemaking. The Councils are implementing a directive from Executive Order 12989 that Federal contractors agree to use an electronic eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of all persons hired during a contract term by a contractor to perform employment duties within the United States and of all persons assigned by the contractor to perform work within the United States on the Federal contract. Decisions related to the potential impact of this directive on the entirety of the United States economy or on individual sectors within the United States economy are not delegated to or exercised by the Councils in this rulemaking.

Moreover, these comments obviously assume that the existing Form I-9 process does not verify employment authorization, and that there will be a significant change in the number and type of employees found authorized to work in the United States with the implementation of E-Verify for Federal contractors. This should not be the case. E-Verify is merely a better means of verifying the work eligibility of the Federal contractor workforce. The Councils are not persuaded that permitting a less effective verification

system to continue for the purpose of maintaining a status quo in which illegal employment is common is a valid reason not to implement the system as to all Federal contractors when a more effective system is available that will create a more stable and dependable cadre of Federal contractors.

As to driving employers to hire more illegal workers “off the books,” the Councils’ position is that all Federal contractors are bound to comply with Federal, State and local laws, and that they should continue to do so should they wish to continue to contract with the Federal Government.

### b. Religious and Disability Accommodation

*Comment:* One commenter stated that requirements to access the Internet violate some religious tenets, making the rule discriminatory. Other commenters indicated that the requirement that employees present a photographic identification unduly burdens certain religious beliefs. Another commenter requested confirmation that the E-Verify system would accommodate persons with visual disabilities.

*Response:* While the Councils remain sensitive to the concerns of different religious groups, they must balance those concerns against the need to have stable and dependable Government contracting and to minimize document fraud in the E-Verify program in support of that goal. In particular, photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing a contractor to immediately compare the picture embedded in the document against the employee. IIRIRA Section 403(a)(2)(A)(ii), 8 U.S.C. 1324a note, thus requires photo identification from employees of employers participating in the E-Verify program. In order to be consistent with these standards, the E-Verify MOU requires all employees of Federal contractors participating in E-Verify to present a photographic identification document.

The Councils recognize that there may be occasions where U.S. citizens assert that religious beliefs preclude their being photographed and, as a result, they may not be able to present the required photographic documentation. The E-Verify program complies with all applicable civil rights laws and will provide accommodations where appropriate, as required by law, on a case-by-case basis.

DHS is also implementing other processes and procedures to accommodate religious beliefs and

disabilities, as required by law, in relation to the E-Verify program. These include telephonic means of verifying employment authorization. These alternative employment authorization verification methods will permit compliance with E-Verify while accommodating user religious beliefs and disabilities.

### c. Employment Discrimination

1. *Comment:* One commenter stated that E-Verify creates grave risks for immigrant women, particularly those who are victims of domestic violence, human trafficking, sexual assault and other criminal activity to the extent the program requires employers to enter the name, SSN and other identifying information of each employee into the E-Verify database, which is then available to the public. The commenter alleged that, as such, E-Verify does not adhere to Violence Against Women Act (VAWA) and Trafficking Victims Protection Act (TVPA) confidentiality provisions.

*Response:* The Councils agree that the E-Verify program should be conducted in compliance with all Federal laws, rules and regulations related to privacy and confidentiality of personally identifiable information. USCIS and the SSA do comply with all of those requirements in the administration of E-Verify program. Contractors are required by MOU to safeguard confidential information, and means of access to it (such as PINS and passwords) to ensure that it is not used for any other purpose and as necessary to protect its confidentiality, including ensuring that it is not disseminated to any person other than employees of the employer who are authorized to perform the employer’s responsibilities under the E-Verify MOU. The Councils direct the commenter to the E-Verify program systems of records notice published by USCIS in accordance with the Privacy Act for more information regarding the program’s collection and use of personally identifiable information. 73 FR 10793, Feb. 28, 2008.

2. *Comment:* A Federal Government agency requested that the Councils supplement the proposed rule and that USCIS supplement the proposed MOU to add a specific reference to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. Section 2000e (1964), as amended, when discussing relevant prohibitions against illegal discrimination.

*Response:* USCIS has supplemented the MOU to add specific reference to Title VII. The Councils supplement the statements in the preamble to the NPRM to clarify that Title VII, as well as INA

Section 274B, 8 U.S.C. 1324b, prohibits unlawful discrimination against any individual in hiring, firing, or recruitment or referral practices because of his or her national origin. Such illegal practices can include selective verification or use of E-Verify in a manner not provided for in paragraph 16 of the MOU; discharging, refusing to hire, or assigning or refusing to assign to Federal contracts qualified employment eligible employees because they appear or sound "foreign"; and premature termination of employees based on tentative nonconfirmations. As such, Title VII applies to all employment actions not otherwise protected by IIRIRA Section 403(d), 8 U.S.C. 1324a note, or precluded by other law.

3. *Comment:* Several commenters expressed concern that the photo identification requirements in the proposed rule will result in lawfully present immigrants and U.S. citizens being terminated from or denied employment because they cannot present photo identification.

*Response:* The Councils disagree with the premise of this comment. There is no requirement that an employer terminate an employee who cannot present photo identification. The MOU will be amended to instruct contractors to contact USCIS regarding possible accommodation. The contractor is prohibited from taking adverse employment action against the employee until the contractor receives a final nonconfirmation.

4. *Comment:* Many commenters, and in particular immigrants rights advocates, religious associations, employers, unions, chambers of commerce, and employer groups commented that verification through the use of E-Verify will result in increased disparate treatment employment discrimination. Some of these commenters speculate that contractors will give preference in hiring and assignment of work to applicants they believe "look like" U.S. citizens and discriminate against applicants who sound or dress "foreign" or have "foreign sounding" names.

Several commenters stated that use of E-Verify will lead to disparate impact discrimination claims because approximately 10 percent of foreign-born U.S. citizens receive tentative nonconfirmations for work eligibility versus 0.1 percent for native-born U.S. citizens.

*Response:* The Councils oppose unlawful discrimination in any form and, in particular, unlawful discrimination that undermines the intent and purpose of this E-Verify final

rule. As was stated above, contractors who use the E-Verify system to unlawfully discriminate against individuals in hiring or employment violate Title VII, as well as INA Section 274B, and are subject to civil penalties and termination of participation in the E-Verify program after suspension and debarment procedures. Such illegal practices can include selective verification; discharging, refusing to hire, or assigning or refusing to assign to Federal contracts to qualified employment eligible employees because they appear or sound "foreign"; and premature termination of employees based on tentative nonconfirmations. Contractors are protected from civil or criminal liability under IIRIRA Section 403(d), 8 U.S.C. 1324a note, when taking actions in good faith reliance on information provided through the E-Verify confirmation system. This, however, does not permit contractors to unlawfully discriminate against applicants or employees in other aspects of the employment relationship.

The Councils are not aware of any opportunity to discriminate in use of the E-Verify system that is any greater than the potential for discriminating against employees in application of the Form I-9 process. Contractors may also unlawfully select out candidates for employment because of foreign sounding names or other "foreign" characteristics because they do not believe those employees will be able to complete the I-9 process. There is thus no reason to believe that the E-Verify program will spur any greater disparate treatment discrimination than the current Form I-9 process. See *Chicanos Por La Causa, Inc. et al. v. Napolitano et al.*, Civil No. 07-17272, 2008 WL 4225536 at \*8 (9th Cir. 2008) ("Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.").

With respect to comments related to disparate impact claims potentially arising from differing tentative nonconfirmation issuance rates for foreign-born U.S. citizens and U.S.-born citizens, the Councils agree that DHS and SSA should improve their database administration to help alleviate all instances of tentative nonconfirmations. As one commenter observes, "myriad reasons" account for errors in the SSA database, including clerical errors made by agency employees and an employer's or a worker's own errors when completing Government forms. Moreover, an error may stem from a name change due to marriage, divorce, or naturalization. An error may also come from the misuse of an SSN by an

unauthorized worker. There are thus many legitimate nondiscriminatory reasons why these databases might produce a greater percentage of tentative nonconfirmations for one group of persons than another. However, these tentative nonconfirmations can be contested and resolved prior to final confirmation or nonconfirmation of employment eligibility. Contractors must agree not to take an adverse action against an employee based upon the employee's perceived employment eligibility status while SSA or DHS is processing a verification request unless the contractor obtains knowledge (as defined in 8 CFR 274a.1(l)) that the employee is not work authorized. A tentative nonconfirmation, or the finding of a photo non-match, does not establish and cannot be interpreted by the contractor as evidence that the employee is not work authorized. Accordingly, the tentative nonconfirmation provided by the DHS and SSA databases does not necessarily lead to an employee's termination from employment or any other adverse action. In fact, the employee is protected from such actions during the process. The Councils therefore do not view the possibility of disparate impact claims as an impediment to issuing this final rule.

#### *The MOU*

##### 1. Need for the MOU

*Comment:* One commenter urged that the proposed rule be modified to make explicit its linkages to the required MOU. Another commenter suggested that the proposed rule, and all prime- and sub-contracts issued under the proposed rule, should set forth with specificity the sanctions and enforcement protocols provided for by the MOU. One commenter suggested that MOU use is not necessary, and that the new contract clause created by this rulemaking should be sufficient to detail E-Verify's compliance requirements.

*Response:* The Councils do not agree. As noted above, the purpose of the FAR clause is solely to require contractors to agree to use E-Verify and to specify when the program will be used. The clause is not intended to duplicate the E-Verify program's internal terms of use. Those program use requirements are appropriately addressed under the MOU. DHS has statutory responsibilities and law enforcement authorities that are addressed under the MOU and those responsibilities and authorities are inappropriate to address either in the FAR or in a contract clause. For the same reasons that industry and Federal standards are not required to be incorporated in full into each contract

that requires adherence to them, it is not necessary to incorporate the E-Verify MOU requirements in each covered contract. Incorporating by reference laws, regulations, industry standards, and other FAR clauses is normal practice in Federal contracting.

## 2. Public Comments on the MOU

*Comment:* One commenter asserted that the public should be afforded an opportunity to comment on the provisions in the E-Verify MOU.

*Response:* The Councils placed the proposed MOU reflecting the program participation requirements for Federal contractors into the public docket, and discussed the requirements under that document in the preamble of the proposed rule. See 73 FR 33376–77. In response, the Councils received many comments related to the MOU in general and as to specific provisions within the MOU, which are addressed in greater detail later in this section. Accordingly, commenters were afforded an opportunity to comment on the provisions of the MOU and, in fact, did provide such comments to the Councils. A final version of the MOU will be available on the E-Verify Web site <http://www.dhs.gov/E-Verify>.

## 3. Specific MOU Provisions

1. *Comment:* Three commenters expressed concern with provisions of the draft MOU regarding those employers who may one day wish to become Federal contractors. One commenter commented that employers will be terminated from E-Verify for technical violations of the (MOU) thereby becoming an obstacle to an employer's later participation in Federal contracts. Another comment stated that those employers who are not currently Federal contractors will not be permitted to query existing workers thereby harming the interests of those employers who may be preparing to enter the Federal marketplace. A comment observed that greater clarity is needed with respect to when termination or suspension can be invoked. One commenter commented that the FAR rule materially changes the MOU between USCIS, SSA and companies participating in E-Verify. A university suggested that the employer have the ability to resolve DHS tentative nonconfirmations on behalf of their employees.

*Response:* The Councils agree that employers who seek to obtain their first Federal contract may be at some disadvantage in relation to employers who already hold Federal contracts covered by this rule, since the new entrant would face the start-up costs

associated with running E-Verify queries of its existing workforce that the already-established contractor has previously incurred. The Councils note, however, that this small "barrier to entry" is no different from the myriad other such "barriers" that new contractors must face to come into compliance with the unique requirements for Federal contracting that are codified in the FAR.

USCIS retains its authority to investigate violations of the E-Verify program. DHS and SSA may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating agency will refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor will not be eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must re-enroll in E-Verify.

The Councils appreciate the recommendations of the commenter with respect to the ability of employers to resolve a tentative nonconfirmation on behalf of those employees whose work authorization stems from J–1, H–1B or O–1. The system is designed to give the employee the responsibility to handle their own case to reduce employer burden, allow the employee to maintain their own documents regarding their status and protect employee privacy. Additionally, it is important to note that the responsibility of providing documents for employment eligibility purposes is on the employee. The instructions accompanying Form I–9 currently require employees to present original documents. Placing the burden on the employee to resolve tentative nonconfirmations is consistent with the requirement that the employee provide documents establishing his or her employment eligibility. Privacy concerns, including confidentiality related to certain visa status, preclude employers from resolving tentative nonconfirmations on behalf of employees. Nothing prohibits an employer from assisting an employee with this process at the request of the employee.

2. *Comment:* One commenter stated that the language referencing the "rebuttable presumption" that an Employer has not violated Section 274 (a)(1)(A) of the Immigration and Nationality Act exists only in the draft MOU and not in the FAR rule and that the MOU must be altered to include additional time for cases involving an SSA no match.

*Response:* The commenter is correct that certain provisions mentioned by the commenter do not exist in the current clause contained in the rule. This is not required by the FAR. With respect to the recommendation that the MOU be changed to allow additional time for addressing SSA "no-match" cases, the comment appears to confuse the time allotted under the MOU to contact SSA (or DHS) to start resolving a mis-match with the time allotted under DHS's no-match rule for an employee to complete the process of resolving a mis-match.

3. *Comment:* A building trade's association commented that several provisions of the draft FAR MOU is using the same disclaimer language as previous versions of the MOU and that that language has not been subjected to judicial review.

*Response:* The commenter is correct that the provisions of the draft MOU have not been subjected to judicial review. However, the provisions contained in that draft MOU closely follow language in MOUs currently in use by over 80,000 employers, which have gone unchallenged over the life of the program, and which have been drafted consistent with the controlling law related to the E-Verify program.

4. *Comment:* A chamber of commerce commented that current employees of Federal contractors should be allowed to opt out of work prior to being verified in E-Verify.

*Response:* The rule does not seek to tell employers which current employees they should assign to Federal contract work, or what privileges or rights employees may have relating to which tasks they are assigned in their workplace. Unless there is something in the specific contract relating to that, that is an internal business and labor management decision for the contractor to make subject to its normal processes and requirements. Therefore, it would be inappropriate to include provisions relating to employees "opting out" of work on Federal contracts.

### a. Reporting Change in Status

*Comment:* There is no comment listed for this topic but the Councils nonetheless address this issue in the response below.

USCIS does not require that employees report a change in status to E-Verify. E-Verify is able to determine whether an employee is work authorized using numerous databases without receiving information directly from an employee. Once an employee has been verified through E-Verify, he or she does not need to be re-verified in E-Verify until employed by a new employer.

A related matter is the Form I-9. If the document presented by an employee (who indicated that he or she is an alien authorized to work) when completing the Form I-9 has expired, the employer is required to update the Form with the new document establishing that employee's work authorization. The new document should be listed under Section 3 ("Updating and re-verification") of the Form I-9. The Employer may opt instead to complete a new Form I-9 with the new document.

#### b. Resolution of Tentative Nonconfirmations

*Comment:* Five commenters indicated that they were concerned that a tentative nonconfirmation might not be resolved within the time allotted by E-Verify. Of those, four commenters commented that employees had insufficient time to resolve a tentative nonconfirmation particularly if the employees are in remote areas that lack access to transportation and to a nearby SSA office. The other commenter also expressed concern that an SSA tentative nonconfirmation could not be resolved in 90 days.

*Response:* Under the program rules for E-Verify, after a tentative nonconfirmation has been generated, the employer must provide that notice to the employee. Once the employee actually receives the tentative nonconfirmation and decides to contest it, the employer initiates a referral through the E-Verify system. Once a case is referred, then the employee has eight Federal Government work days to contact the appropriate agency. He or she can do so by simply contacting SSA or DHS. Once the employee has initiated the process of contesting the tentative nonconfirmation, the employee may continue working until the case has been resolved.

The Councils believe that providing the employee with eight days is a sufficient amount of time for the employee to contact SSA or DHS to begin working out any discrepancy, even taking into account remote locations. It is important to note that the eight-day timeframe in the E-Verify program rules is the time allotted for the employee to initiate the process of

resolving his or her tentative nonconfirmation—not the time allotted for a tentative nonconfirmation to be finally resolved. Most SSA tentative nonconfirmations are resolvable within two days, and DHS statistics show that SSA resolves 96.6 percent of cases within 7 days of the date the individual first contacts SSA. In a few cases, the SSA has extended the time period in order to allow for the employee sufficient time to obtain a required document.

With respect to employees who reside in remote locations, it is important to note that employees who receive a tentative nonconfirmation from DHS are not required to visit a USCIS office. Moreover, in most cases, a DHS tentative nonconfirmation can be resolved over the phone using a toll-free number. In an effort to make the process simpler for many employees living in remote areas, DHS has made system enhancements to E-Verify. As a result, in most instances, naturalized U.S. citizens who receive a tentative nonconfirmation from the SSA are no longer required to personally visit a SSA office. Naturalized citizens are now able to contact DHS directly (over the phone). USCIS believes that this process will greatly limit the number of employees who must make personal visits to a SSA office thereby easing the burden on those who are in remote locations.

The Councils also note that these comments relate to a previous E-Verify process that has since been replaced by a more efficient one. It is true that at one time, the way an employer verified that a tentative nonconfirmation was successfully resolved was to re-query the system. However, beginning in October 2007, SSA and DHS began using a new automated system known as EV-STAR to provide automated feedback to employers concerning the status and resolution of any tentative nonconfirmations received by employees. Since that time, there has been no need for employers to re-query the system.

#### c. Due Process

*Comment:* An immigrant rights advocacy group and a union commented that workers have insufficient due process procedures in place to allow them redress. One commented that there are insufficient judicial remedies in place to provide relief to an aggrieved employee.

*Response:* The Councils recognize the due process concerns raised by the commenters, but believe that the processes in place with the E-Verify system provide adequate opportunity

for employees to contest and resolve any issues that arise. E-Verify, through the MOU and its internal practices and procedures, which are published on the E-Verify program Web site, has provided a system that protects the rights of employees while providing the means to verify the work authorization status of those persons. The MOU prohibits the Employer from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound "foreign" or have received tentative nonconfirmations. The Employer is further warned in the MOU that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. The MOU agreed to by the Employer also states that violations of either section 274B of the INA or Title VII may also lead to the termination of its participation in E-Verify. If the employee believes that s/he has been discriminated against, he or she should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1-800-255-8155 or 1-800-237-2515 (TDD). Concerns regarding the judicial remedies are better framed to other offices within the Executive and legislative branches of Government.

The E-Verify program offers employees who receive a tentative nonconfirmation the opportunity to contest the finding and clarify their records with either SSA or DHS. This is a form of due process protection. If an employee does contest the tentative nonconfirmation and is not able to clarify his or her record with additional documentation, he/she will be issued a final nonconfirmation. Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation.

The E-Verify program is committed to protecting the rights of employees who feel that they have been discriminated against or who believe they have

erroneously received a tentative nonconfirmation. On the E-Verify Web site, on all tentative nonconfirmation letters that employees receive, and in the MOU that E-Verify users sign when joining the program, E-Verify provides the contact information to OSC. In addition, E-Verify registered employers are also required to display two posters which apprise the employees of their rights and how to contact the OSC in the event of perceived discrimination: (1) The "You Should Know Your Rights and Responsibilities under E-Verify" poster produced by USCIS and (2) the "Employee Rights Poster" produced by the OSC. Once a complaint has been made, the Office of Special Counsel is able to investigate any case brought to its attention. The Councils believe that these due process protections are sufficient to ensure that the E-Verify system promotes economical and efficient Federal Government contracting.

#### Content of FAR Rule

##### 1. Definitions (22.1801 and 52.222–54(a))

###### a. "Assigned to the Contract" and "Directly Performing the Work"

*Comment:* Several commenters commented that there is no guidance as to how to identify an employee who is "directly performing" work under a contract and expressed concerns that this could result in inconsistent application of the rule and disagreements over which existing employees must be run through the E-Verify system.

One employer suggested that "directly performing work under a contract" be clarified to mean a person customarily performing more than 50 percent of his/her time in direct support of the covered contract or multiple covered contracts.

A university commented that the proposed rule is too unclear as to how to treat overhead employees who perform some work that benefits a contract and requests that the Councils clarify this situation.

Many other commenters expressed concern over whether the E-Verify requirement applies to employees who are only tangentially involved with covered contracts. Specifically, they inquired whether agreements to provide service, support, or maintenance on an "as needed" basis would be covered even if employees would spend only a small portion of their time on these contracts. Commenters also asked whether employees working to prepare a bid or proposal be covered.

One commenter requested clarification as to whether the

requirement to verify current employees on covered projects extends beyond those working exclusively at project sites, or whether it extends to others working off-site but dedicated exclusively to the covered project. The commenter suggested that the regulations must provide a high degree of specificity on this issue, as the costs and employment administration ramifications are significant.

*Response:* The Councils have removed the definition of "assigned employee" and provided instead a definition of "employee assigned to the contract" because that is the term used in the final rule. The revised definition makes it clear that an employee is not considered to be directly performing work under the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract. The Councils do not believe it is appropriate to try to establish a mathematical definition of an assigned employee. Contractors will instead have to interpret the definition stated in the final rule as it applies to various individual situations.

The Councils note that it is immaterial whether services are provided intermittently or for only a small portion of an individual employee's time as long as the work is done in the United States in direct support of a contract. However, tangential involvement, if it is in terms of indirect involvement instead of directly working on a contract, does not necessarily trigger the E-Verify requirement. For example, a mailroom clerk who delivers mail to a program office supporting a contract as well as to all other offices served by the mailroom, would not be required to go through the E-Verify process. Other non-FAR requirements, however, would necessitate that the employer vet the mailroom clerk at hiring through the I–9 process.

The Councils also note that working on a proposal, as opposed to working on an awarded contract, does not constitute work under the contract in question and would not trigger E-Verify requirements.

There is nothing in the definition of "employee assigned to the contract" that would imply that it makes a difference where that employee is working, as long as it is in the United States.

###### b. "Commercially Available Off-the-Shelf (COTS) Item"

*Comment:* Various commenters advised that the definition of COTS items was not sufficiently clear with respect to "bulk cargo." Several

commenters sought clarification that the rule would not be applicable to their products because they believed their products qualify under the definition of COTS. These commenters recommended that the Councils make clear that the rule would not apply to the items they believed to be COTS. Specifically, the commenters asked that the final rule clarify the definition of COTS so that packaged agricultural products are clearly excluded from the definition of bulk cargo so as to avoid deliveries of fruit and other food stuffs from being considered "bulk cargo" and therefore outside of the definition of COTS items.

*Response:* The Councils concur and have amended the final rule in response to these comments to clarify the definition of COTS to explain that a cargo subject to "mark or count" is not bulk cargo. Nearly all food and agricultural products should fall within the definition of COTS. The only likely exceptions would be bulk shipments of grains in ship holds. The final rule has added an exception for bulk cargo as well as COTS items.

###### c. "Contract" and "Contractor"

1. *Comment:* Commenters requested that the Councils define "contract" to exclude agreements that are not governed by the FAR, such as grants and cooperative agreements.

*Response:* The Councils do not concur with this request. The FAR already defines the term "contract" and the term does not include grants or cooperative agreements. A grant or cooperative agreement that is not governed by the FAR is not required to include the clause in this rule.

2. *Comment:* Several commenters suggested that the Councils more clearly define the term "contractor" to exclude subsidiaries of a parent where the parent holds the contract but the subsidiaries do not.

*Response:* Whoever signs a contract is the contractor. Only the legal entity that signs the contract and is bound by the performance obligations of the contract is covered by this E-Verify term. If ambiguity remains, this issue will have to be handled on a case-by-case basis consistent with traditional FAR principles.

3. *Comment:* One commenter was concerned about the effect of mergers upon implementation of the E-Verify program.

*Response:* If a novation agreement takes place, then the merged entity becomes the contractor. Otherwise, there is no impact.

## d. "Subcontract" and "Subcontractor"

*Comment:* A number of commenters, in addressing the proposed rule's subcontractor flowdown requirement, expressed concern as to the definition of "subcontract" and "subcontractor" and the extent to which the rule might apply to their activities. This was a concern common to agricultural and dairy interests. Two agricultural associations noted that there are numerous sales and supply arrangements that may or may not fall within the rule's coverage. There are direct sales by a producer of an agricultural commodity; direct sales by a packing operation that obtains fruits or vegetables or other commodities from other producers and then sells the product directly to the Government; sales by a broker or handler of agricultural products who purchases the products from a producer or producers but who directly contracts with the Government; and processors of agricultural products that purchase them from producers and sell them to the Government after processing them. One commenter requested clarification that farmers providing food for canning are not "subcontractors" and that truckers hauling processed food are not subcontractors for purposes of application of this clause.

In addition, it was noted that the proposed rule does not adequately address the distinct marketing characteristics of agricultural cooperatives. Several commenters pointed to the distinction between farmer cooperatives and their farmer members and referred to court decisions highlighting this distinction.

Another commenter stated that many employers hold contracts with delivery companies, suppliers, maintenance companies, and others who may perform work in support of the Federal contract, and noted that it was unclear from the proposed rule whether these subcontractors would also be required to enroll in E-Verify.

*Response:* With respect to agricultural and dairy products, the referenced items appear to fall within the definition of COTS or bulk cargo. COTS suppliers would not be subject to the E-Verify requirements because they are supplies, which are not covered at the subcontract level. With respect to the comment regarding potential coverage of delivery companies, suppliers, maintenance companies, and others who may perform work in support of the contract, it was determined that the existing FAR definitions of subcontractor when read in conjunction with previous applicability discussions would address the concerns noted above. The Councils

have amended the rule at 22.1801 and the clause at 52.222-54 to include the definitions "subcontract" and "subcontractor," found at FAR 44.101.

## e. "Period of Performance" vs. "Life of Contract"

*Comment:* One commenter requested that the "Period of Performance" should be defined as ending on the date that delivery is complete. Another commenter questioned the use of the term "life of the contract" in the preamble to the proposed rule.

*Response:* The Councils do not agree. The term "period of performance" is used throughout the FAR and various contracts further refine the definition of that period individually for that contract. In general, the period of performance would start at the award date of the contract and extend through the date delivery is complete, unless otherwise specified in the contract. The period of performance does not extend to the date of contract closeout. The Councils concur that for the sake of consistent terminology, the term "period of performance" is the correct term to express the required period of required compliance with E-Verify, not "life of the contract."

## f. Distinction Between Products and Services

*Comment:* One commenter stated that the rule should make a clearer distinction between products and services.

*Response:* The Councils do not concur with this comment. Contracts for services are clearly defined in Part 37 of the FAR.

## 2. Mandatory Enrollment (22.1802 and 52.222-54(b)(1)(i))

## a. Noncompliant Employers Only

*Comment:* Several commenters stated that the rule should be restricted in its applicability only to contractors who have engaged in the knowing employment of unauthorized foreign nationals or who have shown that they routinely shirk their obligations under I-9 procedures, such as those who receive multiple "no-match" letters demonstrating that their concern for the work eligibility of their workforce may be lacking. Alternatively, the commenters recommended application of E-Verify only to verify employees whose work eligibility may be in question due to receipt of a "no-match" letter.

*Response:* The Executive Order 12989, as amended, does not authorize such a limited approach. In any event, restricting the applicability of the rule to employers who routinely shirk their

obligations would not foster the stability and dependability across the entire Federal contractor community in the manner envisioned by Executive Order 12989. Using E-Verify at the beginning of the contract should reduce the number of "no match" letters received by the employer later in the process.

## b. Non-Citizens

*Comment:* Another commenter suggested that contractors should only verify non-citizen employees using E-Verify to reduce employer burden.

*Response:* Executive Order 12989, as amended, directs the Councils to implement the President's procurement policy through a FAR rule that requires federal contractors to agree, as part of their contract performance, to verify all new hires without differentiating between citizens and non-citizens. Modifying the rule to require verification only of non-citizens would not satisfy the requirements of this presidential directive. Moreover, the Councils believe that verifying only those who do not claim to be U.S. citizens would be discriminatory and would not meet the ultimate goal of fostering a more stable and dependable Federal contractor workforce.

Verifying only those employees who attest to work-authorized alien status would defeat the basic purpose of E-Verify and this rule. E-Verify is designed to guard against identity and immigration fraud in the paper-based I-9 process, which may take the form of false claims of U.S. citizenship backed up with either false or fraudulently obtained driver's licenses, birth certificates, social security cards and/or other Form I-9 documentation other than DHS immigration status documents. An alien-only verification system would not only fail to deter this kind of fraud, but it would encourage it.

Using E-Verify only for non-citizens would likely violate the anti-discrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b, which prohibits discrimination with respect to hiring, firing, or recruitment or referral for a fee, on the basis of national origin or, for certain classes of protected individuals, on the basis of citizenship status. Employers may not treat individuals differently on the basis of national origin, and U.S. citizens, recent permanent residents, temporary residents, asylees and refugees are protected from citizenship status discrimination. This anti-discrimination provision is enforced by OSC. If an employee believes that he or she has been discriminated against during the employment eligibility verification

process, he or she should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1-800-255-8155 or 1-800-237-2515 (TDD).

c. Increase in Program Abuse

*Comment:* Several commenters were concerned that mandatory use will increase abuse of the program. One commenter stated that preliminary reports from Arizona's mandatory use of E-Verify suggest that some employers are violating the terms of the MOU and engaging in illegal employment practices such as verifying existing employees, rather than verifying only new hires and that they are doing so in a discriminatory way. The commenters believed that implementation of the proposed rule will exacerbate the situation regarding discriminatory use of the program. Also, some commenters claimed that employers do not understand the ways in which E-Verify is to be implemented in the workplace, and that as a result they take mistaken actions, such as firing workers when they are not required to do so (or are prohibited from doing so).

*Response:* The rule is clear in its requirements to verify existing employees. All who are assigned to a contract must be verified. This provides no latitude for discrimination. Also, the E-Verify program MOU will actually serve to reduce confusion over employer responsibilities when workers are in the process of clearing up questions as to their authorization to work in the United States. The MOU gives clear descriptions that prohibit employers from firing workers during that period or from taking other adverse actions.

To address employer abuse and/or fraud, the E-Verify program has created a Monitoring and Compliance unit that can detect, deter, and remedy improper use of the system. The Monitoring and Compliance unit also works to safeguard personal privacy information; prevent the fraudulent use of counterfeit documents; and refer instances of fraud, discrimination, and illegal or unauthorized use of the system to enforcement authorities. Once fully staffed, the E-Verify's Monitoring and Compliance unit will carry out its mission by educating employers on compliance procedures and guidelines and providing assistance through compliance assistance calls. The unit will also conduct follow-up with desk audits and/or site visits to unresponsive employers if necessary, and refer cases of fraud, discrimination, and illegal use to the OSC or ICE, as appropriate. The Monitoring and Compliance unit will

also monitor system usage to identify when registered employers have not used the system within an appropriate time period given the size of the organization.

3. Application to Employees (22.1802(b)(2) and (c), and 52.222-54(b))

a. All New Hires During Period of Performance of the Contract

*Comment:* Several commenters suggested that it is inappropriate to require an entire company to be subject to E-Verify for all new hires when the company has only a small number of Federal contracts that comprise a small proportion of its business. They argued that the proposed rule is an overbroad use of the procurement authority to cover new hires that are not associated with performance of a contract and stated that the rule should apply only to new hires at a work site that is performing a contract.

*Response:* Applying the duty to verify all new hires of the entire organization of the contractor is a requirement of Executive Order 12989, as amended. If the requirement were limited only to new hires at locations doing Government work, the rule would be impractical and too easy to undermine by transferring employees from non-contracting work sites to contracting work sites. Not all hires of a contractor are hired through the location where they work. It is very common for a contractor to hire through a central site that has no connection to various work sites. In addition, there are few Federal contractors who have segregated their workforces in the manner suggested in the comments. Modern technology, most notably email, has broadened and facilitated doing work in multiple dispersed locations through a national and even international network of collaborators. Thus, defining the work site would be too unwieldy for an effective rule, making enforcement of this aspect of the rule too difficult and too easy to misinterpret or undermine.

With respect to providers with few Government contracts, the rule does include an exception for COTS to recognize that COTS providers will generally be predominantly commercial, with only a small proportion of business with the Government, as well as exceptions for institutions of higher education; State and local governments and governments of Federally recognized Indian tribes; and for sureties performing under a takeover agreement.

b. Existing Employees Assigned to the Contract

i. No Verification

*Comment:* Many commenters requested that the rule eliminate the requirement for verification of employment of existing employees assigned to the contract. One commenter states that there is no policy reason why Federal contractors should be so radically different from all other employers who participate in the program. More detailed reasons for opposition to verification of existing employees are also separately addressed in the following paragraphs.

*Response:* The Councils do not agree with this approach. The final rule reflects the requirements stated in Executive Order 12989, as amended, that the FAR incorporate a rule that will require verification of all existing employees assigned to a contract. Verification of existing employees who work under contracts is a critical element of this rule, and the elimination of that aspect of the rule would be contrary to the Executive Order.

ii. Burdensome To Track Which Employees Have Been Verified

*Comment:* Many commenters were concerned about the burden of identifying employees assigned to the contract, including time and money required to develop new systems. For example:

- One commenter observed that assigned employees may work on several projects at once and it is burdensome to require them to be tracked to determine which ones have been verified by E-Verify.

- Another commenter stated that the chance of a single employee being "dedicated" to a single contract—whether for a private customer or a Government agency—is the rare exception in a large company. A large, multi-jurisdictional company will be challenged to identify which employee in fact "directly performs work" under a covered contract.

- Another commenter recommended verifying all employees at all hiring sites.

- Another commenter stated that in normal circumstances it will impose considerable burdens and take months, if not years, to put in place the required tracking processes.

- Several university commenters stated that these requirements would impose significant financial and organizational burdens on all affected employers, including substantial costs associated with developing new software systems.

• Another commenter stated that employers would need to create a new process for screening current employees and a process for tracking which employees already have been through the E-Verify screening process every time an employee is assigned to work on a Federal contract.

*Response:* With regard to tracking which employees have been verified, the Councils do not believe this is a problem that warrants a change to the proposed rule. Modern personnel and payroll systems identify numerous qualifications and attributes for each employee. It is a minor effort to add one more attribute to those already included in the accounting and payroll systems. For example, each employee is typically identified against a wage rate, security level, FLSA coverage or not, vacation records, professional qualifications, labor category, etc. Personnel/payroll systems that track these sorts of data typically permit ready modification and expansion in the number and type of attributes that are tracked. It is typically a simple operation to add an attribute to such a system.

Further, contractors can recover associated costs incurred to comply with this program in their proposed prices as they already do with other overhead costs. However, the Councils recognized that the task of identifying which employees are assigned to the contract may be more problematic for some employers. Should the employer find the task of identifying which employees have been assigned to the contract and tracking those employees who have already been verified unduly burdensome, the Councils have amended the rule consistent with Section 8. (a) of Executive Order 12989 to permit a contractor to verify its entire workforce.

### iii. Conflicts Between Public and Private Contracts

*Comment:* Several commenters stated that employers are currently prohibited from using E-Verify to confirm the employment eligibility of existing employees not assigned to a Federal contract. They believe that the proposed rule therefore poses potential problems for firms that hold both public and private contracts.

*Response:* The current MOU required to be signed by all employers that register for E-Verify does prohibit the use of E-Verify to confirm the employment eligibility of existing employees. Upon promulgation of this rule, however, there will be a revised MOU with requirements applicable to Federal contractors. The revised MOU does not contain the same prohibition

on verification of existing employees as to Federal contractors, because the Executive Order and this final rule require the use of E-Verify to confirm the employment eligibility of existing employees who are assigned to Federal contracts. If a contractor that was already using E-Verify enrolls in E-Verify as a Federal contractor, then that contractor may need to sign a new MOU, which will allow the use of E-Verify for existing employees.

### iv. Selective Verification Issues

*Comment:* Some human resources organizations stated that selective screening verification of existing employees increases an employer's exposure to allegations of discrimination based on document abuse, citizenship status discrimination, national origin discrimination or other characteristics protected by Title VII and the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. Another commenter questioned whether employers might register or bid for contracts only so they can verify existing employees.

*Response:* The requirement to ensure that any employee who is assigned to work directly on a contract in the United States is, in fact, authorized to work in the United States is not discriminatory as that term is defined by Title VII and case law. However, the Councils agree that it is appropriate to limit as much as possible opportunities for unscrupulous companies to abuse the E-Verify system. That is why the rule clearly specifies which employees must be verified by the employer. It is also important to note that OSC investigates allegations of national origin and citizenship status discrimination in the workplace, as well as demands for additional documentation in the employment eligibility verification process ("document abuse") and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. The E-Verify MOU makes clear that an employer may not use E-Verify procedures for pre-employment screening of job applicants. In addition, an employer cannot verify only certain employees selectively—for example on the basis of perceived national origin—and may be subject to penalties under the anti-discrimination provision of the INA if it prescreens employees on the basis of perceived national origin or citizenship status.

With regard to an employer bidding on a Government contract just to use E-Verify to verify existing employees, the employer would not be authorized to

verify existing employees unless the contract was actually awarded to that contractor.

### v. Permitting Multiple Alternatives

*Comment:* Another commenter requested that if the proposed current employee verification system is to remain a part of these regulations, the Councils should provide an option for employers in the regulations so that they can adopt a compliance method that meets objectives with the least disruption or cost to contractor operations. Suggested examples included allowing an employer to verify all employees at all hiring sites, all employees at any hiring site that services a covered contract, or only those employees assigned to work on the contract.

*Response:* Consistent with Section 8.(a) of Executive Order 12989, as amended, which requires implementation of the Order "in a manner intended to minimize the burden on participants in the Federal procurement process," the Councils have included a provision in the final rule permitting contractors a voluntary alternative: The option to verify all existing employees of the contractor, provided the contractor initiates verification within 180 days of notifying DHS of its decision to verify its entire workforce. The Councils believe that this alternative best prevents opportunities for discrimination or the appearance of discrimination, relative to other possible alternatives, while potentially reducing the burden of compliance for some contractors.

### vi. Workforce Stability

*Comment:* Several commenters stated that requiring verification of current employees will severely impact workforce stability due to expected errors, delays, and other disruptive effects such as employer misuse of tentative nonconfirmations. The commenters stated that the decision to extend the E-Verify requirement to existing employees actually undermines the FAR Council's stated view that the Federal Government's procurement interests are advanced by a stable workforce with less turnover. The commenters claim that subjecting existing employees to E-Verify is guaranteed to exacerbate, rather than alleviate, the posited problem of instability and turnover in the workforces of Federal contractors and subcontractors.

*Response:* The Councils do not concur. The Councils consider that the additional time allowed in the final rule should alleviate the commenters'

concerns regarding expected errors, delays, and other disruptive effects. The Councils do not believe that the concerns that E-Verify will exacerbate instability and turnover in the workforce are well founded, assuming that employers are currently complying with existing law and only employing individuals who are actually authorized to work in the United States.

vii. Employees Hired After November 6, 1986

*Comment:* A university commenter believed that the proposed rule is applicable to all employees hired after November 6, 1986. The commenter stated that its concerns are magnified by the proposal in the proposed rule that the E-Verify program be extended to all employees hired after November 6, 1986 and that this requirement greatly expands the cost and process burden on employers far beyond the current pilot program.

*Response:* The commenter is mistaken about the requirements of the proposed

rule. The proposed rule was not to be applicable to all employees hired after November 6, 1986. However, because of concerns by some contractors that determining and tracking employees assigned to the contract is too difficult, the final rule does provide an option to contractors to verify all employees hired after November 6, 1986.

c. All Employees of the Contractor

*Comment:* Several commenters believe that the contractor might have to verify all existing employees to achieve compliance and recommended that the rule should provide additional flexibility to allow this. Some employers may find it easier to verify all existing employees and new hires, rather than attempt to distinguish between those who are and who are not working on Federal contracts, thus ensuring compliance. Another company commented that it would be very burdensome to create a mechanism to identify "assigned employees" under a

process accounting system because no one individual charges to a particular job (contract).

*Response:* The Councils agree with these comments and have amended the proposed rule. In situations where a contractor does not believe it has an economical or efficient way to identify employees who perform work principally under a particular contract, or if the contractor believes it is more efficient to verify all employees, the final rule will give the contractor the option to initiate verification of the employment eligibility of all existing employees, within 180 days, rather than limiting the employees who can be verified only to those who are assigned to work under a contract. This approach is entirely at the option of the contractor.

The Council notes that the great majority of "process accounting" would be under COTS contracts, which are exempt from the rule.

Job order costing—work is broken into jobs; each job is tracked separately.

Process costing—a large quantity of identical or similar products are mass produced.

*E.g.*, auto mechanics, carpenters, painters, print shops, computer repair.

*E.g.*, auto assembly plants, hot dog manufacturing, any large mechanized production facility.

Each cost accounting system gathers and reports on the same information. The method used depends on the needs of the business. Process costing traces and accumulates direct costs, and allocates indirect costs, through a manufacturing process. Costs are assigned to products, usually in a large batch, which might include an entire month's production. Eventually, costs have to be allocated to individual units of product.

Accordingly, the final rule will permit a contractor to choose between two alternative approaches. The rule will permit the Federal contractor to choose either to run only existing employees who are assigned to the contract and all new employees through E-Verify, or to run all existing employees and all new employees of the company through E-Verify.

d. Need for Re-Verification

Background: It is important to distinguish what commenters mean by re-verification. They may mean re-verification of employees who have been verified by a system other than E-Verify, or they may mean re-verification of employees who have been verified through E-Verify, by another employer or by the same employer. Each of these types of re-verification will be separately addressed.

i. Re-Verification of Existing Employees

*Comment:* Many commenters stated that the requirement of re-verification of existing employees working on Federal contracts is unnecessary because those employees who have been hired after November 6, 1986, have already been through the employment eligibility verification (I-9) process. For example, one commenter asked the Councils to eliminate the requirement to use E-Verify for employees assigned to work on contracts because such employees who were hired after November 1986 will have already been through an employment eligibility verification process.

The following are some of the objections raised to re-verification for employees whose I-9s were completed long ago:

- A contractor may have accepted documents to demonstrate identity (drivers' licenses) or work authorization (passports or green cards) that have now expired.
- Until 2007, it was permissible for naturalized U.S. citizens to present certificates of naturalization to prove work eligibility, and many employees chose to use these forms in the I-9 process. Those certificates are not usable as part of the E-Verify process.
- The I-9 process does not require an employee to provide an SSN, but E-

Verify does require it. The contractor will have to devise a process to collect and authenticate SSNs for many employees, especially those who started as foreign national legal immigrants, who were not required to have a number when they started work.

- The E-Verify process requires a picture identification document.

Another commenter remarked that the money spent re-verifying employees who are assigned to work directly on a Federal project would be much better spent in fundamental research being conducted by the commenter.

*Response:* Executive Order 12989, as amended, requires the re-verification of existing employees assigned to the Federal contract, even if the employees were screened previously using the I-9 process. The E-Verify process is expected to achieve a much higher level of accuracy in verification than was achieved under the I-9 process alone; E-Verify has built-in tools for accessing databases to further verify the employment eligibility of an employee, whereas the documents submitted by employees under the I-9 process were probably subjected to very little additional verification if they looked acceptable on their faces.

With respect to the process for re-verifying existing employees, the draft MOU contemplated and addressed the

matters raised by the commenter. Employers may use a previously completed Form I-9 as the basis for initiating E-Verify verification of an assigned employee as long as that Form I-9 complies with the E-Verify documentation requirements and the employee's work authorization has not expired, and as long as the employer has reviewed the Form I-9 with the employee to ensure that the employee's stated basis for work authorization has not changed (including, but not limited to, a lawful permanent resident alien having become a naturalized U.S. citizen). If the Form I-9 does not comply with the current E-Verify requirements, or the employee's basis for work authorization has expired or changed, the employer shall complete a new I-9. If the Form I-9 is otherwise valid and up-to-date but reflects documentation (such as a U.S. passport or Form I-551) that expired subsequent to completion of the Form I-9, the Employer shall not use the photo screening tool, subject to any additional or superseding instructions that may be provided on this subject by USCIS. While in some cases these procedures will place on employers and employees the initial burden of completing a new Form I-9, they are designed to avoid the greater burden of unnecessary tentative nonconfirmations resulting from the use of stale data to run E-Verify queries.

Some contractors that are submitting an E-Verify query for a current employee may be put in the position of asking that employee to produce an I-9 document that is different from what was presented during the initial I-9 process. It is important that contractors not engage in illegal discrimination during this process, such as by selectively requesting or rejecting documents during the verification or re-verification process with the purpose or intent of discriminating against employees on the grounds that they appear or sound foreign. See 8 U.S.C. 1324b. If an employee believes that he or she has been discriminated against during the employment eligibility

verification process, he or she should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1-800-255-8155 or 1-800-237-2515 (TDD).

In addition, it is not technically correct that certificates of naturalization were acceptable until 2007. They were taken off the acceptable document list in the regulations in 1997, but DOJ and then DHS had a policy not to enforce violations of this regulation until it updated the Form I-9 instructions to reflect this change, which did not happen until 2007. With respect to SSNs, the Councils do not anticipate that the commenter or other employers should have significant difficulty obtaining their current employees' SSNs, as they already should have these on file for other business purposes.

ii. Re-Verification of Employees Verified by Another Employer

*Comment:* One commenter believed that employees covered by a collective bargaining unit should not have to be re-verified each time they switch to a new company, e.g., in the construction business.

*Response:* The commenter's point appears to relate to the existing statutory provision regarding employment pursuant to a collective bargaining agreement in section 274A(a)(6)(A) of the INA, which provides that in certain cases a subsequent employer is deemed to have complied with the Form I-9 requirements by virtue of verification by another employer within the agreement. If a previous employer within such an arrangement has completed the Form I-9 and E-Verify, a subsequent employer does not have to re-verify, as long as the employment is within the scope of the statutory provision.

iii. Re-Verification of Employees Already Verified by the Contractor

*Comment:* Many commenters were concerned about the requirement to re-

verify an existing employee when the employee is assigned to work on a contract. One commenter concluded that by mandating that Federal contractors verify or re-verify existing employees each time they are assigned to work on a new contract, the proposed rule too radically restructures the E-Verify program, making it unmanageable and unworkable for employers.

*Response:* The proposed rule clearly stated that a contractor is not required to perform additional employment verification using E-Verify for any employee whose employment eligibility was previously verified through E-Verify by that contractor. It is not necessary to run the employee through the E-Verify program again each time the employee is assigned to work on a new contract. When, however, an existing employee is assigned to a contract and that employee has not previously been verified through the E-Verify system, then that employee must be processed through E-Verify at the time of assignment to work on the contract. The end result of this procedure is that for any single company, no employee, whether existing or newly hired, needs to be verified through the E-Verify system more than once.

In addition, the Councils have revised the final rule to exempt employees who hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual. The rule also exempts employees for which background investigations have been completed and credentials issued pursuant to HSPD-12, promulgated by the President on August 27, 2004.

4. Time Periods (52.222-54(b))

Background: The proposed rule set forth the following timeframes:

Timeframe	Start point	Required action
Within 30 calendar days .....	After contract award .....	Enroll in E-Verify. Initiate verification of employees assigned to the contract at time of enrollment.
Within 30 calendar days .....	After enrollment .....	
Within 3 business days .....	After date of assignment to the contract; or Of the award of the contract.	Initiate a verification of each assigned employee who is assigned to the contract after enrollment in the E-Verify program.
Within 30 calendar days .....		

1. *Comment:* Many commenters were concerned that the timeframes provided were insufficient for compliance. These commenters requested longer

timeframes because employers would need to develop complex systems to track and report employees. Among the various recommendations:

- Extend the registration period to 90 days after contract award, to allow time for orderly transition and provide time for employers.

- Permit larger organizations to implement E-Verify in stages across work sites;
- Allow a 6-month phase-in period to allow for registration, training and implementation and verification;
- Add a 90-day transition period before a contractor must begin verifying employees, after the date of contract award.
- Provide a time period to initiate verification of assigned employees that is no less than 60 days from enrollment and 30 days from assignment to a contract, respectively.
- Extend the phase-in period applicable to verification of existing employees for employers who are already signed up for E-Verify. Three days is not long enough to change systems to handle verification of existing employees.

*Response:* The Councils carefully considered all the requested extensions and concur that some of the timeframes need to be extended. The Councils recognize that some of the periods for contractor action in the proposed rule did not all allow sufficient time. The Councils have substantially extended various periods to permit contractors more latitude on when they must begin verifying employees.

The Councils also noted concerns that the requirements for a contractor that is already enrolled as a Federal contractor in E-Verify were not clear. These requirements were only addressed in the policy section of the proposed rule, not in the clause. Nor did the proposed clause specify whether the enrollment referred to was as a non-Federal contractor or as a Federal contractor (which will become important as the implementation of the rule progresses). The Councils have added specific instructions applicable to contractors already enrolled as Federal contractors in E-Verify and amended the time periods in the clause by which the contractors must have taken various actions.

The Councils have simplified the policy section and added more details in the clause. The changes in time periods in the final rule are summarized as follows:

- After new enrollment in E-Verify as a Federal contractor, 90 days to initiate verification of new employees within three business days of hire. This allows a contractor time to set up a new system, or modify an existing system from the non-Federal to the Federal form of E-Verify.
- 90 days (instead of 30) to initiate verification of existing employees after enrollment into the program (or after contract award, if already enrolled as a

Federal contractor). Contractors will likely have to make adjustments to current employee information systems to be able to identify employees assigned to the contract and to track whether employees have been vetted through E-Verify. 90 days after award of a contract that contains the clause should be sufficient for this.

—Thereafter, verify the employee 30 days (instead of 3) after an employee is assigned to work under a contract. —180 days for initiation of verification of all existing employees (if chosen at the option of the contractor).

The Councils did not extend the 30-day period to enroll in E-Verify. Very few commenters argued that this timeframe was insufficient. The Councils also considered that employers already enrolled on the Federal E-Verify program should not need additional time to continue verification of new employees within three business days of hire. The Councils also did not make amendments to timeframes that are required by the MOU rather than the FAR clause.

2. *Comment:* One commenter suggested that E-Verify should provide employers with an option to mark that an SSN has been “applied for” when foreign nationals are waiting on SSN cards that could take weeks to receive. Another commenter expressed concern over the fact that SSNs are not required on the Form I-9 and the SSN is the basis for the electronic verification.

*Response:* DHS has informed the Councils that the MOU will be amended to provide that notating the Form I-9 satisfies “initiating verification” in the narrow situations where (1) the employee has applied for an SSN from SSA and is waiting to receive a SSN; and (2) the employee has requested an accommodation from the photo identification requirement from the E-Verify program and is in the process of resolving the issue. The employer still has an obligation to work in good faith to follow through on that process and ultimately verify the employee with the system.

#### 5. Threshold for Applicability in Prime Contracts (22.1803(b))

*Comment:* A number of commenters requested an increase in the dollar threshold for applicability of the clause. Commenters state that there is no rationale for the \$3,000 threshold.

- For example, several commenters proposed increasing the dollar threshold for applicability of the proposed contract clause from the micro-purchase threshold of \$3,000 to the simplified acquisition threshold of \$100,000. One of these commenters stated that the

applicability standard should be proportionate to its requirement.

- Another commenter proposed raising the threshold from \$3,000 to \$50,000.

*Response:* The Councils have raised the threshold for inclusion of the clause in a prime contract from the micro-purchase threshold to the simplified acquisition threshold. The statute at 41 U.S.C. 427 directs the FAR to provide for simplified acquisition procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold. In order to promote simplified processes for such small acquisitions, the Councils have revised the final rule to exempt all prime contract awards under the simplified acquisition threshold from application of this rule.

According to *Federal Procurement Data System (FPDS)* data, during FY 2007, there were approximately 2.8 million contract awards (new contracts, not orders) Governmentwide totaling approximately \$9 billion for which the basic contract value were less than or equal to the simplified acquisition threshold (\$100,000) each. This is less than 3 percent of total obligations made during FY 2007. Therefore, the exclusion of such low dollar value contracts should have minimal impact on achieving the objectives of the Executive Order, while being of great benefit to small businesses, since acquisitions below the simplified acquisition threshold are generally set aside for small business.

In addition, the Councils have added to the final rule a threshold relating to length of the period of performance of the contract. Since contractors have 30 days to enroll in E-Verify and another 90 days to initiate verification of employees, the Councils concluded that it was not practical to require compliance with the clause in contracts that have a period of performance of less than 120 days.

#### 6. Subcontractor Flowdown (22.1802(b)(4) and 52.222-54(e))

*Comment:* Analysis of the comments relating to the subcontractor flowdown requirements (22.1802(b)(4) (22.1802(c) in proposed rule) and 52.222-54(e)) discloses five general concerns from a broad range of commenters.

##### a. Definitions

For concerns relating to the definitions of “subcontract” and “subcontractor,” see G.1.d.

#### b. Flowdown Thresholds

*Comment:* Various commenters recommended limitation of subcontract flowdown as follows:

- The flowdown threshold of \$3,000 is extraordinarily low, and that an explanation and justification for this dollar threshold should be provided to the public.
- Raise the threshold to \$10,000 and make it applicable only to first tier subcontractors whose subcontracts meet the stated criteria, consistent with the flowdown requirement for the annual EEO-1 report and affirmative action obligations under Executive Order 11246 and Section 503 of the Rehabilitation Act.
- Raise the threshold to \$100,000.
- If the flowdown requirement is maintained, limit it to (1) first tier subcontractors, or (2) subcontracts valued at more than the threshold for obtaining cost or pricing data under FAR 15.403-4, currently \$650,000.
- Remove the flowdown requirement or, at a minimum, limit it to major subcontracts exceeding \$5 million.

*Response:* The Councils do not agree. Although the selection of the appropriate threshold is always somewhat subjective, unless specified by statute or Executive order, rulemakers seek to achieve balance between achieving the policy objectives and not unduly burdening smaller subcontracts. With respect to subcontract actions, the flowdown is already limited by the proposed rule to only subcontracts for construction and for services. These types of subcontracts often involve lower dollar amounts and increasing the threshold would leave too high a portion of the targeted subcontracts not covered by the rule. There is no particular logic that would tie this threshold to EEO reporting, the simplified acquisition threshold (which applies only to prime contracts), or the cost or pricing data threshold. There is no compelling reason to either eliminate or limit the flowdown requirement since the obligation to include the clause at 52.222-54(f) is not any more burdensome than many other flowdown requirements, and the objectives of the Executive Order 12989, as amended, will not be adequately met without extensive subcontractor flowdown. The Councils have therefore maintained the subcontractor flowdown for services and construction to all tiers of subcontracts above the threshold of \$3,000.

#### c. Period of Performance

*Comment:* One commenter urged that consideration be given to recognizing

that an early finishing subcontractor or supplier to a Federal prime construction contractor should not, without exception, be bound to the duration of the prime contract.

*Response:* When flowing down the clause to the subcontractor, it would be effective only for the duration of the subcontract. By the very nature of subcontract to prime contract, many subcontracts are of shorter duration than the prime contract. However, the Councils decided not to extend the 120-day limitation on flowdown. The period of performance of the subcontract is not within the control of the Government. If the subcontractor does not have any subcontract running longer than 30 days, the subcontract term would end before the subcontractor would be required to register with E-Verify. However, if the subcontract period runs beyond 30 days, the subcontractor would be required to enroll in E-Verify, and if the subcontractor continues to receive subcontracts it will be obligated to begin using E-Verify for its new hires.

#### d. Prime Contractor Responsibility for Subcontractor Violations

*Comment:* There was broad concern raised by commenters (covering the service, construction, educational, transportation, and agriculture sectors) regarding the extent to which a prime contractor may be held accountable for violations by its subcontractors. A number of commenters suggested that the prime contractor's flowdown obligation was too difficult to monitor. One commenter noted, for example, that subcontractors do not have privity of contract with the Government, thus they are not normally required to be identified in a Government contract as a party. There was substantial concern among these commenters with respect to the prime contractor's compliance assurance responsibilities. Specifically, these comments focused on the extent to which the prime contractor is responsible for subcontractor failure to comply with the contract obligation to use the E-Verify program. Many commenters questioned how a prime contractor could monitor subcontractor compliance and the extent to which a prime contractor would be accountable for a lower tier subcontractor's non-compliance.

Many commenters argued that the prime contractors' flowdown responsibilities should be limited to ensuring that the clauses are included in their subcontracts and that their subcontractors should be responsible for initiating the E-Verify enrollment process and carrying through with use of E-Verify for employee verification. As

an exception to this general consensus, one commenter suggested that it would be appropriate to require prime contractors to obtain written assurances from contractors that they are complying with all Federal rules, including verification of employment eligibility.

*Response:* The Councils believe that prime contractors are responsible for all aspects of contract performance including subcontract requirements. The methods used to assure compliance are also the responsibility of the prime and the subcontractor. The contractor should perform general oversight of subcontractor compliance in accordance with the contractor's normal procedures for oversight of other contractual requirements that flow down to subcontractors. Prime contractors are not expected to monitor the verification of individual subcontractor employees. Nor is the prime contractor responsible for the subcontractor's hiring decisions. However, the prime contractor is responsible for ensuring by whatever means the contractor considers appropriate, that all covered subcontracts at every tier incorporate the E-Verify clause at 52.222-54, Employment Eligibility Verification, and that all subcontractors use the E-Verify system.

Further, these roles and responsibilities are adequately addressed in the Federal Contractor MOU. Accordingly, the MOU contains a provision that the employer (prime contractor and subcontractors alike) acknowledge that compliance with the MOU is a performance requirement under the terms of the Federal contract or subcontract and that the employer consents to the release of information relating to compliance with its verification responsibilities under the MOU to contracting officers or other officials authorized to review the employer's compliance with Federal contracting requirements.

The Councils consider that it would be an unnecessary information collection to impose a requirement that the prime contractor obtain written assurances from subcontractors that they are complying with all Federal rules, including verification of employment eligibility.

#### e. Notice to Subcontractors

*Comment:* One commenter recommended that the proposed clause impose a requirement for a prime contractor, and any higher-tier subcontractor, to provide a notice along with its requests for bids from prospective subcontractors and suppliers on the Federal construction

contract. Such notice should make explicit to prospective subcontractors and suppliers that the prime contract is subject to the proposed new FAR Subpart 22.18 (Employment Eligibility Verification) and that the requirements of the proposed new clause (FAR 52.222–54, Employment Verification) will be imposed on a subcontractor at any tier, if the subcontract falls within the reach of proposed new FAR 22.1802(b)(4).

*Response:* The Councils do not endorse the need for a separate notice to subcontractors, apart from the notice that is provided by flowing down the clause to the appropriate subcontractors. Many requirements flow down to subcontractors, and it is the responsibility of the subcontractor to review all requirements associated with the requests for bids or proposals. However, the Contractor may write such a notice.

#### 7. Waiver (22.1802(d))

*Comment:* The proposed rule allows the head of the contracting activity to waive the clause requirement in exceptional cases. Several commenters noted that the proposed rule did not define the term “exceptional cases” and proposed that a definition and/or standards for using the waiver be added to the final rule. One commenter proposed that the term be defined to include national security emergencies, natural disasters, acts of terrorism against the United States, urgent military war fighter needs, and FAA emergencies.

*Response:* The term “exceptional cases” is intentionally not defined in the rule in order to allow the head of a contracting activity the flexibility to use this waiver as unique situations arise within each agency. Each head of the contracting activity will be accountable to the agency leadership to appropriately balance the needs of the agency and the policies and goals of the Executive Order 12989.

#### 8. Safe Harbor

*Comment:* Public comments indicated numerous concerns over the mechanics and operability of the E-Verify system. Specifically, employers expressed concerns about potential litigation that could be brought against them as they rely on E-Verify to verify not only newly hired employees, but also to verify existing employees. For example, one commenter cited the legal risk in the event that an unauthorized worker erroneously verified by E-Verify is later found to have committed identification fraud and was therefore improperly employed. Likewise, some companies

fear litigation from employees who are fired as a result of the E-Verify process and file claims of wrongful discharge because E-Verify provided wrong answers in the verification process.

Several commenters believed that the revised MOU for E-Verify leaves employers to face any such legal liability on their own. Article V, “Parties” paragraph E of the revised MOU reads: “Each party shall be solely responsible for defending any claim or action against it arising out of or related to E-Verify or this MOU, whether civil or criminal, and for any liability wherefrom, including (but not limited to) any dispute between the Employer and any other person or entity regarding the applicability of Section 403(d) of IIRIRA to any action taken or allegedly taken by the Employer.”

Other companies claimed that they enjoy immunity as a result of the language in the MOU that states “no person or entity participating in a pilot program authorized [by IIRIRA] shall be civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system.” This immunity language was also repeated in the preamble to this rule. However, there is concern that these immunity provisions may not apply to situations where an adverse employment action is taken against an existing employee.

As a result of these litigation concerns, commenters requested that the rule provide protection from both DHS enforcement actions, as well as discrimination lawsuits, if employees are terminated after the employers have properly complied with program requirements. They recommended that provisions be included in the rule that would indemnify the employer with full disclosure of this indemnification to the employee. As one commenter stated, the rule should be revised to provide a safe harbor that explicitly protects contractors and subcontractors from penalties or other reprisals under state law related to the use of the E-Verify system. The commenter recommended that the preamble immunity language be inserted into the regulatory text as a clear safe-harbor to make it clear that it applies to all employees.

*Response:* The applicable statute, section 403(d) of IIRIRA, provides broad legal protection to employers participating in E-Verify. The MOU language in Article V. E. only clarifies that the Government does not guarantee any level of legal protection under this or any other statute to employers, and will not defend or indemnify claims that may be brought against employers.

The E-Verify statute (IIRIRA Section 403) does not distinguish between new hires and existing employees in the immunity protections it provides employers. IIRIRA section 403(d). The Councils find that the statutory protection from liability for actions taken by employers in good faith reliance on information provided by the E-Verify system provides sufficient protection.

Issues with respect to compliance with E-Verify and adverse actions taken as a result of such actions are the responsibility of DHS and not the contracting officer. Therefore, the proposed safe harbor language is not appropriate for inclusion in the FAR.

#### 9. Enforcement and Sanctions for Non-Compliance

*Comment:* Several commenters requested clarification in the rule of how MOU violations would warrant contract sanctions, and if so, what procedures for contract suspension or termination would apply in that circumstance.

*Response:* USCIS retains its authority to investigate violations of E-Verify program. DHS may terminate a contractor’s MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS terminates a contractor’s MOU, DHS will refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor will not be eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must re-enroll in E-Verify.

#### 10. Process for Resolving Disputes About Applicability of the Clause

*Comment:* One commenter expressed concern that a decision about what contracts are required to include the clause will be left entirely within the discretion of the contracting officer. The commenter was concerned that the presumption would be in favor of including the clause even though it is not required with certain types of contracts, such as those for purchase of COTS items. The commenter was concerned that there is no method for disputing the applicability of the clause.

*Response:* The Councils do not concur with the commenter's concerns. As an initial matter, the contracting officer's conclusions about whether the clause applies will be informed by what the Government is acquiring with the contract. The contracting officer will take into consideration whether the contract is for services or supplies, and whether the supplies are COTS items. The contracting officer will then evaluate whether any applicable exceptions apply such that compliance with E-Verify is not required. Therefore, the Councils do not agree with the commenter's statement that the contracting officer has "complete discretion" to decide whether the E-Verify clause will be inserted in the contract.

Further, the Councils do not agree that it is necessary to develop dispute resolution procedures, because appropriate procedures already exist in the FAR. If a contractor disagrees with a contracting officer's conclusion about the applicability of the clause in advance of award, the contractor may obtain review by submission of a protest to the Contracting Officer, Agency Head or GAO in accordance with FAR Part 33.

- FAR 33.101, Protest, defines a protest as a "written objection by an interested party to \* \* \* [a] solicitation or other request by an agency for offers for a contract for the procurement of property or services."

- FAR 33.102(a) states that upon receipt of a protest, the contracting officer "shall consider all protests and seek legal advice \* \* \*". The requirement to seek legal advice after receipt of a protest ensures that the contracting officer's conclusion about applicability will be reviewed.

If a contractor's disagreement with the contracting officer's conclusion about the applicability of the clause arises after award and during administration of the contract, the process for resolving the dispute is set forth in FAR 33.202, Contract Disputes Act of 1978. Again, upon receipt of a claim, FAR 33.211 requires the contracting officer to "secure assistance from legal and other advisors." The FAR also requires the contracting officer to seek input from other agency officials, including that of agency counsel, and therefore the contracting officer's conclusion about the applicability will be legally reviewed.

Despite commenter's statements, the FAR specifies when the E-Verify requirement shall be included in a contract and the FAR also provides a method for resolving disputes about applicability, both pre-award and during contract performance. (See also

H.3.f. on applicability at the subcontract level.)

### C. Applicability of FAR Rule

#### 1. Commercial Items

##### a. Commercial Items Exemption

*Comment:* Several commenters recommended that the rule should exempt all commercial items, not just COTS items, claiming that such a change would be consistent with procurement reforms facilitating government access to commercial products and services.

*Response:* The Councils do not concur with this comment. The final rule intentionally covers commercial item contracts that are not for COTS items. The intent of the rule was to cover as many contractors and contractor employees consistent with the mandate in Executive Order 12989. The only reason COTS items are exempt is because the Councils believe that COTS providers may choose not to do business with the Government rather than changing their practices to use E-Verify. The Councils concluded that this could result in an unacceptable reduction in the Government's access to items it needs in order to operate. On the other hand, contractors who provide commercial items that are not COTS items are providing commercial products that are custom-made for the Government or services that are categorized as commercial items. These contractors have decided to be part of the Government marketplace. These contractors have established procedures and sometimes created organizations designed to do business with the Government. The Councils determined that the requirement for these contractors to use E-Verify would not be sufficient to drive them from the Government market. Also, to the extent such a business incurs added cost to comply with the E-Verify contract clause, it is free to include that added cost in its proposed contract prices, but will be required to take into account the pricing practices of its competitors if it wishes to be awarded the contract.

##### b. Exempt COTS-Related Services

*Comment:* Various commenters pointed out that COTS suppliers typically sell services along with their COTS items and that the exemption of COTS items from the rule would not be adequate unless it also exempts related services. COTS suppliers who must provide services along with their COTS items would gain no benefit from the COTS exemption if the services are not also exempt.

One commenter requested that the Councils add services to the definition of COTS.

*Response:* The Councils concur in part with this comment. Although the definition of COTS is statutory and does not include services, the Councils agree that the clause should not apply to certain types of services:

- The services must be procured at the same time as the COTS item is procured.
- The services may be provided only by the COTS item supplier. That will eliminate services provided by other contractors who are in the service business. By covering the COTS provider services, the Councils intend to reduce the regulatory burden for companies who provide only COTS items that do not require use of E-Verify. The services must be performed only on or for the COTS item. This means that we do not exempt services that are "custom."
- Third, the services must be typical or normal for the COTS provider.

##### c. Applicability of COTS Exception to Food Products

*Comment:* Several commenters representing various agricultural interests commented that the rule will have far reaching and detrimental effects on the agriculture industry, most particularly growers and harvesters. Examples of sectors of the agriculture industry that were highlighted as problematic are: Fruit growers, fruit harvesters, suppliers of fruit to Federal school lunch programs, and distributors of fruit. These commenters wanted to make sure that the rule was not intended to apply to them or, if it was intended to cover them, they requested that it be made inapplicable to them.

*Response:* The Councils do not believe that any of the examples of agricultural products cited by these commenters would be covered by the rule as originally proposed or as promulgated in this final rule.

First, all food products described by the commenters would fall under the definition of commercially available off-the-shelf (COTS) items or a minor modification to a COTS item, which are exempt from the clause. COTS items are defined as "any item of supply" (food is an item of supply) that is "a commercial item" (the foodstuffs described by the commenters are commercial items) "offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace" (the foodstuffs described by the commenter meet these standards).

Secondly, most of the concerns relayed by the commenters centered on the growers and harvesters. Neither the proposed rule nor the final rule require flowdown of the clause to subcontractors which provide supplies such as food. The only subcontracts that are covered by this rule are services or construction subcontractors. In the unlikely event that a contractor enters a contract with the Government for food products that do not meet the definition of a COTS item or a minor modification of a commercial item, the subcontractors who sold the food to that contractor (farmers, or harvesters or distributors) are not required by this rule to have the contract clause in their subcontracts. This means that they are not covered by the rule when they are subcontractors because no subcontracts for supplies are covered by the rule for any subcontractor. The only providers of supplies who are covered by this rule are prime contractors, not subcontractors. The Councils purposely excluded all subcontracts for supplies from application of this rule for many of the same reasons that prompted the concerns of the agriculture industry commenters.

Nevertheless, the Councils have further modified the COTS-related exception to address these concerns. The exception in the clause prescription at 22.1803 for COTS-related items has been expanded also to exempt items that would be COTS items but for being bulk cargo. By incorporating this expanded exception for COTS-related items, the Councils intend to exempt foodstuffs such as grains, oils, produce and all other agricultural products shipped as bulk cargo, to the extent they are otherwise classified as COTS items.

#### d. Acquisitions of Commercial Items Under the FAR

*Comment:* Several commenters requested that the final rule make it clear that the rule applies only to commercial acquisitions under the FAR. According to these commenters, many grant recipients and State and local governments may incorrectly assume the rule applies to them. One comment also sought clarification of whether the rule would apply to a carnival operator hired to provide services on a military installation.

*Response:* The Councils do not concur. There are several parts to this question, addressing both the application of the rule to commercial items and the question of acquisitions under the FAR versus "non-acquisitions."

- The commenters misunderstand the applicability to commercial items. The

rule does not apply only to commercial items. It applies to both non-commercial and commercial items (although COTS items are excluded).

- An exception has been added to permit State and local governments to limit their use of E-Verify only to employees assigned to the contract (allowing them to exclude new hires not assigned to the contract).

- Also, the requirements to use E-Verify only occur when a contract includes the FAR clause. There is no mechanism for the FAR to require insertion of the clause in any grants or contracts that use non-appropriated funds that are not covered by the FAR. Whether the clause would apply to a contractor providing carnival services will depend on several factors; the location of the contract performance alone will not be determinative, unless the contract is performed outside the United States.

#### 2. Small Business

##### a. Unfair Impact on Small Business

*Comment:* Many commenters were concerned that E-Verify may impose significant and costly administrative requirements on small business, and that the rule will have a disproportionate adverse impact on small business.

- For example, one commenter noted that few small businesses have specific human resource departments to manage the increased workload, and many more lack the necessary equipment to run the program.

- Another commenter noted that small businesses do not have the luxury of large staffs to prevent lost productivity while employees resolve tentative nonconfirmations.

- Commenters suggested that small businesses may also face accessibility issues, such as lack of access to high-speed internet.

- The SBA Office of Advocacy stated that small businesses may lack the financial resources and human capital to adapt their technology infrastructure systems to changing requirements being imposed by the Federal Government.

- The SBA Office of Advocacy also noted that small business Federal contractors operate on very thin profit margins and these types of technology systems require capital outlays that cannot be easily recouped by passing the cost to the client and are costly to the small business owner.

- Another commenter stated that small companies that do not have the means to set up systems and staffing with adequate training to monitor nonconfirmations may find themselves at risk for noncompliance.

- Some comments argued that the burden is even greater on small businesses that are subcontractors. SBA Office of Advocacy expressed concern that the compliance cost burden on small business subcontractors could be disproportionate, because such businesses have fewer contracts among which they can spread the cost of doing business.

Some of these commenters were concerned that some small businesses would not have the resources to implement E-Verify and may therefore exit the Government market. For example, one commenter noted that E-Verify requires both infrastructure and an investment of employee expertise. Small businesses that do not have the resources to implement may decide not to pursue Government contracts. Further, a small business council was concerned that to stay competitive, small businesses would not be able to pass the extra costs of E-Verify on to the Government, and will therefore be deterred from bidding.

Several commenters expressed concern about the detrimental effect that loss of participation by small businesses will have on the Government and the taxpayers. One commenter noted that through the loss of competition by small businesses, the Government loses out on the innovative ideas of small businesses that exit the market. Another commenter stated that the Federal sector will lose the benefit from the "ingenuity and flexibility" that small businesses bring to the table.

Several commenters noted that Congress has expressed concern about the potential impact of E-Verify on small businesses. For example, various commenters cited to the mandated study of impact on small business in H.R. 6633, a bill passed by the House of Representatives that would have extended the E-Verify program for another 5 years.

*Response:* The Councils do not agree that this rule imposes an unfair burden on small businesses. The economic analysis found that total compliance costs increase as the size of the contractor increases. For example, a 10-employee firm may only need one person trained to execute E-Verify queries, but a 100-person firm may need 2 or 3 employees trained in E-Verify. However, when compliance costs are considered as a percent of revenue, the impact on smaller contractors is greater than the impact on larger contractors since smaller firms have less revenue available. The Small Business Administration publication *The Impact of Regulatory Costs on Small Firms* (2005) shows that on a per employee

basis, smaller firms have a larger regulatory compliance cost burden than larger firms. The SBA study states: "On a per employee basis, it costs about \$2,400, or 45 percent, more for small firms to comply than their larger counterparts." Consequently, the results of the economic analysis that show a relatively higher regulatory impact burden on the smaller entities than the larger entities are not unusual or specific to this final rule.

The requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors who choose to perform certain work for the Federal Government. Presumably, entities which do not receive the desired return on revenue to justify the expense of participating in E-Verify would choose not to be a Federal contractor or subcontractor.

It has been the law since 1986 that all employers must verify the eligibility of new hires to work in the United States. E-Verify provides a tool that will make this verification easier and more reliable. Although the E-Verify system does require the employer to have access to some equipment such as a computer, Internet access, a printer, and either a scanner, photo copier, or a digital camera, the Councils believe that this equipment is not prohibitively expensive. Almost all small businesses doing business with the Government would already have such equipment or be able to readily acquire it. The equipment for a small business to implement E-Verify need not be particularly sophisticated or complex.

H.R. 6633, which has been passed by the House allows 2 years for the GAO study of the impact of E-Verify Pilot Program on small businesses, including specific details on small entities operating in States that have mandated the use of E-Verify. The bill has not been passed by the Senate, but it does not request that any implementation of E-Verify be suspended pending completion of the study. In addition, Congress reauthorized E-Verify and appropriated \$100 million for the program for fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110-329 (Sept. 30, 2008), without requiring this study, and it does not appear that there will be any additional legislative developments on E-Verify in the 110th Congress.

The Councils have endeavored to limit the impact of this rule on small businesses by raising the threshold of applicability of the clause to contracts in excess of the simplified acquisition

threshold. As a result of this change, a substantial quantity of contracts below that threshold will be exempt from the E-Verify clause, and will be available to small business contractors that do not wish to participate in the program. Since the FAR currently requires set-aside of contracts below the simplified acquisition threshold for small business participation, contracting opportunities that do not necessarily require E-Verify use will remain available for small businesses.

#### b. Small Businesses Exemptions

*Comment:* Various commenters suggested exemption or waiver for some or all small businesses. For example:

- Exempt all small businesses: The SBA Office of Advocacy recommended that, until better data is available, small businesses should be exempted from the requirements of the rule. Another commenter recommended consideration of exempting all small businesses that qualify under the size standards established by SBA.

- Exempt small businesses with less than 15 employees: One commenter recommended that the applicability standard should be proportionate to its requirements and suggested that this rule should follow E.O. 13201, under which the Notice of Employee Rights Concerning Payment of Union Dues does not apply to contractors with less than 15 employees.

- Exempt small businesses with less than 75 employees: Several commenters recommended exemption for businesses with less than 75 employees. One commenter asserted that small enterprises do not have the administrative capacity to comply with this contract clause. Another commenter stated that applying the new verification requirements only to locations employing at least 75 individuals full-time would allow for sufficient personnel to manage the system and ensure compliance and consistency.

- Waive the requirement for certain small businesses: Several commenters recommended waivers for certain small businesses for which compliance with the system would be burdensome.

*Response:* The goal of this rule is to apply verification broadly, to the extent feasible and consistent with Executive Order 12989, in order to enhance the stability of Government contractors' and subcontractors' workforces and to assist them in compliance with the immigration laws of the United States. Nonetheless, the Councils have inserted certain dollar and contract duration thresholds for applicability and have provided specific exceptions because the Councils have concluded those

thresholds and exceptions are consistent with their mandate to implement Executive Order 12989 in a way best calculated to improve the efficiency and economy of the Federal contracting system. The Councils do not believe providing exemptions for small businesses based on the number of employees will further that goal and note that other revisions, discussed above, will likely ease the burden on small businesses.

#### c. Alternatives To Lessen the Burden on Small Businesses

*Comment:* Various commenters suggested other ways to reduce the burden on small businesses that participate in E-Verify under this rule, for example:

- Allow small businesses more time to initiate the clearance process for new assigned employees (see G.4).

- Raise the thresholds to the simplified acquisition threshold (or other thresholds more than \$3,000).

*Response:* Most of these comments are discussed elsewhere in the report in more detail. The Councils have agreed to the above modifications to the E-Verify rule which will lessen the burden on small businesses, as well as other revisions, such as:

- Lengthening other time periods for compliance (See G.4).

- Applying a period of performance of 120 days (See G.5).

In addition, the USCIS E-Verify Program's outreach office has coordinated closely with the Small Business Administration since April 2008 to conduct outreach events to ensure specific concerns relating to small businesses are heard and addressed.

### 3. Agriculture

#### a. Applicability to Agricultural Cooperatives

*Comment:* Some commenters asked if the agricultural cooperative is the prime contractor under a FAR contract, whether the grower member is considered the prime contractor as well for purposes of checking the status of grower employees. Commenters also asked whether the answer would be the same when the agricultural cooperative is a marketing cooperative.

*Response:* The Councils have made clear in the final rule that virtually all food products are COTS and COTS contracts are exempt from the rule. Therefore, the Councils believe these concerns have been addressed.

However, there are various types of cooperatives, and many are corporations. Some cooperatives buy the

agricultural product from the grower and resell to the Government. In this case, the grower is a subcontractor and would be exempt from the rule because—

- This involves a supply rather than a service; and
- Supplies are exempt from subcontract flowdown.

Other cooperatives involve pooling arrangements that are not subcontracts, but rather under which there is one prime contract between the Government and the cooperative (on behalf of the growers). In this case the answer is more difficult. If the growers are considered prime contractors for other purposes of Government contracting, then they would be so for purposes of E-Verify application. If, on the other hand, the cooperative alone is the prime contractor, then the growers are not the prime contractor. Applicability of the clause to each contract and different types of agricultural producers is a fact-based analysis that cannot be definitively answered by the Councils.

#### b. Rural Farms

*Comment:* Some commenters pointed out that many growers are small farms located in remote rural areas. Many farms hire seasonal workers at field sites that are not in an office, and so electronic or telephonic use of E-Verify is not readily available to the employer. In addition, employer and employees are not near the Social Security office.

*Response:* The Councils have made clear in the final rule that virtually all food products are exempt from the requirements of this rule. The commenters concerns about access to technology necessary to use E-Verify or the remote location of the contractor have been raised by other commenters as well and addressed in this rule.

The Councils believe that most entities involved in Federal contracting at any level, or their designated agents, will have access to basic office equipment such as a telephone, computer, and internet access. The employer is not required to visit the Social Security office; only the employee must visit if an SSA tentative nonconfirmation is received, and he or she is afforded eight Federal Government working days in which to contact SSA or USCIS. As noted above, when the employee is a naturalized citizen, the employee may choose to call USCIS directly to resolve a citizenship-based tentative nonconfirmation, rather than visit the SSA office. DHS tentative nonconfirmations can be handled with a telephone call rather than a personal visit.

#### c. Implementation During Harvest

*Comment:* Some commenters stated that implementing the rule in some agriculture sectors will be unworkable because of the rapid pace required for harvest. Seasonal laborers will move out to another job long before employer is able to obtain verification of employment status. Seasonal laborers need to work on harvesting/packing, not traveling to and spending time at the Social Security office.

*Response:* The Councils have made clear in the final rule that virtually all food products are exempt.

#### d. Government Sales

*Comment:* Some commenters noted that the increased costs, and risks of losing large percentage of workforce, would be too great for some growers to continue selling to the Government. Increased grower costs and less competition would increase the Government's costs. If food growers stop selling to the Government, commenters claim that foreign countries will become the source of food for U.S. servicemen and school children.

*Response:* The Councils have made clear in the final rule that virtually all food products are exempt, therefore the concerns expressed by the commenters have been addressed.

#### e. Agricultural Employees

*Comment:* One commenter noted that the Westat study data on recently enrolled users showed that recently enrolled users were more likely than long-term users to have a small percentage of foreign born employees. This is different from U.S. agricultural employers, where according to a recent USDA study, over a third of hired farm workers do not have citizenship status, and of those 90 percent list Mexico as the birth country.

*Response:* The FAR Council notes that agricultural employees are more likely to have immigration issues than most other kinds of employees. Nevertheless, because of the exception for COTS, non-agricultural employers are much more likely to be covered by the electronic verification requirements of the rule.

#### f. Shift to Foreign Agricultural Growers

*Comment:* One commenter noted that prime contractors might not want to hire U.S. agricultural growers as subcontractors because of wanting to avoid E-Verify problems. Also, the prime contractors might force subcontractors to use E-Verify even when the FAR would exempt the subcontract.

*Response:* The E-Verify clause does not flow down to subcontracts for

supplies. A subcontractor for supplies that has an E-Verify clause in the subcontract should contact the prime contractor or next higher tier subcontractor that included the clause. If unable to obtain resolution, the subcontractor may contact the contracting officer for assistance in resolving the issue.

#### 4. Institutions of Higher Education; State and Local Governments and Governments of Federally Recognized Indian Tribes; and Sureties

##### a. Institutions of Higher Education

*Comment:* Seven universities and two associations opposed the application of the rule to educational institutions. In general, the universities supported efforts to encourage improvements to compliance with requirements to demonstrate work authorization and citizenship, but recommend an exemption for research and higher education institutions, arguing that the rule would impose an unnecessary financial and administrative burden. The commenting associations predicted that including academic institutions within the scope of this rule would place stress on the E-Verify system.

The several commenters emphasized various aspects of the interrelated problems that universities face, as follows:

- One of the largest universities contended that E-Verify is difficult to use and that the proposed rule underestimates the time and resources required by an organization of its size to implement E-Verify, and its impact on U.S. citizens and lawful permanent residents.

- Another university described its use of a "sponsored pool accounting system" to facilitate frequent changes in researchers' and staff members' funding sources, and how its separation of contract administration and human resources processes complicates E-Verify's clearance procedure.

- Another university that employs a large number of foreign nationals claimed to have a strong program to monitor work authorizations. It stated that the added procedural burden on the university and its employees will hamper its ability to attract highly sought foreign nationals, impacting the quality of its research programs.

- Another estimated that modifying its existing employment eligibility monitoring system to comply with the proposed 3-day clearance requirement would cost \$1 million because new processes would need to be implemented outside the payroll system it currently uses. In addition, the

commenter claimed that employee relations issues would be a major impact, and notes that Federal contracts are only 2 percent of its business.

- Another university described universities as low-risk employers because their international population is already subject to oversight through the Federal visa approval processes and their own internal recruitment and other mechanisms.

- Another university was most explicit about the other internal mechanisms that reduce the vulnerability of educational institutions to immigration violations. According to this comment, research organizations operate in an environment of strict regulation and control, including export control and intellectual property as well as immigration and employment requirements. These contribute to their high level of regulatory compliance and they rarely encounter problems with document fraud or with employees lacking proper documentation of their employment authorization.

- Another university also recommended exempting universities from the proposed contract term, but also expressed concerns about the impact on grants and cooperative agreements as well. (Grants and cooperative agreements are not covered by FAR, so the requirements do not in fact apply.)

- One association cited, as an example of potential stress on the E-Verify system's resources, the fact that the University of California employs approximately 170,000 faculty and staff. The demand on system resources at a university is subject to annual spikes at the beginning of the academic terms, according to another association. Association commenters were also concerned about the potential impact of this rule on international personnel at colleges and universities who face delays in securing SSNs. Its members report that many international employees were incorrectly denied SSNs by the SSA. According to these commenters, many who eventually received SSNs did so only after repeated interventions by institutions and after a process that took, in many cases, several months. These delays may be as long as some student workers or staff members are employed by the institution. Such individuals can be employed in a range of positions, from short-term work-study jobs in smaller offices to long-term research projects in large laboratories. The commenters claimed that delays resulting from E-Verify use could jeopardize both the individuals and employers.

*Response:* The Councils do not find the comments about value, accuracy, or capacity of the E-Verify system to be bases to exempt educational institutions from the rule, for reasons addressed elsewhere in this final rule. Moreover, other Government contractors also attract a foreign talent base that supports U.S. science and technology capabilities.

However, the Councils recognize that coverage of a large number of educational institutions was not anticipated in the proposed rule. These entities have a large number of students with intermittent employment, which may complicate these institutions' efforts to comply with E-Verify requirements. Most Federal funding of universities is in the form of Federal grants, and there are relatively few Federal contracts, but under the proposed rule, a single contract could be sufficient to require an entire university to use E-Verify for all its new hires.

The Councils are also concerned that including universities under this broad rule may increase incentives for academic institutions to insist on grant funding rather than agreeing to enter into contracts. This would increase costs and performance risks to the Federal Government.

Accordingly, the Councils have reduced the burden on institutions of higher education by revising the applicability of the E-Verify requirements to cover only those employees assigned to a Government contract. In order to focus this exception, it is limited to institutions of higher education as defined at 20 U.S.C. 1001(a).

#### b. State and Local Governments and Governments of Federally Recognized Indian Tribes

*Comment:* One commenter was concerned about whether the rule might be misconstrued when applied to contracts under the Randolph-Sheppard Program. The concern was whether the State licensing agency, which signs the contract with the Federal Government on behalf of the blind entrepreneur would be required to enroll in E-Verify.

*Response:* The State licensing agency would be considered the contractor, but the Councils have decided that State and local Governments, as well as the Governments of federally recognized Indian tribes, should only be required to use E-Verify to verify the employment eligibility of employees assigned to the Government contract. The clause would be included in the contract, however, and would flow down to covered subcontractors for services or construction, including the blind

entrepreneurs under Randolph-Sheppard.

#### c. Sureties

*Comment:* A sureties association requested a *de minimis* exception. Government construction contracts require that contractors obtain performance and payment bonds in accordance with the Miller Act, 40 U.S.C. 3131 *et seq.* A performance bond secures the contractor's performance in the event of a default. If the construction contractor defaults, the surety steps in to complete the contract using one of three methods.

- Sureties can enter into a takeover agreement with the Government and then the surety completes the project using a completing construction contractor.

- The second method involves the surety obtaining bids for completion of the project after which the Government contracts with the winning bidder to complete the project.

- The third method permits the surety to reimburse the Government for the excess costs incurred by the Government to pay a completing contractor.

The first method, where surety enters into a takeover agreement directly with the Government, is frequently selected. Sureties are concerned that if the rule applies to sureties who enter into takeover agreements, then many sureties will select one of the other options to avoid the cost of complying with the FAR rule. Additionally, issuing performance bonds on Federal construction contracts is often a very small portion of each surety's business because the sureties often sell other types of insurance such as auto, homeowners and general liability. If the FAR rule applies to all employees performing activities unrelated to bonds as well as new hires of the surety after the effective date of the takeover agreement, sureties may conclude that it is too expensive to enter into takeover agreements. The commenter also noted that when a surety enters into a takeover agreement with the Government, the actual work of completing the construction project is performed by a construction contractor hired by the surety and not by the surety itself. The sureties requested a *de minimis* exception "under which companies whose contracts with the Federal Government are a small portion of the company's total revenues need only verify the eligibility of employees involved with the contract."

*Response:* The Councils, while not agreeing to an across-the-board *de minimis* exception, have individually

considered the issues and agree that an exception applicable to sureties is appropriate. E-Verify use will not be necessary unless a surety provides a performance bond, the contractor defaults and the surety subsequently enters into a takeover agreement with the Government to complete the project. Prompt completion of construction projects using the most appropriate method available is a priority and it is not in the Government's interest to create an obligation that will discourage sureties from entering into a takeover agreement with the Government if such an agreement is appropriate. Therefore, E-Verify compliance will apply only to those employees of the surety directly assigned to the takeover agreement and to the construction contractor(s) that are hired by the surety. The full clause requirements will flow down to the construction subcontractors.

#### 5. Financial Institutions

1. *Comment:* Several commenters recommended that banks and other financial institutions whose contracts are limited to serving as issuing and paying agents for U.S. savings bonds and savings notes or being insured by the FDIC should be excluded from the e-verification requirement. One commenter requested similar treatment for financial institutions that are parties to financial agency agreements (FAAs) with the Federal Government because FAAs are not subject to the FAR. This commenter stated that FAAs explicitly state: "This FAA is not a Federal procurement contract and is therefore not subject to the provisions of the Federal Property and Administrative Services Act (41 U.S.C. Sections 251-260), the Federal Acquisition Regulations (48 CFR Chapter 1), or any other Federal procurement law."

*Response:* Agreements or activities performed by financial institutions that are not subject to the FAR are not required to comply with the E-Verify provisions and clauses of the FAR.

2. *Comment:* One commenter requested clarification that the rule applies to "contracts in which a Federal agency is purchasing goods or services, and does not apply to companies who purchase goods or services from the Federal Government."

*Response:* Contracts for purchase of goods by companies from the Federal Government are not subject to the FAR and therefore are not required to comply with the E-Verify provisions and clauses in the FAR.

#### 6. Hospitality Industry

*Comment:* One commenter commented on the difficulty of applying

E-Verify to hotel employees. This commenter stated that it is impossible to determine beforehand which specific employee would be interacting with a guest, since many of the individual interactions are initiated by the guest and could involve one of many possible employees in each instance. Further, hotels do not have segregated areas for Government employees nor do they assign specific employees to serve Government employees. This situation is further complicated by the fact that employers are specifically prohibited from screening existing employees through E-Verify, except for those employees assigned to the Government contracts.

*Response:* First, the revision to the proposed rule that will make the clause inapplicable to contracts that will have a period of performance of less than 120 days may eliminate almost all hotel contracts from being subject to the rule. Second, the decision to allow contractors the option of using E-Verify for all existing employees, rather than just those assigned to the contract, will likely resolve any remaining issue.

#### 7. Other

##### a. Security Clearances

*Comment:* Several commenters recommended that the rule permit employees who hold security clearances or HSPD-12 identification to be an equivalency for use of E-Verify.

*Response:* HSPD-12 mandates that a person must be suitable (minimum of a national agency check with inquiries (NACI)) in order to be issued an HSPD-12 card. Specifically, HSPD-12 imposes certain credentialing standards prior to issuing personal identity verification cards, including verification of name, date of birth, and social security number (among other data points) against Federal and private data sources. The Councils agree that the degree of scrutiny applied to individuals granted HSPD-12 credentials provides sufficient confidence that any such person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary.

With regard to security clearances, the degree of scrutiny applied to individuals granted security clearances also provides sufficient confidence that any such cleared person is likely truthful about his or her authorization to work in the United States that additional investigation through E-Verify is not necessary if the security clearance is active.

##### b. Hiring Halls and Intermittent Work

*Comment:* One commenter requested clarification about how new hires are impacted if they are not full time employees, such as "hiring hall" laborers hired for short time work on a specific project.

*Response:* The INA requires employers to verify the work eligibility of all new hires. There is no exception for short-term or part-time employment, as long as the situation involves "employment" as defined in 8 CFR 274a.1(h). When the employer completes the Form I-9 process, it should also use E-Verify to verify employment eligibility. If the employment is for less than three days, the I-9 must be completed at the time of hire, as opposed within the three days after hire that is allowed for longer-term employment. In either situation, the E-Verify query must be initiated when the I-9 process is completed. In addition, there is an existing statutory provision regarding employment pursuant to a collective bargaining agreement in section 274A(a)(6)(A) of the INA, which provides that in certain cases a subsequent employer is deemed to have complied with the Form I-9 requirements by virtue of verification by another employer within the agreement. If a previous employer within such an arrangement has completed the Form I-9 and E-Verify query, a subsequent employer does not have to reverify, as long as the employment is within the scope of the statutory provision.

##### c. Applicability To Change Orders and Material Modifications

*Comment:* Various commenters requested that the rule should specifically clarify whether and how the new requirements would apply to change orders or material modifications entered into after the effective date of the regulations on base contracts that were entered into before the regulations take effect. Another commenter recommended that the rule should be revised to specifically disallow inclusion of this E-Verify clause in such amendments, so that existing contractors are allowed to complete their current contracts under the same terms that were initially agreed upon.

*Response:* Inclusion of the E-Verify clause in change orders or material modifications will be implemented on a bilateral basis.

#### D. Implementation Schedule

##### 1. Effective Date

###### a. More than 30 Days After Publication of the Rule

*Comment:* Several commenters asked that the effective date be some time more than the usual 30 days after publication of the final rule.

- Some commenters asked for an extension, but did not ask for a specific time period.
- Many commenters asked for 120 days after publication.
- Some universities and a personnel council asked for a minimum of 180 days. One commenter justified this because it needed time to hire and train new staff to use E-Verify, time to develop new processes to support compliance, and time to evaluate equipment and computer software upgrades.

*Response:* The rule will be effective on January 15, 2009. The timelines for initial verifications have been increased. In the proposed rule, verification queries on new and existing employees assigned to the contract had to be initiated within 30 calendar days of enrollment; whereas in the final rule it will be 90 calendar days.

Also note that the burden on some of the commenters (agriculture and education in particular) will not be as severe as the commenters expected. Agriculture will mostly be unaffected, due to the COTS exception. Institutions of higher education will be able to choose to only verify the existing employees and new hires that are assigned to the contract. The impact on sureties has also been minimized.

###### b. Congressional Action

*Comment:* Several commenters felt the final rule should not be published until Congress reauthorized the E-Verify program, which at the time was set to expire in November 2008. Another commenter wanted Congress to study the rule, or enact comprehensive immigration reform. One commenter suggested that a one year postponement would give an opportunity for Congress to consider the consequences of a mandatory program.

*Response:* Congress reauthorized E-Verify and appropriated \$100 million for the program through the end of fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110–329 (Sep. 30, 2008). If in the future Congress fails to extend E-Verify and the program is terminated, the rule will need to be reconsidered at that time. Otherwise, the Councils must

implement the Executive Order 12989, as amended.

###### c. Finalization of the “No-Match” Rule

*Comment:* One commenter asked that the effective date be delayed until the “no-match” rule is finalized. It pointed out that the 2007 proposed rule regarding safe-harbor steps associated with SSA’s no-match program would provide up to 90 days for employers to resolve discrepancies within their records.

*Response:* The Councils disagree. As an initial matter, DHS’s No-Match Rule has been finalized with the publication of the Supplemental Final Rule on October 28, 2008. More significantly, the comment confuses two separate and independent programs. The DHS No-Match Rule provides guidance to employers that receive a no-match letter from SSA on how to conduct appropriate due diligence and settle questions raised by the no-match letter regarding the work authorization of employees identified by the letter. Employers that follow the steps set forth in DHS’s No-Match Rule are guaranteed a safe harbor from the use of the no-match letter as evidence of the employer’s violation of INA section 274A.

###### d. Finalization of the Revised MOU and Training

*Comment:* One commenter noted that DHS needed to finalize the MOU prior to the effective date of the FAR rule. Another commenter expanded upon this point to assert that DHS needs to finalize the E-Verify Web site, training materials, and program manual prior to the effective date of the FAR rule. A chamber of commerce wanted DHS to undertake a nationwide program to educate and train contractors prior to the rule’s effective date.

*Response:* The Councils concur that implementation of the final rule must coincide with finalization of the MOU and other necessary systems revisions. The Councils expect that the MOU and other DHS systems and procedures will be ready in time for the effective date of the final rule.

###### e. Establishment of a Post-Final Nonconfirmation Process

*Comment:* One commenter, citing its experience with E-Verify, asked that DHS adopt processes for a post-final nonconfirmation process, initiated by either the employee or the employer, so that performance of contracts is not hampered by unnecessary termination of work-authorized employees.

*Response:* Under E-Verify rules, an employee must be permitted to continue

working until a final nonconfirmation is issued. After the final nonconfirmation, if the employer has grounds to believe the final nonconfirmation is in error, the employer may still allow the employee to work, but the employer must inform DHS of its decision to retain the worker, and if the worker is later found to be unauthorized, the employer will be subject to a rebuttable presumption that the employer knowingly employed an illegal alien. See IIRIRA Section 403(a)(4)(C). Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation.

###### f. Inaccuracies in the DHS and SSA Data Bases Are Fixed

*Comment:* Several commenters asked the rule be delayed until DHS and SSA fixed alleged inaccuracies in their data, which could stem from name changes, incorrect data entry, and delayed citizenship status updates.

*Response:* Some of these inaccuracies cannot be fixed until the employee takes steps to correct the problem, and the employee will discover the problem when the employer initiates a verification query and receives a tentative nonconfirmation. The actual numbers of inaccuracies can only be estimated, and the estimates vary significantly according to the estimator. As noted above, DHS has implemented several improvements to the E-Verify system to avoid tentative nonconfirmation responses resulting from out-of-date citizenship data. The Councils do not agree that the rule should be delayed.

###### g. Implementation of the Westat Report Recommendations

*Comment:* One commenter recommended that the Westat report recommendations be implemented before the E-Verify system is expanded.

*Response:* DHS’s continues to improve and further develop the E-Verify system. Many of the Westat recommendations have already been implemented. There is no need to delay the rule.

#### h. GAO Study Completed

*Comment:* Some commenters asked that the rule be postponed until GAO completed its study called for under the pending five-year re-authorization legislation. One commenter felt the studies mandated by H.R. 6633 (if enacted) might offer insights on ways to strengthen the program. The first study is an examination of the causes of tentative nonconfirmations, and the second is an assessment of the impacts on small businesses.

*Response:* The Councils have decided not to postpone the rule. H.R. 6633, which has been passed by the House of Representatives, allows two years for the GAO study of the impact of E-Verify Pilot Program on small businesses, including specific details on small entities operating in States that have mandated the use of E-Verify. The bill has not been passed by the Senate, but it does not request that any further implementation of E-Verify be held up pending completion of the study. In addition, Congress reauthorized E-Verify and appropriated \$100 million for the program through the end of fiscal year 2009 in the Consolidated Security, Disaster Assistance, and Consolidated Appropriations Act, 2009, Public Law 110-329 (Sep. 30, 2008), without requiring this study, and it does not appear that there will be any additional legislative developments on E-Verify in the 110th Congress.

#### 2. Phased Transition

##### a. General

*Comment:* One commenter suggested that because of the existing “error rates” and capacity concerns, the Government should take a more measured or phased approach in increasing E-Verify participation, rather than implementing a rule that will encompass almost all Government contractors within a very short period. Another commenter argued that USCIS indicated the current issues could be adequately addressed in four to five years, which suggests that neither DHS nor SSA anticipated that the agencies would be required to immediately implement full coverage for all contractors at one time and instead contemplated a more realistic implementation period of anywhere from four to five years.

*Response:* The Councils have decided that a delay in the implementation of the rule is not necessary. DHS and SSA have stated that they are ready to handle full implementation.

##### b. Four-Phase Transition

*Comment:* One commenter recommended a four-step phase-in—

- New employees of prime contractors;
- New employees of subcontractors; following this, the Councils should evaluate the success of the program for new employees before proceeding to:
  - Existing employees of a prime contractor assigned to a new Federal contract; and then
  - Existing employees of new subcontractors.

*Response:* The Councils must implement the Executive Order expeditiously. The time periods for verification have been lengthened, to ease the burden on employers.

##### c. From Largest to Smallest Contractors or Contracts

*Comment:* Several commenters recommended phased implementation, over periods of up to 7 years, based on number of employees of the contractor, or the number of employees required to effectuate the contract.

- The first year of the program would be for the largest noncommercial contracts, and gradual rollout over the next four years in descending order of size, measured by the number of employees who would be required to effectuate the contract.
- Apply the first year to contractors and subcontractors with 2,000 or more employees. Do not count harvest-time employees as if they were year-round employees in measuring the number of employees for a phase-in.

*Response:* The Councils do not expect agricultural employers to be significantly affected by this rule, because of the COTS exemption. Implementation of the suggested phase-in would be very difficult, and the Councils have decided against this proposal. The dollar threshold exception for prime contracts has been raised to \$100,000 (which will especially help small business) and the verification deadlines lengthened.

##### d. By Agency

*Comment:* One commenter suggested a phase-in over a period of time or perhaps by agency.

*Response:* The phase-in by agency is an interesting suggestion. However, the Councils do not believe it is necessary to phase-in by time or agency. DHS and SSA are prepared to support implementation of this rule as revised.

#### 3. Applicability to Indefinite Delivery/Indefinite Quantity Contracts

##### a. Existing IDIQs

Background: The proposed rule’s preamble stated that the proposed rule: “Applies to solicitations issued and contracts awarded after the effective

date of the final rule in accordance with FAR 1.108(d).” Under the final rule, Departments and agencies should, in accordance with FAR 1.108(d)(3), amend existing indefinite-delivery/indefinite-quantity (IDIQ) contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.

1. *Comment:* One commenter suggested that not applying the rule to existing IDIQ contracts would enable a more even rollout of the program.

*Response:* The Councils have been advised that DHS and SSA are prepared to process E-Verify queries of contractor employees subject to the rule, including those performing under existing IDIQ contracts.

2. *Comment:* The same commenter objected to applying the rule to existing IDIQ contracts because companies made business decisions to bid on these contracts initially without contemplating the significant cost that will be incurred as a result of this new requirement.

*Response:* The contracts would be modified on a bilateral basis. The contractor will be able to decide whether it wishes to accept the clause. There can be no unilateral imposition of the clause on any pre-existing IDIQ contract without the contractor’s consent.

##### b. Cost Recovery for Modified Contracts

*Comment:* Two commenters asked for the rule to spell out the amount contractors would receive to implement compliance on existing IDIQ contracts.

*Response:* The FAR does not normally spell out the amount of consideration it expects the Government to pay on a contract negotiation. This is a contract-by-contract issue determined by individual contracting officers.

##### c. Meaning of “Substantial”

*Comment:* One commenter asked the Councils to define “substantial work” or “substantial number of orders.”

*Response:* The interpretation of “substantial” will be within the discretion of the contracting officer. The normal use of the word applies.

##### d. Meaning of IDIQ Contract.

*Comment:* One commenter stated that the FAR proposed rule would require re-verifying all employees currently employed under “indefinite delivery/indefinite quantity” contracts, and that most university Federal grants are multiyear agreements under which

thousands are employed. Another commenter discussed a multiyear contract it had with HHS to provide social services on a national level to victims of human trafficking, where HHS paid for services, up to a certain amount, and for a fixed period, to victims of trafficking on a per capital basis. This commenter asserted that—

- Its contract was not IDIQ;
- A contract extension is not a new contract; and
- A Federal contract for the provision of mainly social services to victims of trafficking is not an IDIQ contract.

*Response:* The commenters may be somewhat confused about what a FAR IDIQ contract is. A grant is not an IDIQ contract; grants are not covered by the FAR. A contract for social services to victims of trafficking might be an IDIQ contract. The contract itself will say whether it is an IDIQ contract; if so it would contain an IDIQ clause, such as 52.216–22 “Indefinite Quantity.” IDIQ contracts are described in the FAR at Subpart 16.5, especially at 16.504.

#### *E. Regulatory Flexibility Analysis and/or EO 12866/Regulatory Impact Analysis/Paperwork Reduction Act*

##### 1. Benefit Analysis Issues

*Comment:* Several commenters believe this rule will increase the Government’s cost of doing business because many contractors will pass back to the Government their costs of using E-Verify. Also, commenters claim that this rule will mean fewer businesses will want to bid on Government contract work.

*Response:* The Councils concur that this rule may result in additional compliance costs for contractors, and these additional costs could be passed back to the Government. However, Executive Order 12989, as amended, requires that contractors use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility. The President has found that Executive Order 12989 “is designed to promote economy and efficiency in Federal Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose workforce is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose workforce is more stable.” Consequently, the President has made the finding that the increased economy and efficiency to the Government as a result of this rule outweighs the cost of the rule.

##### 2. Cost Estimates

###### a. On Contractor

1. *Comment:* Commenters, including the SBA Office of Advocacy, argue that the Initial Regulatory Flexibility Analysis (IRFA) did not consider all of the relevant costs. They state that profit margins vary by industry, and even very low compliance costs could be significant for some businesses. For example, in the architecture and engineering contracting environment, the maximum allowable profit margin is six percent. Commenters also claim that the analysis did not consider costs such as the social welfare cost or the cost of penalties and lawsuits.

*Response:* The IRFA fully complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA compared estimated compliance costs for four distinct sizes of small business (10, 50, 100, and 500 employees) to the respective revenue of these businesses, using information obtained from the Small Business Administration.

The Councils do not agree that a compliance cost burden of 0.03 percent of revenue could typically be regarded as a significant economic impact. The Councils further disagree that it would be appropriate to add additional cost factors such as the “upcoming three percent mandatory IRS withholding” when these costs are not direct compliance costs of the rule.

With regard to the full social welfare cost of the rule, Regulatory Flexibility Analyses are only to include the direct impacts of a regulation on a small entity that is required to comply with the regulation. *Mid-Tex Electric Coop. v. FERC*, 773 F.2d 327, 340–343 (D.C. Cir. 1985) (holding indirect impact of a regulation on small entities that do business with or are otherwise dependent on the regulated entities not considered in RFA analyses). See also *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (In passing the Regulatory Flexibility Act, “Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. \* \* \* [T]o require an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.”). See, also, Regulatory Flexibility Improvements Act, Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, on H.R. 682, 109th Cong., 2nd Sess. (2006), at 13 (Statement of Thomas

Sullivan, Chief Counsel for Advocacy, Small Business Administration, testifying on the RFA by noting that “the RFA \* \* \* does not require agencies to analyze indirect impacts.”).

2. *Comment:* A commenter stated that OMB guidelines direct agencies to account for all regulatory (*i.e.*, non-budgetary) costs and that, in general, costs that are not within the discretion of an agency to avoid or prevent are properly attributable to the statute, and an agency may assign them accordingly. The commenter further stated that, nevertheless, all regulatory (*i.e.*, non-budgetary) costs must be accounted for and must be included in the IRFA.

*Response:* The commenter has confused the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), with the requirements of other administrative reviews. For example, the commenter is apparently suggesting that the IRFA should comply with OMB Circular A–4 and Executive Order 12866. These analyses are not required by the RFA, nor are they mandated for this rule under any other provision of law. The internal, managerial nature of this and other similarly-worded Executive Orders has been recognized by the courts, and actions taken by an agency to comply with the Executive Order are not subject to judicial review. *Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 445 (9th Cir. 1993) (citing *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986)). Although the requirements of the RFA analysis is fairly compatible with many of the analytical requirements under OMB guidance, the comments invoking Executive Order 12866 and OMB Circular A–4 standards to identify alleged deficiencies in the IRFA are misplaced.

3. *Comment:* A commenter stated that, upon hiring a new worker or upon assigning an employee to Federal contract work, and running the employee against E-Verify, the employer who receives a tentative nonconfirmation for an employee must continue to pay and train the new employee, only to possibly find out later that the worker cannot resolve the nonconfirmation and must be terminated. According to the commenter the IRFA should have taken these costs into account.

*Response:* The economic analysis included a cost of \$5,000 in termination and replacement expenses for each authorized employee that is terminated or resigns employment due to this rule. This \$5,000 estimate is meant to include the full range of the direct costs of termination, such as administrative expenses and training costs.

4. *Comment:* The SBA Office of Advocacy claimed that the economic analysis did not distinguish between prime small business contractors and small business subcontractors and that there is a disproportionate compliance cost burden on small business subcontractors.

*Response:* It is not clear how the direct cost of complying with the rule would materially differ depending on whether the contractor was a prime contractor or a subcontractor. The commenter did not give any specific examples of how a subcontractor's direct compliance costs would differ from a prime contractor's direct compliance costs.

5. *Comment:* The SBA Office of Advocacy stated that some contractors in the construction or manufacturing industries, for example, can have hundreds of employees and still be considered small. The commenter claimed that it is doubtful that DHS' \$419 figure is an accurate statement of the costs of the rule to these small businesses.

*Response:* The economic analysis did not state the cost to a contractor with "hundreds of employees" would be \$419. The economic analysis presented information showing how the rule would impact four sizes of small entities (10, 50, 100, and 500 employees) by comparing their estimated compliance costs to their respective revenues. The estimate of \$419 was for a contractor with ten employees. The economic analysis estimated the compliance cost to a company with 500 employees to be \$8,964, so the Councils agree with the commenter that a contractor with hundreds of employees would be expected to incur more than \$419 in compliance costs.

6. *Comment:* The SBA Office of Advocacy stated that if, after reviewing the comments received regarding its RFA certification, the FAR Council has reason to believe that it can no longer certify that the proposed rule will not have a significant economic impact on a substantial number of small entities, then the FAR Council should examine feasible alternatives that would lessen the burden on small entities. In that event, the commenter stated that the FAR Council should also publish an IRFA detailing those alternatives, describing the scope and impacts of the proposed rule on small entities, and provide another opportunity for small businesses to comment prior to publication of the final rule.

*Response:* The Councils did prepare an Initial Regulatory Flexibility Analysis. The Councils did not certify that the rule would not have a

significant economic impact on a substantial number of small entities. For the final rule, the Councils have prepared a Final Regulatory Flexibility Analysis. The proposed rule, at 73 FR 33379, explained the alternatives that were considered in order to minimize the impact of the rule on small entities. The Councils have considered additional alternatives in the FRFA based on public comments.

7. *Comment:* Many commenters argued that the assumption contained in the economic analysis that the costs related to unauthorized workers, such as the turnover and replacement costs and lost productivity costs due to the employment of unauthorized workers "are attributable to the Immigration and Nationality Act, not to the Federal Acquisition Regulation" would be true only if the Immigration and Nationality Act imposed on employers a continuing duty, post-hire, to investigate the immigration status of existing employees. The commenters are of the opinion that the Act imposes no such duty, and that Congress deliberately decided against imposing such a duty when it enacted IRCA in 1986. They argue that an employer who is currently employing unauthorized employee Jane Roe, after having hired her in 2002 in full accordance with I-9 procedures, and who has no knowledge or suspicions as to Roe's immigration status, is not breaking any law and is not illicitly avoiding any cost of doing business by keeping Roe in its employ without periodically investigating her status. Therefore, the commenters conclude that any new regulation that would force the employer to investigate Roe and acquire the knowledge that would require the employer to terminate her and replace her would impose a cost on the employer.

*Response:* The Immigration and Nationality Act expressly prohibits employers from knowingly continuing to employ an alien who is not authorized to work in the United States. INA section 274A(a)(2), 8 U.S.C. 1324a(a)(2). How an employer obtains knowledge of an employee's illegal status is immaterial—employers that have actual or constructive knowledge of their employees' illegal work status are statutorily obligated to cease their employment, and any costs that result are attributable to the statute, not to this rulemaking.

The commenters suggest that they would not have discovered the illegality but for their compliance with this rule, and that the consequences of their discovery should be accounted as a cost of this rule. This argument appears to rest on the belief that the INA's

prohibition on illegal employment applies only until the employee has filled out the Form I-9. While it may be that many employers have taken a misguided "see no evil" approach under which they hope to avoid learning inconvenient truths about the legal status of their existing workforce, that is not an approach that is countenanced by the INA.

While the cost of terminating or replacing unauthorized workers cannot properly be considered a cost of this rule, some turnover involving legal workers that are unable or unwilling to resolve their tentative non-confirmations can be counted as a cost of the rule. Such turnover costs for legal workers were estimated in the IRFA and Final Regulatory Flexibility Analysis (FRFA).

8. *Comment:* A commenter stated that the economic analysis assumes that the employee would bear the cost of driving to SSA, "but it will be the employer who likely will bear the salary cost of that time." In addition, the commenter believed that contractors and subcontractors will suffer far larger lost opportunity and productivity costs than those included in the economic analysis.

*Response:* The Councils disagree with the commenter. The economic analysis actually assumes the employer would incur a lost productivity cost 100% of the time an authorized employee needed to visit SSA to resolve the tentative non-confirmation and used "fully-loaded" wages to estimate lost productivity. A fully-loaded wage includes such benefits as retirement and savings, paid leave (vacations, holidays, sick leave, and other leave), insurance benefits (life, health, and disability), legally required benefits such as Social Security and Medicare, and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Councils used data from the Bureau of Labor Statistics in order to estimate the fully-loaded wage. Nevertheless, in practice we believe some employers may not incur lost productivity or opportunity cost if the employee takes personal time to resolve their non-confirmations. Also, to the extent employers have the capability to plan around employee absences and other employees are available, the productivity losses estimated in the economic analysis could be higher than what employers may actually incur. Given the fact that the economic analysis estimated a lost productivity cost 100 percent of the time an authorized employee needed to visit SSA at the fully loaded wage rate for a full eight hour day, the Councils

do not believe that the lost-productivity cost estimate for going to SSA is unreasonable.

9. *Comment:* Commenters stated that the economic analysis did not allocate costs for the time required for employers to identify covered employees and manage compliance with E-Verify. For new employees, commenters noted that these costs are admittedly nominal, as new employees are self-identified, and the E-Verify process goes hand-in-hand with the I-9 process already required. But the commenters stated that this is not the case for current employees because—

- To comply with current employee requirements, the employer must first take steps, through performance file review or manager interviews, to determine which employees are subject to the current employee obligation;
- Once the covered employees are identified, the employer must then ascertain if an E-Verify query is required, by checking E-Verify or I-9 records to see if a prior query was obtained;
- If not, the employer must then proceed to obtain the information necessary to conduct an E-Verify query for all such employees.

*Response:* The rulemaking requires existing employees assigned to the contract to be vetted through E-Verify. The economic analysis accounted for the marginal cost of the time it would take to execute the queries for the existing employees; however, the Councils agree that additional time should be added to account for the time needed to identify the covered existing employees.

Contractors will incur an opportunity cost of time to determine which of their existing employees will actually need to be vetted. After those employees have been identified, the contractor will review the employee's previously completed I-9 form to see if the I-9 complies with the terms of E-Verify enrollment. If the I-9 meets the criteria for E-Verify enrollment, the human resources specialist is expected to contact (by telephone for example) the employee to ensure that the information on the existing I-9 is still accurate (such as the stated basis for work authorization).

Some commenters appear to have assumed that each I-9 required a "face-to-face" meeting between the employee and a company representative. A "face-to-face" meeting may not be necessary if the I-9 does not need to be updated. Contractors will not normally need to spend several minutes with each employee discussing the need to confirm their Form I-9 information. For

example, many contractors may send out an e-mail to their employees or otherwise communicate to alert them that human resources may be contacting them in the future to validate the information on their I-9. However, there will be occasions when a face-to-face meeting will have to be arranged between the human resources specialist and an employee (to review E-Verify acceptable work authorization documents for example). Assuming an average of 20 minutes for a human resources specialist to review an existing I-9 and either call an employee to validate this I-9 or meet with the employee to review documents and an employee's average opportunity cost of 10 minutes to discuss the I-9 information, the RIA will be updated. In addition, the RIA will include an assumption that 10 percent of the time a second 20 minute contact (phone call or meeting) between the employee and human resources specialist could be necessary to resolve any additional I-9 issues related to E-Verify.

10. *Comment:* A commenter stated the economic analysis estimates 3.5 million Government contractor employees will be required to be vetted through E-Verify in 2009. Using the Government's own estimate, the commenter stated that about 370,000 employees will be terminated even though they are legally entitled to work in the United States.

Another commenter stated that in the economic analysis of the proposed rule, the assumption is made that 3.8 million employees of Federal contractors will be required to be run through E-Verify as a result of this rule for the first year the rule is in effect. Based on prior statements by DHS, the commenter notes that two percent of these workers will ultimately be fired because of their inability to resolve a tentative non-confirmation with the SSA or DHS. Thus the commenter calculates that, as a conservative estimate, approximately 70,000 lawfully authorized workers will be fired as a result of this rule.

*Response:* The economic analysis estimated that two percent of the cases where the tentative non-confirmation was not resolved could potentially result in an authorized worker either choosing to resign instead of working diligently to resolve the tentative non-confirmation or the employee being terminated. The economic analysis indicated that 5.3 percent of the time there was a tentative non-confirmation that was not resolved. Multiplying 2 percent times 5.3 percent equals 0.106 percent. In order to estimate the number of authorized employees that choose to get employment elsewhere or otherwise do not resolve the tentative non-

confirmation (for whatever reason), multiply the 3,831,992 employees vetted through E-Verify times 0.106 percent to get 4,060 authorized employees, not the 370,000 stated by the one commenter, nor the 70,000 "fired" as stated by the other commenter.

11. *Comment:* A commenter stated the RIA subtracted 10 percent of contract dollar volume but did not provide any basis for that assumption.

*Response:* Page 21 of the RIA stated that 10 percent was the approximation for contracts with no work performed in the U.S. The *Federal Procurement Data System—Next Generation* was the source of that information.

12. *Comment:* A commenter stated the economic analysis assumes that labor turnover at Government contractors mimics the annual labor turnover rates in private industry. Multiplying the calculated number of employees (1.5 million) by 1.4 yields 2.2 million contractor employees, a number that is compounded at a 5 percent annual rate for future years. The commenter stated that this appears to be a reasonable first approximation because contractors are not burdened by civil service rules that effectively forbid employee termination. The problem is that this assumption is logically inconsistent with the previous assumption that contractor labor and Government labor earn the same wages and salaries. The commenter concludes that, if this were true, turnover in Government employment would be no different than private sector turnover.

*Response:* The economic analysis stated "in order to adjust for turnover we assumed an annual turnover rate of 40.7 percent as the Bureau of Labor Statistics (BLS) estimated the annual turnover rate for all industries and regions in 2006 at 40.7 percent." We disagree that it is "logically inconsistent" to assume for the purposes of the economic analysis that Federal Government contractors have a turnover rate that is equivalent to the turnover in "all industries and regions" in the U.S. It is not entirely clear if the commenter believes the turnover rate used in the economic analysis is too high or too low as the commenter did not suggest a specific turnover rate that should be used in place of the 40.7% rate used in the economic analysis.

According to the BLS publication *Job Openings and Labor Turnover: January 2007* (which is the same source used for the 40.7% turnover estimate), the turnover rate for the federal government was 25%. It is very possible that the turnover rate for the federal government contract workforce more closely resembles the 25% turnover in the federal workforce than the 40.7% "all

industries and regions" turnover rate used in the economic analysis and that we have overestimated the number of employees vetted through E-Verify. However, there are more factors involved with turnover than simply pay. For example, the perceived increased job security of federal employment compared with the private sector likely influences the federal turnover rate. Also, the pension a federal employee receives is based on age and years of service and likely serves to encourage federal workers who have accrued significant amount of federal service not to leave federal employment. Many federal employees also choose to work for the federal government in order to serve the public good. Consequently, we did not feel it was appropriate to assume that federal contractor turnover rate was equivalent to the federal government turnover rate since there are nonwage considerations involved with job turnover. If federal contract employees do have a turnover rate closer to the federal government of 25% rate than the 40.7% estimated in the analysis, the amount of turnover and number of employees vetted through E-Verify have been overestimated in the economic analysis and the costs of the rule are therefore an overestimate.

13. *Comment:* A commenter stated the RIA includes what is described as an uncertainty analysis, but in fact it consists of merely a numerical sensitivity analysis with respect to two assumptions: (1) The number of contractors and subcontractors affected by mandatory E-Verify; and (2) the number of contractor and subcontractor employees that would be vetted through mandatory E-Verify. The commenter stated that "[t]he product of this 'uncertainty analysis' is a series of impressive looking, but substantively and presentationally misleading color graphs." The commenter also claimed that this analysis violates Office of Management and Budget's Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (2002); Notice and Republication.

*Response:* The Regulatory Flexibility Act does not require any sensitivity analysis or uncertainty analysis be performed in an IRFA. However, the RIA provided a sensitivity analysis simply to show how the costs of the rule could change if the primary estimates of two key cost drivers were varied. First, the sensitivity analysis varied the number of employees that are vetted through E-Verify (holding all else constant) and determined how the overall cost of the rule would change.

Secondly, the sensitivity analysis varied the number of covered contractors and subcontractors (holding all else constant) that have to be enrolled into E-Verify and determined how the overall cost of the rule would be impacted. Finally, the sensitivity analysis varied both the number of employees and the number of contractors simultaneously in order to get an overall sense of how uncertainty in these two key variables impacts the overall cost.

The model developed by the Councils to estimate the number of employees vetted through E-Verify included variables that were informed by professional judgment. Such variables include the contract percentage for labor (26 percent), overhead (26 percent), material expenses (26 percent), general and administrative (12 percent), subcontractors (20 percent), and the average wage of a Federal contract worker (\$66,705). (Some of these figures are percentages of others.) Changes in any of these variables would impact the estimate of the number of employees vetted through E-Verify. As the estimate of the number of employees vetted through E-Verify is directly influenced by these variables, we believe it is useful to show how the overall costs of the rule could change if the number of employees vetted changed. The Councils continue to believe its estimate of the number of employees vetted through E-Verify is reasonable; but the sensitivity analysis does show how the costs would change if the number of employees estimated were varied by 50 percent using a triangular distribution.

The estimate of the number of primary contractors within the scope of the rule is based on a query of the *Federal Procurement Data System-Next Generation* and is not based on a professional estimate. However, the number of covered subcontractors that are not otherwise a prime contractor is not available and this variable is a professional estimate. The sensitivity analysis shows how the costs would change if the number of covered contractors estimated were varied by 25 percent using a triangular distribution. Both the 25 percent and 50 percent ranges used in the sensitivity analysis were selected based on professional judgment.

14. *Comment:* A commenter disagreed with the Fiscal Year 2007 estimate that 3,475,730 employees will be vetted through E-Verify. The commenter believes that the Government is assuming that 75 percent of a contractor's employees will be assigned to a contract while only 25 percent will not. The commenter knows of many

large employers and with few exceptions the portion of their revenue derived from Federal contracts is significantly less than 25 percent. The commenter believes many more employees will be vetted through E-Verify than has been estimated by the Government. Thus the commenter concluded that the costs have been understated.

*Response:* The Councils agree that there are numerous businesses which contract with the Federal Government but derive a relatively small portion of their revenue from the Federal Government. However, there are also many contractors that have enough Federal contracting business that they have organized themselves into business units that concentrate on Federal contracting sales. The estimate takes into account both businesses that do both relatively little Federal contracting and those that do extensive Federal contracting.

Many commenters appear to be interpreting the term "contractor" in an overbroad fashion. Only the legal entity that signs the contract is bound by the E-Verify obligation, not necessarily all affiliates or subsidiaries of that entity. Each contractor has the ability to organize or incorporate itself as it chooses, and questions of whether certain entities are a part of the contracting legal entity can only be answered in specific factual contexts.

Regarding the commenter's belief that the number of employees vetted through E-Verify is understated, there were several assumptions made when conducting the economic analysis that may mean the actual number of employees vetted has been overestimated. The proposed rule does not apply to any employees hired prior to November 6, 1986, as these employees are not subject to employment verification under INA section 274A, 8 U.S.C. 1324a. The economic analysis did not remove any of these workers from the estimate of the number of employees vetted.

In addition, several States have laws that already require varying degrees of E-Verify use. There are also Federal contractors that have already chosen to enroll in E-Verify that do not operate in a State with an E-Verify requirement. Since many Federal contractors are already enrolled in E-Verify or operate in a State with an E-Verify requirement, these contractors have already incurred many of the enrollment costs of this rulemaking and their newly hired employees would be vetted through E-Verify even absent this rulemaking. The economic analysis did not reduce the cost estimate to account for the costs of

employers who have already enrolled in E-Verify.

Furthermore this final rule has narrowed the scope of those required to be vetted through E-Verify. For example, the final rule clarifies that the E-Verify requirement does not apply to prime contracts with performance periods of less than 120 days and raises the threshold for prime contractors to the simplified acquisition threshold (\$100,000) instead of the micro-purchase threshold (\$3,000). However, the estimate of the number of employees vetted through E-Verify has not been reduced. We believe for these reasons the cost estimates are not understated.

15. *Comment:* Other commenters, including the SBA Office of Advocacy, that believed that the number of contractors that will be vetted through E-Verify has been underestimated criticize the fixed factors (e.g., 26 percent for labor) used in the economic analysis as well as the estimate that the number of subcontractors is assumed to equal 20 percent of the number of prime contractors. One commenter claims that the estimates used by the Councils are not based on “empirical data” and that the economic analysis was not explicit regarding how these factors were determined.

*Response:* The dollar value of the contracts estimated to be within the scope of the rule was found by querying the *Federal Procurement Data System* and does not rely on an estimate by the Councils. Instead of simply providing a “top-level” estimate, the Councils developed a model to estimate the number of employees that would be expected to be vetted through E-Verify. The factors utilized (e.g., 26 percent for labor) are all multiplied against the estimated dollar value of contracts. When describing the percentage estimates used to estimate factors utilized, the economic analysis specifically stated “we understand these assumptions are rough and we welcome public comment providing more precise information.” However, the commenters have not provided better information.

We note that the analysis required by the Regulatory Flexibility Act need not produce statistical certainty. The law requires that the Councils “demonstrate a ‘reasonable, good-faith effort’ to fulfill [the RFA’s] requirements.” *Ranchers Cattlemen Action Legal Fund*, 415 F.3d 1078, 1101 (9th Cir., 2005). See also *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114–15 (1st Cir. 1997). The IRFA and economic analysis produced by the Councils in this rulemaking meet that standard. The assumptions underlying the economic analysis are reasonable, and the

Councils have utilized the best data available to produce the IRFA and the economic analysis. We continue to believe the estimates we provided are reasonable.

16. *Comment:* A commenter stated that over 54 million people are currently employed by companies that work on Government contracts (commenter cited *Wall Street Journal Examines How Federal Government Use of Contract Workers Contributes to Number of Uninsured U.S. Residents*, Wall Street Journal, 26 March 2008). The commenter assumed an 8 percent error rate for E-Verify, and claimed that as many as 432,000 legal employees could have their employment disrupted.

*Response:* The article cited by the commenter stated there were “5.4 million Federal service-contract workers” not the 54 million contract workers cited by the commenter. We note that the 5.4 million estimate may include contracts that are not covered by the rule. For example, the scope of the rule excludes contracts that do not include any work that will be performed in the United States.

The Councils disagree that 432,000 legal employees will have their employment disrupted. The economic analysis stated there was a 5.8 percent tentative non confirmation rate. Multiplying 3,831,992 employees by 5.8 percent equals 222,256 employees (who are both authorized and unauthorized) that would receive a tentative non-confirmation under the projections in the economic analysis. Current experience with E-Verify shows that about 0.5 percent of employees successfully take steps to resolve the tentative non-confirmation, which equals 19,160 authorized employees who may be required to resolve a tentative nonconfirmation.

17. *Comment:* The SBA Office of Advocacy stated that the Regulatory Planning and Review section of the rule states that the rule will impact 168,324 businesses. The commenter further stated that the regulatory flexibility analysis states that there will be 162,125 small businesses affected by the rule. The commenter concludes that the public is left to assume that there are 162,125 small business with prime contracts and subcontracts. The commenter cites data from the Small Business Administration that in FY 2006 agencies awarded \$60,703,667,336 to small business subcontractors. The commenter calculates that if this amount were distributed to 162,125 small business subcontractors it would mean that each business received on the average a contract valued at \$375,000. However, the commenter noted that

DHS cites the average annual revenue of a ten-person firm as approximately \$1.4 million.

*Response:* The estimate of 168,324 contractors impacted is the FY09 annual estimate. However, the 162,125 small business subcontracts is not an annual estimate. As noted in the proposed rule at 73 FR 33378, “while there are no reliable numbers for subcontracts awarded to small businesses, the Dynamic Small Business database of the Central Contractor Registration—a database of basic business information for contractors that seek to do business with the Federal Government—gives a number of 324,250 small business profiles that are registered. Assuming that 50 percent of these small businesses contract with the Federal Government at either the prime or subcontract level, then that number is 162,125 small businesses.” Registration with the Central Contractor Registration (CCR) does not mean the small business is currently or ever will be a Federal contractor; it simply means the registrant seeks to do business with the Federal Government. Consequently, dividing 50 percent of the small business CCR registrants (162,125 small businesses) by the FY 06 SBA estimate of \$61 billion in small business contract awards may yield \$375,000, but the meaning of that statistic is not clear.

As explained in the economic analysis, the estimate of average annual revenue of \$1.4 million for a ten-person firm is based on data from the Small Business Administration. We have no reason to believe this data from SBA is unreliable. We assume many small businesses have revenue from sources other than Federal Government contracts. The economic analysis also made no claim that a ten-person firm was the average size of a small business that received a Federal contract. Rather, it presented information on how the rule would impact four sizes of small entities (10, 50, 100 and 500 employees) by comparing their estimated compliance costs to their estimated respective revenues.

18. *Comment:* Commenters noted that, in order to comply with the E-Verify MOU, employers agree to only accept “List B” documents listed on the Form I-9 that contain a photo. Commenters stated that the cost of obtaining a photo ID for those employees should be included as a cost of this rule. In addition, commenters stated that 11 percent of U.S. citizens do not currently have a photo ID and cited the Brennan Center for Justice’s report entitled “*Citizens Without Proof, A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo*

*Documentation*, Brennan Center for Justice, New York School of Law, November 2006.”

*Response:* The cost of obtaining a photo ID should be included as a cost of the regulation, and it has been added into the economic analysis. However, the Councils do not agree that 11 percent of the employees covered by the requirements of the rule might not have a photo ID.

The entire study cited by the commenter was only three pages and did not include many details such as survey methodology and how the results were determined. In addition to the Brennan survey cited by the commenter, a publicly available American University study entitled “*Voter IDs Are Not the Problem: A Survey of Three States*” was reviewed. (American University Center for Democracy and Election Management, January 9, 2008. <http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf>). This survey of 2,000 registered voters in Indiana, Maryland, and Mississippi determined that, overall, only 1.2 percent of the total respondents lacked Government-issued photo identification. Comparing the results of the American University study with the Brennan survey shows there appears to be considerable disagreement among the estimates of the percentage of Americans without a photo ID.

However, it is not clear how either the results of the Brennan study or the American University study is definitive for the purposes of the final rule’s economic analysis. The rulemaking is regulating federal contractors. The universe of federal contractors is not directly comparable to either the population of “voting-age American citizens” (the Brennan survey sample) or “registered voters” (the AU study sample). Both the “voting-age American citizen” and “registered voter” populations by definition include people not in the workforce.

Consequently, the final economic analysis will assume 0.5 percent of workers vetted through E-Verify will need to obtain a photo ID and that employers will incur an eight-hour opportunity cost so that the employees can obtain a photo ID.

19. *Comment:* Commenters believed that the costs of implementing the rule are underestimated.

*Response:* The Councils agree in part, and have reviewed the economic analysis with the E-Verify program and have increased certain enrollment and training time cost estimates in the economic analysis for those contractors that enroll in E-Verify. Additional costs have been added for employers to

identify those existing employees that need to be vetted through E-Verify. Consequently, the estimated implementation costs have increased for the final rule relative to the costs estimated for the proposed rule. Another category of implementation costs was added to the economic analysis. This category, called “Miscellaneous Implementation Costs,” is estimated to be an additional 10 percent of the total calculated implementation costs (such as employer enrollment, reviewing and updating the I-9’s of existing employees, the purchase of a computer) to cover costs companies may incur to execute the rulemaking requirements, such as planning.

20. *Comment:* A commenter stated that the proposed rule requires contracting officers to modify covered existing indefinite quantity/indefinite delivery (IDIQ) contracts to add the proposed E-Verify contract clause. Commenters believe the RIA excludes the cost of modifying these IDIQs and that the Government will need to engage in negotiations with these IDIQ contractors. In addition, the commenter believes the Government will owe “consideration” to the contractors in exchange for agreeing to include the E-Verify contract clause. The commenter believes, based on the professional estimate of a former Federal procurement official, that the number of existing IDIQ contracts that would need to be modified is approximately 10,000.

*Response:* The Councils agree that the economic analysis did not include the cost of modifying these IDIQ contracts, but disagree regarding the extent of the cost burden of these modifications. For the purpose of the economic analysis, the commenter’s estimate that 10,000 existing contracts will need to be modified was used. However, extensive “negotiations” between the Government and the contractors are not expected. The final economic analysis uses a two-hour opportunity cost of time for the contractor to process the modification and have discussions with the Government, if needed.

The **Federal Register** does not normally spell out the amount or type of consideration the Government expects to pay on a contract negotiation. This is a contract-by-contract issue determined by individual contracting officers. This is a pass-through cost to the Government. However, due to the statutory preference for multiple award IDIQs and the resultant competitive pressures, the Councils expect that the amount of consideration required at time of contract modification would be negligible.

21. *Comment:* A commenter disagrees with the estimate of the average wage of a Federal contractor used in the economic analysis. The commenter notes that the economic analysis assumed the average yearly salary a Federal Government employee earns (\$66,705) is a reasonable proxy for the average annual salary of a Federal contractor and noted that, according to the Bureau of Labor Statistics, the average wage rate in the U.S. is approximately \$40,000. The commenter believed that the average salary a Government contractor earns is less than the average salary a Federal employee earns and the BLS estimate of \$40,000 is a better approximation of Federal contractor pay than the \$66,705 used in the economic analysis. The commenter concludes that the consequence of the annual salary of Federal contractors being overestimated is an underestimate of the number of contract employees and an underestimate of the costs of mandatory E-Verify.

*Response:* The Councils do not have data that shows the average wage of a contract employee on a Federal contract. Consequently, we had to rely on our extensive knowledge of Federal contracts and our knowledge of the personnel who perform work on those contracts to inform our estimate of a reasonable wage rate of a Federal contractor.

The Councils continue to believe the average U.S. wage rate of approximately \$40,000 annually is a poor proxy for the average Federal contractor wage. As explained in the economic analysis, the average educational attainment level of the average Federal Government employee is significantly higher than the educational attainment level of the general U.S. workforce. In addition, according to the Bureau of Labor Statistics, “Although the Federal Government employs workers in every major occupational group, workers are not employed in the same proportions in which they are employed throughout the economy as a whole \* \* \* The analytical and technical nature of many Government duties translates into a much higher proportion of professional, management, business, and financial occupations in the Federal Government, compared with most industries. Conversely, the Government sells very little, so it employs relatively few sales workers.” (see <http://www.bls.gov/oco/cg/cgs041.htm>).

As a result of the higher Government educational level, which is driven by the higher proportion of professional, management, business, and financial occupations in Government when

compared to the U.S. workforce, the U.S. workforce's average annual \$40,000 salary can not reasonably be used as a proxy for the work the Federal Government is required to perform. The Councils believe the average wage rate for employees performing the work the Federal Government is required to perform is certainly higher than the U.S. average wage rate and based on our experience with contracts we continue to believe that \$66,705 is a reasonable approximation of the average Federal contractor's annual salary. This estimate is an approximation and the actual wage rate of a Federal contractor could be higher or lower than our estimate. The economic analysis includes a sensitivity analysis that shows how the cost of the regulation changes based on increases or decreases in the number of employees being vetted through E-Verify.

We further note there is some credible information that shows Federal Government employees are significantly underpaid when compared to similar private sector occupations. For example, according to the Federal Salary Council, "Federal employees make an average of 23 percent less than their private sector counterparts." (see [http://www.govexec.com/story\\_page.cfm?articleid=38212&ref=rellink](http://www.govexec.com/story_page.cfm?articleid=38212&ref=rellink)). While we did not increase the \$66,705 average Federal Government salary upward by 23 percent to account for this "pay gap" when estimating the wage of Federal Government contractors, commenters should be aware of this information.

22. *Comment:* A commenter provided wage survey data that established the prevailing rate for many occupations covered under the McNamara O'Hara Service Contract Act and the Davis Bacon Act for seven specific job titles. The commenter provided hourly and annual wage rates for the jobs: Accounting Clerk I, Data Entry Operator I, Cook I, Food Service Worker, Janitor, Laborer, Grounds Maintenance, Computer Operator I. The commenter noted that the wage rates for the seven specific occupations (selected by the commenter) were much less than the \$66,705 average wage rate used in the economic analysis.

*Response:* While the Councils do not dispute that there are specific occupations in which Federal contractors make less than the average wage rate of \$66,705 used in the analysis, the higher proportion of professional, management, business, and financial occupations in the Federal Government, compared to the U.S. workforce, means the work the Federal Government performs requires a relatively higher educated workforce

that earns more than the national average.

23. *Comment:* A commenter stated that the economic analysis begins with a figure for the number of prime Government contractors in 2007 and assumes that this number will increase at a 5 percent compound annual rate over the study period. No justification is provided for this assumption.

*Response:* The economic analysis noted that it is difficult to project the number of contractors over the ten-year period of analysis (FY 2009–FY 2018) due to the number of variables that could influence the amount of Government spending and the amount of that spending that would be used to purchase contract support. The Councils continue to believe that a 5 percent growth rate is a reasonable assumption.

24. *Comment:* The SBA Office of Advocacy stated that the proposed rule does not allow small businesses to fully assess the impact of the rule because the economic analysis lacks transparency. The commenter argues that the economic analysis in the docket is problematic from a methodological point of view because the proposal includes only the number of contracts in FY06, total value of contracts in FY06, and the total value of contracts in FY07. The commenter concludes that the remainder of the analysis amounts to a series of behavioral assumptions that are neither substantiated nor justified.

*Response:* The Councils disagree that the economic analysis is problematic or that it lacks transparency. The write-up, accompanying tables, and sample calculations show exactly how the costs were calculated. In addition, the economic analysis included a section that showed how small entities of various sizes (10, 50, 100, and 500 employees) would be impacted by the specific cost categories of the rule (start-up and training costs, verification costs, authorized employee replacement cost) and compared those costs to the estimated revenue of companies in those respective sizes in order to get an idea of the economic impact of the rule on those sizes of small entities.

The economic analysis did use FY 2006 data to estimate the number of contractors, but as explained in the economic analysis, the number of real dollars spent on Federal contracts remained nearly the same in FY 2006 and FY 2007. The commenter did not provide any information to show why our assessment was incorrect or unreasonable, but just asserted that it was "problematic." While there is not "empirical data" to support every assumption in the economic analysis, the use of professional judgment is

accepted practice when conducting IRFAs. The IRFA requested comments in the section of the analysis that explained very methodically how the number of employees impacted were modeled and invited more precise information from the public to inform our model. None was received.

25. *Comment:* The SBA Office of Advocacy stated that the total number of contracts is derived by making various assumptions, such as assuming that subcontractors have a 20 percent share, there are 20 percent new contracts per year, and that the total number of contracts grows at five percent per year. The commenter states if any of these assumptions were to change the total number of contracts in the analysis would be affected. The commenter further states the proposal does not indicate where the percentages came from.

*Response:* Page 19 of the economic analysis stated "The 20 percent estimate of covered subcontractors is a "best guess" provided by Government contracting professionals." Page 20 states " \* \* \* the Federal Government does not have an estimate of the total number of assigned employees that perform work on Government contracts or an estimate of the number of new hires at a covered contractor or subcontractor. In order to estimate the number of employees that will be vetted through the E-Verify system, we must make a series of assumptions that allow us to estimate the amount of contract labor being purchased by the Government and then convert the amount of labor being purchased into Full Time Equivalent positions (FTE's)." Pages 21 through 23 explain the calculations and clearly label which numbers are estimates.

The Councils agree that changes in these assumptions would change the number of contractors and the number of personnel vetted through E-Verify. The economic analysis includes an appendix that shows how the cost of the rule would change if the number of contractors and the number of employees vetted through E-Verify change.

26. *Comment:* A commenter stated that the rule should consider the cost of the rule on businesses that make a business decision not to do business with the Federal Government due to the rule.

*Response:* The Councils agree, but we note that under the Regulatory Flexibility Act, the economic analysis need only include the direct impact of a regulation on a small entity that is required to comply with the regulation. Nevertheless, the analysis provided

under the requirements of EO 12866 and the Regulatory Flexibility Act implicitly takes this potential impact into account. The analysis is conducted under the assumption that every federal contractor and subcontractor would choose to incur the cost of the rulemaking and continue to do business with the Federal Government. Businesses may choose not to incur the cost of compliance with this rule, but would presumably only do so were the cost of compliance higher than avoiding doing business with the government. In such cases, the analysis would actually have overestimated the impact of the rule.

27. *Comment:* A commenter believes the *Federal Procurement Data System-Next Generation* (FPDS-NG), the source for the estimate of the number of FY 2006 prime contractors in the economic analysis, contains inaccurate data. The commenter believes the use of data from the FPDS-NG in the economic analysis is "questionable" and that the number of contractors in FPDS-NG is underreported.

*Response:* The Councils disagree. FPDS is the comprehensive web-based tool for agencies to report contract actions. It collects, processes, and disseminates official data on Government contracts. It is therefore the best available source of data on Government contract actions.

28. *Comment:* A commenter stated that multiple people would need to be trained to run the E-Verify checks and estimated that it would take "3 to 4 hours of time for one person to register, understand the MOU and take the tutorial." The commenter questioned estimates contained in the economic analysis such as: The ten-minute registration process, the training time needed for the different types of E-Verify Users (Corporate Administrator and General User 1.5 hours and Program Administrator 2.5 hours; Program Administrators and General Users would also incur 0.5 hours of recurring training), and the estimate of the amount of time needed to review the MOU. The commenter further noted that the economic analysis assumed that to sign the MOU would take 30 minutes for a Human Resources Manager; if a General Manager reviews the MOU (assumed to be 40 percent of the time) the General Manager's review would add another 30 minutes, and if an attorney reviewed the MOU (assumed to be 25 percent of the time), the attorney's review would add another one hour. The commenter did not believe these estimates were accurate for a multinational corporation.

*Response:* The burden estimates used in the economic analysis are assumed to

reflect an average burden for all contractors that enroll in E-Verify. Experiences of one company or a specific group of companies may not accurately reflect the burden at the typical contractor. However, the E-Verify program office has reviewed the commenter's comments and has agreed that some of the estimates used in the economic analysis should be increased.

The economic analysis assumed that a human resources manager would take 0.5 hours to read and sign the MOU; that estimate has been increased to 1.5 hours. Also, the hours for attorney review are being increased from 1 hour to 2 hours, and the estimate for a general manager review will be raised from 0.5 hour to 1 hour. Note that in many companies, especially the smaller entities; the human resources manager is the same person as the general manager. We have assumed that, even though there is no requirement for more than one person to be involved with registering the company and signing the MOU, there may be multiple personnel involved in some instances.

The initial training hours for the corporate administrator have been increased from 1.5 hours to 2 hours, the program administrator initial training hours have been raised from 2.5 hours to 3 hours, and the general user initial training hours are increased from 1.5 hours to 2 hours.

The 30-minute estimate for annual recurring training for the program administrator and general user will be increased to a full hour for each. This "recurring training" includes time to review new additions to the user manual.

In summary, while it could take three to four hours to register, understand the MOU, and take the tutorial, these activities only occur when the contractor initially enrolls. Staff later registered by the contractor as general users and program administrators will only need to take the tutorial to begin utilizing the E-Verify system.

29. *Comment:* Commenters believed that on-going compliance obligations have been understated. The commenters stated that calculations did not include an analysis of coping with the constantly changing program. Commenters argue that—

- Every time the MOU changes, E-Verify employers will have to analyze whether they need to sign a new MOU;
- Every time the manual changes, employers will need to spend time reviewing what has changed, whether it impacts them, and how to accommodate any required changes; and
- Every time the photo tool changes and expands, all E-Verify organizations

will need to train their staff and change their processes accordingly and then will need to audit compliance with the new standards.

The commenters consider that this on-going compliance obligation is compounded by the fact that a large employer cannot simply distribute the information provided by the Government about legal changes, because each change must be translated into materials specific to the employer's processes and procedures.

*Response:* We disagree with the characterization that E-Verify is a burdensome, constantly changing program. The September 2007 Westat report found that "The vast majority of [E-Verify] employers (96 percent of long-term users) disagreed or strongly disagreed that the tasks required by the system overburden their staff." (pg. 65) The report also stated that approximately 97 percent of long-term users found the indirect set-up and maintenance costs associated with the system were either no burden or only a slight burden (pg. 106). DHS does not require employers to sign a new MOU when there is a change to the program. Currently, upon logging onto E-Verify, users are greeted with a message board that contains all new enhancements to the system and any applicable policy changes. The message board contains a full archive of all messages in the event that the employer has not logged on to the E-Verify system in several months. Of all the recent enhancements to the program, only the addition of the Photo Tool required E-Verify users to complete additional training. This action was atypical. This additional training was an unusual requirement for the program as changes to the program do not typically require mandatory training. The analysis includes a full hour of "on-going" training each year so that the user can keep current on any changes to E-Verify.

Federal contractors who happen to be currently enrolled in E-Verify will be required to take a tutorial refresher that addresses the verification of existing employees. However, the economic analysis assumed that none of the Federal contractors were currently enrolled in E-Verify and consequently estimated the costs for the full training module, not for the refresher module. To the extent that the contractor is an existing E-Verify user, the economic analysis likely overestimates the training burden.

30. *Comment:* A commenter noted the challenges and costs of resolving tentative nonconfirmations are understated. Commenter states that, for its members, consistency and

compliance are critical and must be built into the process from day one. This is especially important for implementing tentative nonconfirmation procedures. Based upon the experience of its members that are E-Verify users, the commenter believes the RIA estimates are grossly understated. One large multinational employer provided the following data on its experience with E-Verify when it was hiring many student interns between January 1, 2008 and May 22, 2008. Out of 598 queries submitted, it received tentative nonconfirmation notices on 92 or 15.38 percent. Out of the 83 DHS tentative nonconfirmations (the remainder were SSA tentative nonconfirmations), about 80 percent of those tentative nonconfirmations required personal attention to resolve, at a great cost to the employer and the impacted foreign nationals.

*Response:* While the RIA estimated that 5.1 percent of the employees would receive SSA tentative nonconfirmations; the employer in the example only received 9 SSA tentative nonconfirmations (if 83 were DHS tentative nonconfirmations) out of 598 total queries. This is 1.5 percent, or significantly less than the 5.1 percent estimated in the RIA.

However, the Councils agree with the commenter that the RIA estimate of ten minutes to complete the tentative nonconfirmations should be increased. The Councils believe ten minutes is a reasonable estimate solely for the time needed to review the tentative nonconfirmation notice with the employee and for the employee to decide if he/she want to contest the tentative nonconfirmation. If the employee decides to contest the tentative non-confirmation, it should take an additional ten minutes for the employer to print out and provide the referral notice to the employee; this additional time is being added to the estimate.

The employee must then contact the appropriate Government office within eight Federal working days. The employer is not required to spend any additional time on the resolution process until the employee has resolved the case with the appropriate Federal agency. This time commitment is part of the verification process followed by all E-Verify users and is not unique to Federal contractors.

31. *Comment:* A commenter noted that its members report that corrections at the SSA usually take in excess of 90 days. The members report that employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records

corrected. The members also report that policies for handling this, e.g., does the employee get paid time off to go to SSA, must be consistent and fair. One member reports that its biggest issue actually happens *after* an employee gets his or her record corrected by SSA. At that point, the member states that the employer must spend weeks waiting in limbo. According to the employer, E-Verify instructed this employer to check the record weekly because it was still not clearing even after SSA fixed the error. The commenter notes that when this occurs, the employer and employee are left in an awkward predicament because nothing happens—no approval is issued, no new tentative nonconfirmation is issued, and no final nonconfirmation is issued.

*Response:* First, this rule does not require that the employer compensate the employee for time away from work. Next, the September 2007 Westat report concluded that “[m]ost case study employees who had received tentative nonconfirmations reported no costs associated with resolving the finding \* \* \*.” (pg. 101) Data capture methods instituted for E-Verify with the new electronic secondary process at SSA show that the vast majority of SSA tentative nonconfirmations (94.9 percent) are resolved within 24 hours of contacting the SSA Field Office.

32. *Comment:* A commenter stated that a number of the commenter’s members have made arrangements to electronically deliver tentative nonconfirmations, and they inform the commenter that it is not unusual for 24 hours to pass before the tentative nonconfirmation even reaches the employee. The commenters state that where companies conduct some of their E-Verify queries in-house and outsource other queries to a third party, the amount of time needed to discuss a tentative nonconfirmation will vary depending on who submitted the query.

*Response:* A 24-hour or longer delay in passing a tentative nonconfirmation notice to an employee does not impact the eight-day timeframe for contacting DHS or SSA. The employee must be given the tentative nonconfirmation notice in advance of an employer referring a case to DHS or SSA. The employer must review the tentative nonconfirmation notice with the employee and ask the employee whether he/she chooses to contest the tentative nonconfirmation. If the employee chooses to contest the tentative nonconfirmation, the employer will then go back into the E-Verify system and initiate the referral in the system, which begins the eight-day period.

33. *Comment:* One commenter disagreed with the economic analysis regarding the one-minute estimate to resolve a final nonconfirmation.

*Response:* The one-minute period estimated for resolution of a final nonconfirmation refers solely to the time it takes for an employer to close the case in the E-Verify system, not the external processes the employer may take in response to a final nonconfirmation. The economic analysis includes a \$5,000 termination and replacement cost for an authorized employee who leaves employment with the employer (the employee is terminated or resigns). The cost of replacing unauthorized workers is attributed to the cost of current immigration law and is not considered to be a cost of this rule.

34. *Comment:* Commenters stated that the eight-day timeframe provided to employees for resolving a discrepancy is likewise inadequate. They state that—

- When an employer receives a tentative non-confirmation, the employer must notify the employee and provide him or her with an opportunity to contest that finding;
- If the employee contests, he or she then has eight business days to visit an SSA office or call USCIS to try to resolve the discrepancy; and
- Eight business days does not provide enough time for many employees to visit an SSA office, particularly in cases where the employee is working on a remote jobsite potentially hundreds of miles away from the closest SSA office and/or where transportation is not readily available.

Therefore, the commenter suggested amending the requirement to allow employees thirty business days to try to resolve the discrepancy with SSA or DHS.

*Response:* An employee who receives a tentative nonconfirmation is given eight Federal Government work days to contact the appropriate agency. After visiting SSA, or placing a phone call to DHS, the applicable agency must also provide a response to the employee within two days.

The E-Verify statute (404(c) of IIRIRA) sets forth the design parameters for the secondary confirmation system. It states that the Secretary of Homeland Security shall specify a secondary verification system capable of providing a final confirmation or nonconfirmation within 10 working days after the date of the tentative nonconfirmation. USCIS experience in administering the program shows that 95 percent of secondary verifications are completed within 2 days. In order for the system

to comply with the statutory specifications, USCIS allows eight working days for the employee to visit SSA or contact DHS.

In cases where additional time may be required for resolving the discrepancy with SSA or DHS, the employer will receive a message through E-Verify called "Case in Continuance," which may extend beyond the ten-day resolution period. During this time, the employer may not take action against the employee while the employee is resolving his or her case.

35. *Comment:* A commenter from an institution of higher education expected that most rejections will involve non-immigrant post-doctoral associates and fellows who have already undergone careful scrutiny in obtaining a visa to enter the United States.

*Response:* The Immigration Reform and Control Act of 1986 (IRCA) requires all employers to verify the identity and work authorization of any employee working in the U.S. by having the employee complete a Form I-9. While nonimmigrant post-doctoral associates and fellows have already obtained a visa to enter the U.S., this does not alleviate the employer of its responsibility under IRCA. In addition, the fact that an alien has been issued a visa has nothing directly to do with whether the alien is work-authorized in the United States, as millions of aliens who are issued visas and admitted to the United States in B, F or certain other nonimmigrant categories are not authorized to be employed in this country.

36. *Comment:* The SBA Office of Advocacy was concerned about its ability to successfully complete the on-line tutorial, required by the MOU that contractors will be required to sign. The commenter states that, while the proposed rule acknowledges the tutorial, it does not acknowledge the requirement that a proficiency test at the end of the tutorial needs to be taken and a 71 percent pass rate achieved. The commenter is concerned about the cost implications to an employer who does not pass the test, stating that the costs involved have more dimensions than just the opportunity cost.

*Response:* The E-Verify program knows of no situation in the history of the program where an employer was ultimately unable to participate because it could not pass the mastery test. The cost and burden associated with the tutorial is more than adequate to also cover the mastery test as well.

Employers are able to retake the mastery test as many times as is necessary to pass. Taking the tutorial and the mastery test is a requirement to

use the system and run verification queries. Those responsible for running queries (and passing the mastery test) are not always the same as those who have signed the MOU on behalf of the entire company.

37. *Comment:* Commenters stated that not all contractors have computers at all sites at which they engage in hiring. Consequently, they conclude that they will incur costs to computerize and establish Internet accessibility for every facility at which they hire employees. Given the mobile nature of traveling carnivals and circuses, as well as the sporadic availability of Internet access in some rural areas, the commenter does not believe that all employers can have reliable Internet access or even regular access to a computer while traveling to conduct business. Being mobile, the carnival industry would face additional costs associated with transporting this equipment from location to location.

*Response:* It would be unusual for a Federal Government contractor not to have Internet access and a computer. Still, employers have the option of using an outside company or vendor to run their queries. Through this method of using E-Verify, the third party engages in an MOU with the DHS and SSA on behalf of its client. Employers could also seek out other sources of Internet access, such as a public library. While the commenter offered no specific information on the increased marginal cost of transporting a laptop computer and printer, it does not appear to be significant.

The economic analysis estimated that two percent of contractors did not have a computer or Internet connection at their hiring site. The economic analysis stated "If we do not receive comments indicating that covered Federal contractors or subcontractors would need to purchase a computer and/or internet connection, we may eliminate this category of costs in the final rule." As such comments were received, that cost will be included in the final rule.

38. *Comment:* Commenters noted the E-Verify MOU requires the employer to make photocopies of certain documents, and to print certain documents if a tentative non-confirmation occurs. The commenters stated that the analysis fails to consider the additional cost of printing and copying equipment an employer must acquire and maintain at each hiring site under the rule. Further, the commenters noted that the E-Verify MOU requires, under certain circumstances, that the employer either scan certain documents provided by the employer for electronic submittal to DHS or use an express mail account. The commenters stated that the added

cost of a scanner—wherever employees are hired—is not considered by the analysis.

*Response:* The economic analysis will add additional printing costs to the analysis. The analysis will add the cost of an "all-in-one" printer/copier/scanner/fax machine for the contractors that may need to purchase a computer. The economic analysis had already considered certain photocopying costs. However, the printer/copier/scanner/fax machine that is being included provides an alternative (such as scanning a document) to photocopying documents.

39. *Comment:* The SBA Office of Advocacy stated that contractors will be required to sign a MOU that is an agreement between them, the SSA, and USCIS. The commenter stated that the proposed rule provides the contractor with an opportunity to negotiate the terms of the MOU and that the cost of compliance includes a line item for the contractor's attorney to read the MOU. The commenter recommended that the cost of compliance should recognize the cost for an attorney to negotiate an acceptable MOU.

*Response:* The terms of the MOU are not negotiable.

40. *Comment:* A commenter stated that the rule does not take into account the costs businesses would incur as a result of "erroneous nonconfirmations" that result from E-Verify database inaccuracies. The commenter stated that Government-commissioned reports, congressional testimony, and other evidence support its opinion about the unreliability of the E-Verify program. The commenter also stated that the recent reauthorization of the program by the U.S. House of Representatives specifically acknowledged this fact by requiring further study by the GAO of the erroneous tentative nonconfirmation rate.

*Response:* The Westat report in 2007 found that the erroneous tentative nonconfirmation rate for all workers from October 2004—March 2007 was 0.6 percent. (Westat report pg. 57, table) This means that 0.6 percent of workers that were found work-authorized by the system initially received a tentative nonconfirmation during the verification process. A system that correctly verifies authorized workers as work-authorized 99.4 percent of the time cannot reasonably be termed "unreliable." Further, the economic analysis did estimate the cost to employers of resolving the tentative nonconfirmations.

41. *Comment:* A commenter stated that there are no reliable figures to report the number of erroneous final nonconfirmations because there is

currently no process in place to appeal such an outcome. The commenter submits that most employers will simply fire individuals with a final nonconfirmation report from E-Verify.

*Response:* Employers or employees may contact the E-Verify program if additional time is needed to provide such documentation or if they believe a final nonconfirmation was received in error. The E-Verify program may delay a final nonconfirmation finding on a case by case basis in those cases where employees have experienced delays in receiving needed documentation that will help prove their employment eligibility, and the program will work with the employer and/or employee to research the case and identify the reason for the final nonconfirmation. Where an employer or employee has questions about a final nonconfirmation, DHS or SSA can place such cases "in continuance" for resolution by either SSA or DHS.

42. *Comment:* A commenter states that according to a June 7, 2008, Government Accountability Office Report, the existing electronic verification systems in place at DHS and SSA are frequently unable to provide the "instant" verification that E-Verify is supposed to provide. The commenter quotes this report as finding that in eight percent of the cases, "[r]esolving these nonconfirmations can take several days, or in a few cases even weeks." June 7, 2008 GAO Report, "Electronic Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System," p. 3. The commenter states that the delays are attributable to several factors, including USCIS's failure to promptly update its database when it receives new citizenship information. The commenter claims that, in those circumstances, an authorized worker will be terminated under the proposed rule even if he or she promptly attempts to correct the database error.

*Response:* Employees are not penalized if their case requires additional time to resolve. As long as they contact the appropriate agency within the required eight-day timeframe and begin the process of contesting a tentative nonconfirmation, they must be permitted to continue working until their case is resolved.

Contrary to the commenter's assertions, DHS does update its database when immigrants are naturalized as citizens. However, when naturalized employees properly state that they are citizens, their information is verified against the SSA database, which may not yet reflect their naturalized status. USCIS implemented a change to the E-

Verify system in May 2008 to re-check against DHS naturalization databases any citizens that SSA cannot verify because of a citizenship mismatch. This change prevents naturalized citizens from receiving a tentative nonconfirmation if their information is available in the more current DHS database. However, new citizens remain responsible for updating their records with SSA when they are naturalized.

Moreover, the E-Verify MOU makes clear that employers are prohibited from discharging, refusing to hire, or assigning or refusing to assign to federal contracts employees because they appear or sound "foreign" or have received tentative nonconfirmations. The MOU also notifies an employer that any violation of the unfair immigration-related employment practices provisions in section 274B of the INA could subject the Employer to civil penalties, back pay awards, and other sanctions, and violations of Title VII could subject the Employer to back pay awards, compensatory and punitive damages. Violations of either section 274B of the INA or Title VII may also lead to the termination of the employer's participation in E-Verify. If the employee believes that he or she has been discriminated against, he or she should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD). Employers that have questions relating to the anti-discrimination provision should contact OSC at 1-800-255-8155 or 1-800-237-2515 (TDD).

43. *Comment:* A commenter stated that the FAR Council says that the only currently employed lawful workers who will be casualties of its proposed rule are those who "choose not to take the steps necessary to resolve a tentative nonconfirmation," and who thereafter are fired. 73 FR at 33377. The commenter states that that assertion is premised on the notion that there are no errors in the relevant databases that cannot be quickly corrected in the eight-day period provided for in the Proposed Rule. The commenter contends that that notion is undeniably false—as the GAO Report makes clear when it says that it sometimes takes "weeks" to correct an error under the E-Verify system.

*Response:* The commenter appears to misunderstand the eight-day period under the E-Verify program for an employee with a tentative nonconfirmation to contact SSA or DHS. Employees are not expected to resolve their tentative nonconfirmations within eight days—they are only required to contact the appropriate agency within that timeframe in order to challenge the tentative nonconfirmation. The economic analysis does assume there

could be some authorized employees who are terminated, but this should occur only under unusual circumstances. The authorized worker has an economic incentive to ensure his/her information properly matches SSA's records both to preserve his/her job and to ensure the employee receives full credit for contributions made into Social Security. The analysis estimated that 2 percent of the 5.3 percent unresolved tentative nonconfirmation cases ( $2\% \times 5.3\% = .106\%$ ) represent an authorized employee who either resigned or was terminated.

44. *Comment:* A commenter stated that, so far this year, the commenter has initiated nearly 1,400 new-hire queries through E-Verify and anticipates that new-hire queries will approximate 3,000 a year. The commenter states that its E-Verify tentative non-confirmation rate far exceeds the estimated rate of non-confirmations published by E-Verify and USCIS. The commenter notes that all of its tentative nonconfirmations have ultimately been cleared by E-Verify as work authorized, but only after significant investment of time and money.

*Response:* Employers' tentative nonconfirmation rates will vary depending on the makeup of their workforces. While the majority of SSA tentative nonconfirmations are resolved within ten days, E-Verify does accommodate employees whose cases cannot be resolved within that timeframe provided that they have contacted SSA and have followed all of the requirements.

USCIS continues to partner with SSA in the implementation of the E-Verify program, especially in diminishing database errors and resolving mistaken final nonconfirmations. It is the responsibility of individual citizens to update their records with SSA; this includes the most common updates of name change due to marriage and change in citizenship status due to the naturalization process.

45. *Comment:* A commenter stated that mandating contractors to use the Basic Pilot/E-Verify program will not eliminate the U.S. economy's demand for unauthorized workers. According to the commenter, contractors who need workers will continue to hire them "off the books."

*Response:* The INA prohibits hiring or continuing to employ aliens whom the employer knows are not authorized to work in the United States. INA section 274A(a)(1), (a)(2). Any employment of aliens whom the employer knows are not authorized to work in the United States is a violation of the law. We disagree with the implication that

employers will find a way to violate the law anyway, so lax enforcement of the law is in the U.S. economy's best interest.

46. *Comment:* A commenter stated that smaller businesses may find it financially more difficult to comply with Executive Order 12989. According to the commenter, the proposed rule indicates that the costs of participation in the E-Verify program will likely include startup registration costs, opportunity costs of the time spent on training, opportunity costs of the time spent on employee verification, productivity costs when employees need to leave work to visit SSA/USCIS to correct information, and employee turnover costs. The commenter quotes statistics drawn from a survey of employers who have used the system to demonstrate that the startup process for E-Verify can be burdensome.

*Response:* The statistics reported by the commenter in the example from page 60 of the September 2007 Westat report are incorrectly drawn from the table in the report. In fact, 72.9 percent of employers disagreed with the statement "the on-line registration process was too time consuming"; only 13.4 percent agreed with the statement (of which 2.4 percent strongly agreed). Also, 75.9 percent of employers surveyed disagreed with the statement "the on-line tutorial was hard to use," an additional 21.2 percent of employers surveyed strongly disagreed with the statement, only 2.8 percent agreed (of which 0.2 percent strongly agreed). Finally, 67.9 percent of employers disagreed with the statement "the tutorial takes too long to complete;" only 21.6 percent of employers agreed (of which 3.8 percent strongly agreed). The statistic on the importance of passing the mastery test and the perceived burden was correctly drawn from the table.

System set up and maintenance costs are a concern for the program and especially their impact on smaller employers. Therefore, questions on these costs have been and will continue to be asked in the independent evaluations of the program. The statistics cited in the example are accurately quoted from the Sept. 2007 Westat report, however, it must be noted that the average start-up and maintenance costs are calculated from a very widely skewed distribution of cost data. As stated on pg. 104 of the Westat report, "Eighty-four percent of employers that used the Web Basic Pilot for more than a year reported spending \$100 or less for start-up costs, and 75 percent said they spend \$100 or less annually to operate the system.

However, 4 percent of long-term users said they spend \$500 or more for start-up costs, and 11 percent spent \$500 or more annually for operating costs." The report does not segregate the employers that reported a high level of cost into large and small employers. However, the report does state on page 106 that "[n]ot surprisingly, maintenance costs were higher for employers that verified employees at multiple locations than for those that verified at only one location (\$1,653 versus \$490)." So, to the extent that small employers are less likely to verify employees at multiple widely distributed locations, their costs would be expected to be lower than the average provided in the report.

Separate from this final rule, the E-Verify program is working to identify and address issues that may result in an employee not fully understanding the opportunity to contest an initial mismatch, e.g., the Plain Language Initiative. The program currently provides program materials in English and Spanish and is currently working to produce documents in nine additional languages.

47. *Comment:* Commenters stated that the RIA assumes that 2 percent of authorized workers for whom E-Verify generates a tentative nonconfirmation will not resolve their records to the Government's satisfaction. Commenters believe that failing to resolve a tentative nonconfirmation leads inexorably to a final nonconfirmation, which results in employee termination. The commenters note that the RIA claims that these workers "choose not to resolve the non confirmation," but no evidence is provided showing that the lack of records resolution is the result of worker choice. Furthermore, the commenters note that the RIA does not explain why workers would intentionally choose a path that leads to termination. The commenters believe that a more plausible explanation is that these workers have unusually difficult problems to resolve or they are less capable than their peers at navigating multiple Government bureaucracies or they are marginal workers for whom the burden of resolving records exceeds the gain from remaining in the formal labor market. Whatever the cause(s), the commenters believe E-Verify will be responsible for these terminations and the RIA acknowledges this and includes, as a cost to employers, the additional recruitment and training that are required to replace these employees. However, commenters believe the RIA ignores the opportunity cost of termination to the employees themselves. The \$10 billion present value cost estimate should be

understood as a lower-bound for the true social cost of forced unemployment of authorized workers.

*Response:* The Councils disagree that there will be any significant "forced unemployment" cost caused by this rule on authorized workers. If the E-Verify program issues a tentative non confirmation to an employee, the employer cannot fire, prevent from working, or withhold or delay training or wages for that employee during the resolution process. All employees receiving tentative nonconfirmations are given the opportunity to contest and correct their records.

A limited case study in the 2007 Westat report notes that "Most employees reported positive experiences correcting their paperwork with SSA or USCIS" and "Overall, employees who contested SSA findings did so quickly: The record review showed an average of only 2.1 days between the referral to SSA and the date the SSA representative signed the referral letter (if one was provided to the employee)" (Appendix E pages E-13 and E-14). This 2.1 day average time to resolve a tentative non-confirmation suggests the resolution process is not an unreasonably difficult burden for those that choose to utilize the process.

As there is no law that compels an authorized worker to resolve a tentative non-confirmation, the Councils believe it is reasonable to add a cost for an employer to replace an authorized worker who does not resolve the tentative non-confirmation. For the purpose of the economic analysis, the Councils assumed that 2 percent of the 5.3 percent unresolved tentative non-confirmations were authorized workers leaving employment with the employer ( $2\% \times 5.3\% = .106\%$ ). The employer would incur employee replacement (turnover) costs whether the authorized employee resigned or was terminated. Due to the economic incentive to ensure one's records are correct with SSA and to continue employment, it would be a very unusual circumstance for an authorized worker not to work diligently to resolve the tentative non-confirmation.

We disagree with the commenter's assertion of a "\$10 billion" present value cost estimate of "forced unemployment." The commenter's \$10 billion estimate is apparently premised upon assuming a 15 year period of analysis of "forced unemployment" and a "disemployment rate" of "1.060%." We assume the "disemployment rate" used by the commenter was meant to be the ".106%" estimate in the RIA for the proposed analysis of people who are authorized to work but either resign or

are terminated for failure to resolve the tentative non-confirmation. If true, this would cause an order of magnitude error in the commenter's calculations. Also, the economic analysis assumed the 2% replacement rate for authorized workers who do not resolve their tentative non-confirmations included any and all reasons an authorized employee potentially leaves employment, such as voluntary resignation.

Finally, the E-Verify program knows of no information that supports the commenter's assertion that workers who do not resolve their tentative non-confirmations have "unusually difficult problems to resolve, or they are less capable than their peers at navigating multiple government bureaucracies, or they are marginal workers for whom the burden of resolving records exceeds the gain from remaining in the formal labor market."

48. *Comment:* Commenters stated the RIA extrapolates to a coerced population of Federal contractors from the current E-Verify population, which consists of volunteers. In this case, the commenters believed volunteers are likely to be firms for which participation in the program is actually beneficial. The commenters concluded, if this were the only criterion for participation, then they would expect data from these firms to be "better" than data the Government will obtain once it makes participation mandatory.

*Response:* The economic analysis used actual information regarding the E-Verify authorization process (*i.e.*, percentage of tentative non-confirmations, percentage of final nonconfirmations, etc.) generated by the entities that were using the E-Verify program during October 2006–March 2007 in order to estimate costs.

The rate of tentative non-confirmations, percentage of final nonconfirmations, and other operational statistics may be different for entities that choose to be Federal contractors than for the existing E-Verify population, but there is no evidence to support the theory that data from the existing E-Verify enrollees would be "better" (lower tentative nonconfirmation rates) than data the Government will obtain once additional Federal contractors join E-Verify. We note there are many states that currently require certain employers to participate in E-Verify. For example, Arizona and Mississippi are currently requiring all employers to enroll in E-Verify and authorize the work status of newly hired employees. Also, Idaho, Minnesota, and North Carolina require state government

agencies to vet newly hired state employees through E-Verify.

In fact, there is data that suggests there could be fewer tentative non-confirmations among the federal contractor population than in the general population. The September 2007 Westat report stated on page 41 (note that E-Verify was formerly known as "Basic Pilot"): "\* \* \* establishments registering for the Web Basic Pilot differ significantly from employers not enrolled in the program. More specifically, pilot participants tend to be larger than most establishments, have higher proportions of foreign-born employees, and be more concentrated in certain industries and locations." The report also stated, "\* \* \* it appears currently that citizens are underrepresented in the Web Basic Pilot program compared to the nation. Since citizens are more likely than noncitizens to be authorized automatically and less likely to get an erroneous tentative nonconfirmation, it is reasonable to expect that a program that verifies all new hires nationally would have a higher percent verified automatically and a lower erroneous tentative nonconfirmation rate than is currently the case, if nothing else changes." (pg. 134) Consequently, we could reasonably expect that tentative non-confirmation rates for federal contractors could be lower than the rates experienced by current E-Verify enrollees.

49. *Comment:* A commenter stated that the calculations from the sample should be treated with caution because the sample consisted of a six-month season that did not include Spring- and Summer-hires. The commenter further stated that seasonal workers would be covered by E-Verify but are excluded from this sample. In addition, the commenter stated that if a Federal agency had proposed to collect data from volunteer E-Verify participants and use them to predict results from a mandatory E-Verify program, the Office of Management and Budget would have been compelled by law and its own regulations to disapprove the information collection on the ground that it lacked practical utility (commenter cited in footnote 24—"OMB's information collection rule forbids it from approving a statistical survey 'that is not designed to produce valid and reliable results that can be generalized to the universe of study.'" See 5 CFR 1320.5(d)(2)(v); 60 FR 44988.

*Response:* The Council agrees a full year's worth of data would provide a better indicator of the likely impacts of the final rule. Therefore, for the final rule's economic analysis, a full 12 months of data are used, instead of the

six months used in the proposed rule's economic analysis. However, given that the economic analysis did not conduct a "statistical survey," the commenter's purpose in stating that the economic analysis did not comply with OMB "statistical survey" guidelines is not clear.

50. *Comment:* The SSA provided additional information regarding the marginal cost of the rule to SSA.

*Response:* The economic analysis will be revised to incorporate the cost estimates provided by SSA. For example, the economic analysis estimated the cost to SSA in FY09 to be \$622,699, while the SSA estimated its FY09 costs to be \$1,023,294.

#### b. On Federal Acquisition Workforce

*Comment:* A commenter stated that the proposed rule assumes only \$1,547,194 in costs that the Federal Government will incur in 2009 as "operating costs from each query that an employer executes" and "resolving tentative nonconfirmations." According to the commenter, the proposed rule has not considered costs associated with contracting officer time and effort.

*Response:* Contracting officer duties under the final rule consist almost exclusively of inserting the clause into appropriate solicitations and contracts. The marginal effort associated with that duty is so slight as to be practically immeasurable. Further, there is no reason to believe that additional contracting officers will need to be hired due to the impact of this rulemaking.

#### 3. Reasonable Alternatives

*Comment:* The SBA Office of Advocacy suggested that the Administration should examine feasible alternatives to the proposed rule, if comments received indicate that the proposed rule would have a significant economic impact on a substantial number of small businesses. Another commenter wrote that the Administration's analysis of reasonable alternatives is flawed for failure to take into account all reasonable alternatives, and for failure to adequately address the lone alternative taken into account.

*Response:* The Council has considered all reasonable alternatives, as addressed herein and in the FRFA, and has adopted all the alternatives that fulfill the objective of the Executive Order.

#### 4. Paperwork Reduction Act

*Comment:* An immigration lawyers association commented that the proposed rule violated the Paperwork Reduction Act by imposing an additional information collection

burden on employers and because employers who fail to keep such records will face significant liability.

*Response:* The Councils recognized in the proposed rule that the rule contains information collection requirements over and above the burden hours already approved for the E-Verify System. 73 FR 33379. The Councils have requested and received approval from OMB for this new information collection requirement. Accordingly, the information collection requirements of this rule fully comply with the requirements of the Paperwork Reduction Act.

#### *F. Final Regulatory Flexibility Act Analysis*

This Section F constitutes the Final Regulatory Flexibility Act Analysis (FRFA), as required by the Regulatory Flexibility Act, 5 U.S.C. 604. The issues covered here are also addressed in detail in the Regulatory Impact Analysis for FAR Case 2007-013, available at <http://www.regulations.gov>.

This final rule implements Executive Order, 12989, as amended, to enhance the stability and dependability of Federal Government contractor workforces by requiring them to use the USCIS' E-Verify system as the means for verifying employment eligibility of certain employees.

The Councils expect this rule to impact nearly every small entity in the Federal contractor base. However, the direct cost this rule imposes does not appear to have a significant economic impact on a substantial number of small entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Nevertheless, the Councils have not formally certified the rule as not having a "significant economic impact on a substantial number of small entities," as allowed under section 605(b) of the Regulatory Flexibility Act.

In addition to the costs of this final rule, the Councils expect this rule to carry certain benefits to employers in that it provides an economical, web-based method for performing verification of employment eligibility of employees, improving the reliability of the employment verification procedures employers are already required to perform. Federal contractors' participation in E-Verify is also expected to reduce the likelihood that contractors will discover, long after the fact, that they have hired unauthorized aliens, thereby sparing contractors the cost of terminating and replacing employees not authorized to work under Federal immigration law after resources have been expended on the training of those employees.

In addition, a number of changes have been made in the final rule to lessen the impact on small businesses; they should also benefit large businesses in reduced compliance costs. Specifically, the timelines have been significantly extended (see Section B., "Changes Adopted in the Final Rule", paragraph 1., "Significantly Extended Timelines", for the precise changes); the threshold for prime contracts has been raised from \$3,000 to the simplified acquisition threshold (\$100,000); contracts with a performance period of less than 120 days are exempted; the COTS-related exemption has been expanded (see Section B., "Changes Adopted in the Final Rule", paragraph 9., "Expanded COTS-related exemptions for:" of this rule); contractors are offered the option of using E-Verify on all existing employees so as to eliminate the necessity of segregating employees performing directly on a Federal Government contract from those who are not; and contractors may exempt employees with an active, current security clearance or for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD) 12.

Executive Order 12989, as amended, prohibits Federal agencies from contracting with companies that knowingly hire employees not eligible to work in the United States and instructs Federal agencies to contract with companies that agree to use an electronic employment verification system to confirm the employment eligibility of their workforce. The E-Verify System is the best available means for contractors and subcontractors to verify employment eligibility. Consequently, this final rule is being promulgated to institute a contractual requirement for contractors and subcontractors to utilize E-Verify as the means of verifying that (1) all new hires of the contractor or subcontractor and (2) all employees directly engaged in performing work under covered contracts or subcontracts are eligible to work in the United States. The final rule adds a new FAR Subpart 22.18 and a new clause.

The prohibition against Federal agencies contracting with companies that knowingly hire employees not eligible to work in the United States has existed since 1996. Virtually all employers in the United States, including Federal Government contractors and subcontractors, are prohibited from hiring an individual without verifying his or her identity and authorization to work and from continuing to employ an alien whom

they know is not authorized to work in the United States (section 274A(a) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1324a; 8 CFR part 274A). Many aliens, including lawful permanent residents, refugees, asylees, and temporary workers petitioned by a U.S. employer, are authorized to work in the United States (see 8 CFR 274a.12, listing classes of work-authorized aliens).

The new contractual requirement to use the E-Verify System will enhance the Government's procurement system by decreasing the employment of unauthorized aliens in the Government's supply chain and thereby fostering a more stable and dependable Federal Government contracting community.

This rule will impact many small entities in the Federal contractor base. Major exceptions are contractors providing commercially available off-the-shelf (COTS) items and items that would be COTS items but for minor modifications, entities that enter into contracts with a value less than \$100,000, and subcontractors that provide supplies rather than services or construction. In Fiscal Year 2006, there were over 100,000 small businesses that received direct Federal contracts. While there are no reliable numbers for subcontracts awarded to small businesses, the Dynamic Small Business database of the Central Contractor Registration—a database of basic business information for contractors that seek to do business with the Federal Government—gives a number of 324,250 small business profiles that are registered. Assuming that 50% of these small businesses contract with the Federal Government at either the prime or subcontract level, then that number is 162,125 small businesses.

The Councils have placed in the public docket a detailed Regulatory Impact Analysis of the compliance requirements of this rule. Generally, employers will incur opportunity cost of the time their employees will spend complying with the requirements of the regulation. Employees will need to be trained in order to be able to operate the E-Verify system, as well as spending time on processing employee verifications. Employers will incur start-up costs from enrolling in the E-Verify program, including costs such as reviewing and updating USCIS Form I-9 (Employment Eligibility Verification) for existing employees and potentially a cost to modify an existing personnel or payroll system to be able to record the E-Verify status of their employees. We believe a small number of employers may need to purchase a computer,

internet connection, and printer for their hiring site. Certain employee replacement (turnover) costs may also be incurred due to this regulation.

In order to further inform our understanding of the economic impact of this rule on small entities, we considered hypothetical contractors with 10, 50, 100, and 500 employees and estimated the economic impact of the rule on those four sizes of entities in their initial year of enrollment. The initial year a contractor enrolls in E-Verify is expected to be the year with the highest compliance cost, as the contractor is incurring both the start-up costs of enrolling in E-Verify as well as the majority of the costs of vetting its existing employees through the E-Verify system.

The estimated average direct cost of this rule to a contractor with 10 employees is \$1,254 in the initial year. For a contractor with 50 employees, the estimated average direct cost of participating in E-Verify is \$3,163 in the initial year. For a contractor with 100 employees, the estimated initial-year impact is \$5,615. A contractor with 500 employees is expected to have an initial year impact of \$24,422. This level of direct cost burden is well under 1% of the expected annual revenue of these four sizes of entities and does not appear to represent an economically significant impact on an average direct cost per contractor basis. To the extent that some small entities incur direct costs that are significantly higher than the average estimated costs, those employers may reasonably be expected to face a significant economic impact.

As discussed previously, the Councils do not consider the cost of complying with preexisting immigration statutes to be a direct cost of this rulemaking. Thus, while some employers may find the costs incurred by replacing employees that are not authorized to work in the United States to be economically significant, those costs of complying with the Immigration and Nationality Act are not direct costs attributable to this rule.

In addition, the requirement for entities (both large and small) to enroll in E-Verify only applies to contractors and subcontractors that choose to perform certain work for the Federal Government. When an entity's leadership determines that participating in E-Verify would impose a significant economic impact on the operation, the leadership must make a business decision whether the revenue generated by doing business with the Federal Government would provide a financial return sufficient to justify the cost of such participation in E-Verify.

Presumably, entities that do not receive the desired return to justify the expense of participating in E-Verify would choose not to be a Federal contractor or subcontractor.

The SBA Office of Advocacy claims that the initial analysis did not consider costs such as the social welfare cost or the cost of penalties and lawsuits. However, the IRFA fully complied with the requirements of § 603 of the Regulatory Flexibility Act. The IRFA compared estimated compliance costs for four distinct sizes of small business (10, 50, 100, and 500 employees) to the respective revenue of these businesses, using information obtained from the Small Business Administration, and identified a compliance cost burden of 0.03 percent of revenue for the small entity with 10 employees. The Councils do not agree that 0.03 percent would typically be regarded as a significant economic impact. Further, with regard to the full social welfare cost of the rule, regulatory flexibility analyses need not include anything other than the direct costs of a regulation on a small entity that is required to comply with the regulation.

The SBA Office of Advocacy believes that the Councils underestimated the number of contractors that will be vetted through E-Verify and criticizes the fixed factors (*e.g.*, 26 percent for labor) used in the economic analysis, as well as the estimate that the assumption that the number of subcontractors is 20 percent of the number of prime contractors. It claims that the estimates the Councils used are not based on "empirical data" and that the economic analysis was not explicit regarding how these factors were determined. The Councils respond that the dollar value of the contracts within the scope of the rule was found by querying the Federal Procurement Data System and does not rely on an estimate by the Councils. Instead of simply providing a "top-level" estimate, the Councils developed a model to estimate the number of employees that would be expected to be vetted through E-Verify. The factors utilized (*e.g.*, 26 percent for labor) are all multiplied against the estimated dollar value of contracts. When describing the percentage estimates used to estimate factors utilized, the economic analysis specifically stated "we understand these assumptions are rough and we welcome public comment providing more precise information." However, no better information was provided in the comments. The SBA Office of Advocacy encouraged the FAR Council to revisit the economic analysis as more data become available. The Councils will consider reviewing this

aspect of the economic analysis once the final rule has been in effect and useful data becomes available.

The Councils are unaware of any duplicative, overlapping, or conflicting Federal rules. There are current requirements for all employers, not just Federal contractors and subcontractors, to verify the employment eligibility of their newly hired employees. These requirements have existed since 1986. Arguably related rules include DHS's "No-Match" rule, which provides guidance to employers on how best to respond to the Social Security Administration's (SSA) no-match letters, through which employers are alerted annually about their employees whose names and Social Security numbers submitted on tax forms do not match up to the information in the SSA's database. Although this "No-Match" rule concerns the SSA's letters generated from one of the data sources used by the E-Verify system, the "No-Match" rule is not directly associated with use of the E-Verify System. The two rules interact insofar as use of E-Verify—and the resulting strengthening of Federal contractors' employment verification processes—is expected to reduce the incidence of SSA "No-Matches" in the Federal contract workforce resulting from the employment of unauthorized alien workers. But the "No-Match" rule is designed to assist employers to ensure that their entire existing workforce remains work-authorized, while this amendment to the FAR is designed to ensure that unauthorized aliens are not brought into the Federal Government's contractor workforce.

In addition to the alternatives discussed above in the response to public comments—particular, the section entitled "Small Business," and its subsections including "Alternatives to Lessen the Burden on Small Businesses"—the Councils considered the following alternatives in order to minimize the impact on small business concerns:

- Whether to exempt small businesses entirely from the requirement to use E-Verify. The SBA Office of Advocacy was concerned that small businesses do not have the financial resources and human capital to adapt their technology infrastructure systems to rapidly change requirements being imposed by the Federal Government. The Councils limited the applicability of this rule to small businesses by raising the dollar threshold, limiting flowdown, exempting COTS suppliers, and in various other ways discussed throughout this notice.

- How to limit the compliance costs for small businesses. The SBA Office of Advocacy noted that small business Federal contractors operate on very thin profit margins and the types of technology systems necessary here require capital outlays that cannot be easily recouped by passing the cost to the client and are costly to the small business owner. Although the E-Verify system does require the employer to have access to some equipment such as a computer, Internet access, a printer, and either a scanner, photo copier, or a digital camera, the Councils believe that this equipment is not prohibitively expensive. Almost all small businesses doing business with the Government would already have such equipment or be able to readily acquire it. The equipment for a small business to implement E-Verify need not be particularly sophisticated or complex. The Councils have made every effort to limit the cost of compliance.

- How to limit appropriately the burden of compliance on subcontractors. The SBA Office of Advocacy is concerned that there is disproportionality in the compliance cost burden on small business subcontractors because there are fewer avenues and fewer contracts among which the small businesses can spread the cost of doing business. The final rule adds a number of exemptions that will ease the burden on small business and large business contractors; for example, contractors will have the option of verifying all existing employees, not just those performing directly on the contract. This eliminates the need to develop a system to identify employees assigned to the contract.

- Whether to require E-Verify participation as a preaward eligibility requirement rather than as a postaward contract performance requirement. The rule is distinct from the existing E-Verify program, in that it would require E-Verify queries to be performed on certain existing employees of a contractor, and the Councils believe that the obligations created by the rule should be codified as a postaward contract performance requirement.

- Whether the use of E-Verify should be required for existing employees of the contractor who are assigned to work under the Government contract or should be limited only to the new hires of the contractor. Executive Order 12989, as amended, instructs Federal contracting agencies to contract with employers that agree to use E-Verify to confirm the work eligibility of their existing employees assigned to work on Federal contracts. The Councils decided that requiring employment eligibility

confirmation of all workers assigned to a new Government contract was most consistent with Executive Order 12989 and with the Federal Government's own obligation to use E-Verify when hiring Federal employees, and it would most effectively ensure that the Federal Government does not indirectly exploit an illegal labor force.

- Whether to require contractors to use E-Verify only for new hires that would be assigned to work under a Government contract and exclude all other new hires of the contractor from the E-Verify requirement. Executive Order 12989, as amended, instructs Federal contracting agencies to contract with employers that agree to use E-Verify for all new hires of the contractor. The Councils decided that requiring contractors to use the E-Verify program as part of standard hiring practices would simplify employment verification, and conforms with the requirements of Executive Order 12989 and with a principal goal of the rule—to ensure that the Federal Government does business with companies that do not employ unauthorized aliens.

- Whether the use of E-Verify should be required for all prime contracts or only for those contracts that do not call for COTS items or items that would be COTS items but for minor modifications, as defined at FAR Part 2 (containing the definition of a commercial item). Because COTS suppliers, by definition, do not specialize in serving the Federal Government, and because the Government might lose access to COTS suppliers if they determine the cost of complying with the rule outweighs their gains from Government business, the Councils decided not to require the use of E-Verify for COTS items and items that would be COTS items but for minor modifications. As noted above, the Councils expanded the reach of this exception for COTS items in response to comments received on the proposed rule.

- Whether the requirements of the rule should flow down to all subcontracts or should be limited to subcontracts for services or construction. The Councils determined to apply the rule only to subcontracts for commercial or noncommercial services, including construction. It does not apply to subcontracts for material or to subcontracts less than \$3,000.

#### *G. Statutory and Regulatory Requirements*

Executive Order 12866

Executive Order 12866, “Regulatory Planning and Review,” directs agencies

and the Office of Management and Budget (OMB) to determine whether a regulatory action is “significant” and therefore subject to review by OMB and subject to the analyses directed by that Executive Order. 58 FR 51735, October 4, 1993, as amended. The Councils have determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), because there is significant public interest in issues pertaining to immigration and because this is an economically significant rule pursuant to this Executive Order. Accordingly, this final rule has been submitted to OMB for review.

This is a major rule under 5 U.S.C. 804.

A Regulatory Impact Analysis that more thoroughly explains the assumptions used to estimate the cost of this final rule is available in the docket as indicated under **ADDRESSES**. For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. A summary of the cost and benefits of the final rule follows:

In the initial fiscal year the rule is expected to be effective (fiscal year 2009), the Councils estimate that there will be approximately 168,624 contractors and subcontractors that will be required to enroll in E-Verify due to this rule and that there will be an additional 3.8 million employees vetted through E-Verify. In the initial year, the cost of the final rule at 7% net present value is approximately \$245.4 million, and, over the ten-year period of analysis (2009–2018), the cost of the final rule is approximately \$1,105.4 million. In the initial year, the cost of the final rule at 3% net present value is approximately \$254.9 million, and, over the ten-year period of analysis (2009–2018), the cost of the final rule is \$1,336.5 million. Compliance costs from participating in the E-Verify program fall into the following general categories, and Table 1 below provides a summary of the costs:

- *Startup Costs:* Employers must register to use the E-Verify system and sign a Memorandum of Understanding with USCIS and SSA. Employers will also incur costs such as reviewing and updating USCIS Form I-9 (Employment Eligibility Verification) for existing employees and potentially a cost to modify an existing personnel or payroll system to be able to record the E-Verify status of their employees. A very small number of employers may need to purchase a computer, internet connection and printer for their hiring site if that hiring site does not already have internet access.

- *Training:* Employees who use the E-Verify system are required to take an on-line tutorial. While USCIS does not charge a fee for this training, employers will incur the opportunity cost of the time the employee spends on the training, as the employee's time could have been spent on other activities.

- *Employee Verification:* Employers will incur the opportunity cost of the time spent entering data into E-Verify and, if the employee receives a tentative nonconfirmation, employers would inform the employee and spend time closing out the case after resolution of the tentative nonconfirmation. In addition, the employer would incur lost productivity when an employee needs to be away from work to visit SSA to correct his/her information. As estimated, the employee would bear the cost of driving to SSA.

- *Employee Replacement (Turnover) Cost:* There may be a small percentage of workers who are authorized to work in the U.S. and who receive a tentative nonconfirmation but do not take the steps necessary to resolve it (despite the strong economic incentives to do so). The Councils cannot predict why an authorized employee would not work diligently to resolve the tentative

nonconfirmation, given the incentives to do so, but we believe the economic analysis should reasonably account for such a possibility. Assuming that a small number of authorized employees would not resolve their tentative nonconfirmations, and would either resign or be terminated, is simply a conservative analytical assumption in light of the fact that there is no law compelling employees to resolve their tentative nonconfirmations; thus, employers may incur some additional costs due to having to replace a small number of authorized employees. To the extent that the accompanying E-Verify rulemaking results in the termination or resignation of a worker authorized to work in the U.S., those associated employee replacement costs would be considered to be a cost of the rule. However, the termination and replacement costs of unauthorized workers are not counted as a direct cost of this rule because

current immigration law prohibits employers from hiring or continuing to employ aliens whom they know are not authorized to work in the U.S. The termination and replacement of unauthorized employees will impose a burden on employers, but INA section 274A(a), 8 U.S.C. 1324a(a), expressly prohibits employers from hiring or continuing to employ an alien whom they know is not authorized to work in the United States. Accordingly, costs that result from employers' knowledge of their workers' illegal status are attributable to the Immigration and Nationality Act, not to the FAR rule.

- *Federal Government Cost:* The Government will incur operating costs from each query that an employer executes and will also incur costs from resolving tentative nonconfirmations.

TABLE 1—10 YEAR COST OF FINAL RULE  
[7% present value]

Year	Employer			Employee	Government	Total
	Startup costs	Authorized employee replacement cost	Verification cost	Verification cost	Verification cost	
2009	\$188,138,945	\$15,041,464	\$37,836,372	\$2,436,863	\$1,928,888	\$245,382,532
2010	72,368,319	7,798,427	19,616,690	1,263,415	998,560	102,045,411
2011	71,015,802	7,652,663	19,250,187	1,239,831	979,895	100,138,378
2012	69,688,407	7,509,622	18,890,355	1,216,654	961,579	98,266,617
2013	69,443,845	7,369,253	18,537,018	1,193,865	943,606	97,487,587
2014	68,145,775	7,231,511	18,190,724	1,171,588	925,973	95,665,570
2015	66,872,076	7,096,345	17,850,716	1,149,689	908,670	93,877,497
2016	65,621,976	6,963,703	17,516,996	1,128,187	891,691	92,122,553
2017	65,041,291	6,833,541	17,189,537	1,107,092	875,028	91,046,490
2018	63,825,632	6,705,812	16,868,275	1,086,406	858,677	89,344,803
Total	800,162,068	80,202,341	201,746,869	12,993,591	10,272,566	1,105,377,436

Because unauthorized workers are at risk of being apprehended in immigration enforcement actions, contractors who hire them will necessarily have a more unstable workforce than contractors who do not hire unauthorized workers. Given the vulnerabilities in the I-9 system, many employers that do not knowingly employ illegal aliens nevertheless have unauthorized workers, undetected, on their workforce.

This rule will promote economy and efficiency in Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor with a less stable workforce will be less likely to produce goods and services economically and efficiently than will a contractor with a more stable workforce. Because of the Executive Branch's obligation to enforce the immigration laws, including the detection and removal of illegal aliens identified through worksite enforcement, contractors that employ illegal aliens

cannot rely on the continuing availability and service of those illegal workers. Such contractors inevitably will have a less stable and less dependable workforce than contractors that do not employ such persons. Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration laws imposes a direct risk of disruption, delay, and increased expense in Federal contracting. Such contractors are less dependable procurement sources, even if the contractors did not knowingly hire or knowingly continue to employ unauthorized workers.

Contractors that use E-Verify to confirm the employment eligibility of the workforce are much less likely to face immigration enforcement actions and are generally more efficient and dependable procurement sources than contractors that do not use that system to verify the work eligibility of their workforce. Rigorous employment verification through E-Verify will also help contractors confirm the identity of

the persons working on Federal contracts, enhancing national security at less expense to the Government than it would cost for contractors to obtain more rigorous security clearances that may not be otherwise required by their contracts. This is likely to be particularly beneficial where contractors operate at sensitive national infrastructure sites.

*H. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any information collection requests in a final rule. It is estimated that this rule will increase the information collection burden hours already approved for the E-Verify Program. The OMB control number for the currently approved E-Verify Program Information Collection Request is 1615-0092.

Although the E-Verify Program has a currently approved Paperwork Reduction Act clearance, we are seeking OMB approval on the proposed amendments to the current OMB approved collection. The purpose of this notice is to allow 60 days for public comments on the amendments to the E-Verify Program collection of information, not on the amendments to the FAR rule. Comments on the amendments to the E-Verify Program should be submitted no later than January 13, 2009. This process is conducted in accordance with 5 CFR 1320.10.

When submitting comments on the information collection, they should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Overview of Information Collection for the E-Verify System (OMB Control Number 1615-0092):*

a. *Type of information collection:* Revision of currently approved information collection.

b. *Title of Form/Collection:* E-Verify Program.

c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. OMB Control Number 1615-0092; U.S. Citizenship and Immigration Services.

d. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary respondents are business or other for-profit entities, small business, or other organizations. The E-Verify Program allows employers to electronically verify the eligibility status of newly hired employees. Certain Federal contractors and subcontractors will also be required to perform queries on existing employees assigned to the contract.

e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

Implementation: 125,015 at 0.86 hours per response.

Training: 521,134 at 2.26 hours per response.

ID/IQ Contracts: 3,333 at 2.00 hours per response.

Initial Query: 4,094,955 at 0.12 hours per response.

Secondary Query: 195,329 at 1.94 hours per response.

For implementation, it is estimated that the number of responses per respondent will be 17. For all others, the number of responses per respondent will be one.

f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 3,882,482 burden hours.

All comments regarding this information collection should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, Attention: Chief, 202-272-8377.

**List of Subjects in 48 CFR Parts 2, 22, and 52**

Government procurement.

Dated: November 6, 2008.

**Al Matera,**  
*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 22, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 2—DEFINITIONS OF WORDS AND TERMS**

■ 2. Amend section 2.101 in paragraph (b)(2), in the definition “United States”, by redesignating paragraphs (6) through (8) as paragraphs (7) through (9), respectively, and adding a new paragraph (6) to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

*United States* \* \* \*

(6) For use in Subpart 22.18, see the definition at 2.1801.

\* \* \* \* \*

**PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

■ 3. Amend section 22.102-1 by removing from the end of paragraph (g) the word “and”; removing the period from the end of paragraph (h) and adding “; and” in its place; and adding paragraph (i) to read as follows:

**22.102-1 Policy.**

\* \* \* \* \*

(i) Eligibility for employment under United States immigration laws.

■ 4. Add Subpart 22.18 to read as follows:

**Subpart 22.18—Employment Eligibility Verification**

Sec.

22.1800 Scope.

22.1801 Definitions.

22.1802 Policy.

22.1803 Contract clause.

**22.1800 Scope.**

This subpart prescribes policies and procedures requiring contractors to utilize the Department of Homeland Security (DHS), United States Citizenship and Immigration Service's employment eligibility verification program (E-Verify) as the means for verifying employment eligibility of certain employees.

**22.1801 Definitions.**

As used in this subpart—  
*Commercially available off-the-shelf (COTS) item*—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), “bulk cargo” means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

*Employee assigned to the contract* means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to

include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

*Subcontract* means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

*United States*, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

**22.1802 Policy.**

(a) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States, but is not a substitute for any other employment eligibility verification requirements.

(b) Contracting officers shall include in solicitations and contracts, as prescribed at 22.1803, requirements that Federal contractors must—

(1) Enroll as Federal contractors in E-Verify;

(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor may choose to verify only new hires assigned to the contract if the contractor is—

(i) An institution of higher education (as defined at 20 U.S.C. 1001(a));

(ii) A State or local government or the government of a Federally recognized Indian tribe; or

(iii) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;

(3) Use E-Verify to verify employment eligibility of all employees assigned to the contract; and

(4) Include these requirements, as required by the clause at 52.222–54, in subcontracts for—

(i) Commercial or noncommercial services, except for commercial services

that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item; and

(ii) Construction.

(c) Contractors may elect to verify employment eligibility of all existing employees working in the United States who were hired after November 6, 1986, instead of just those employees assigned to the contract. The contractor is not required to verify employment eligibility of—

(1) Employees who hold an active security clearance of confidential, secret, or top secret; or

(2) Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)–12.

(d) In exceptional cases, the head of the contracting activity may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

(e) DHS and the Social Security Administration (SSA) may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminates a contractor's MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (b) of the clause at 52.222–54. If the contractor is suspended or debarred as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

**22.1803 Contract clause.**

Insert the clause at 52.222–54, Employment Eligibility Verification, in all solicitations and contracts that exceed the simplified acquisition threshold, except those that—

(a) Are only for work that will be performed outside the United States;

(b) Are for a period of performance of less than 120 days; or

(c) Are only for—

(1) Commercially available off-the-shelf items;

(2) Items that would be COTS items, but for minor modifications (as defined at paragraph (3)(ii) of the definition of “commercial item” at 2.101);

(3) Items that would be COTS items if they were not bulk cargo; or

(4) Commercial services that are—

(i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);

(ii) Performed by the COTS provider; and

(iii) Are normally provided for that COTS item.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

- 4. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(26) through (b)(41) as paragraphs (b)(27) through (b)(42), respectively, and adding a new paragraph (b)(26); and
- c. Redesignating paragraph (e)(1)(xi) as paragraph (e)(1)(xii), and adding a new paragraph (e)(1)(xi) to read as follows:

**52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Jan 2009)**

\* \* \* \* \*

(b) \* \* \*

(26) 52.222–54, Employment Eligibility Verification (Jan 2009). (Executive Order 12989). (Not applicable to the acquisition of commercially available off-the-shelf items or certain other types of commercial items as prescribed in 22.1803.)

\* \* \* \* \*

(e)(1) \* \* \*

(xi) 52.222–54, Employment Eligibility Verification (Jan 2009).

\* \* \* \* \*

(End of clause)

- 5. Add section 52.222–54 to read as follows:

**52.222–54 Employment Eligibility Verification.**

As prescribed in 22.1803 and 12.301(d)(3), insert the following clause:

**Employment Eligibility Verification (Jan 2009)**

(a) *Definitions.* As used in this clause—  
*Commercially available off-the-shelf (COTS) item*—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1(c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpacked form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

*Employee assigned to the contract* means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

*Subcontract* means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

*United States*, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

(b) *Enrollment and verification requirements.* (1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall—

(i) *Enroll.* Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) *Verify all new employees.* Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); and

(iii) *Verify employees assigned to the contract.* For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of—

(i) *All new employees.* (A) *Enrolled 90 calendar days or more.* The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the

contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(B) *Enrolled less than 90 calendar days.* Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(ii) *Employees assigned to the contract.* For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Contractor shall follow the applicable verification requirements at (b)(1) or (b)(2), respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) *Option to verify employment eligibility of all employees.* The Contractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the Contractor, then the Contractor must reenroll in E-Verify.

(c) *Web site.* Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: <http://www.dhs.gov/E-Verify>.

(d) *Individuals previously verified.* The Contractor is not required by this clause to

perform additional employment verification using E-Verify for any employee—

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;

(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD)–12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) *Subcontracts.* The Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for identification of the parties), in each subcontract that—

(1) *Is for—*(i) Commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or

(ii) Construction;

(2) Has a value of more than \$3,000; and

(3) Includes work performed in the United States.

(End of clause)

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Chapter 1

[Docket FAR 2008–0003, Sequence 4]

### Federal Acquisition Regulation; Federal Acquisition Circular 2005–29; Small Entity Compliance Guide

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the