General Instructions for Using the Model Comments

- Rather than include all of the issues raised in this model comment, you should choose several issues that are most important to you. DHS recognizes when comments are substantially identical and when it sees a pattern in the comments, the comment review process tends to become a cataloguing exercise rather than an actual consideration of the comments. DHS will create a list that cross-references each commenter with the issues they raise, and vice-versa. Thus, the more variety in the set of issues each commenter raises, the longer it will take for DHS to complete this effort.

- Similarly, to the extent time and resources allow, do not simply cut-and-paste the sample comments. You should attempt to preface each comment with a general statement of how the particular issue is relevant to your particular workforce or company. This will force DHS to actually read the comments as opposed to simply scanning them for issues.

- DHS is attempting to justify this rule by arguing that the costs to employers are minimal. Thus to the extent possible you should attempt to discuss the costs you will incur as a result of this rule.

How to Comment: There are 3 ways to submit your comments. Be sure that whichever method you choose, the comments include the Docket Number ICEB 2006-0004 included in the subject line of the sample comments.

You may submit comments by visiting http://www.regulations.gov. Under the tab for "Comment or Submission," search on "no match" and a link to the rule will appear in the results. You may then click on "send a comment or submission and complete the form. Follow the instructions for submitting comments.

Alternatively you may be able to reach the comment form by follwing this link:

http://www.regulations.gov/fdmspublic/component/main?main=SubmitComment&o=090000648040982e

You may also comment visa the US Mail or by courier by sending your comments to:

Marissa Hernandez
U.S. Immigration and Customs Enforcement
425 I St NW, Suite 1000
Washington DC 20536

Be sure that the envelope clearly includes the docket number referenced above.

MODEL COMMENT FOR BUSINESS COMMUNITY

PRINT ON YOUR COMPANY LETTERHEAD

DRAFT - April 7, 2008, 11:24am

VIA ELECTRONIC MAIL

Director
Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
425 I Street, NW, Suite 1000
Washington, DC 20536

RE: DHS Docket No. ICEB-2006-0004– Rulemaking Proceedings on Safe-Harbor Procedures for Employers Who Receive a No-Match Letter - Clarification; Initial Regulatory Flexibility Analysis

Dear Director:

On behalf of [INSERT YOUR COMPANY NAME] we submit the following comments on the supplemental proposed rule cited above. [INSERT INFO ON YOUR COMPANY].

We believe the following issues/concerns should be addressed:

- A 30 day response time is not sufficient to review the entire supplemental rule and Initial Regulatory Flexibility Analysis. The initial proposed rule, which did not contain such an analysis, provided for a 60-day comment period. This supplemental proposed rulemaking should thus provide for at least an equal comment period. However, given the complexity of the Regulatory Flexibility Analysis we ask for a 90 day comment period.

- This supplemental rule makes no substantive changes from the Final Rule published in August of 2007. We do not believe that this comports with the decision of the United States District Court for the Northern District of California's injunction and related comments on October 10, 2007.

- The Initial Regulatory Flexibility Act Analysis indicates a significant cost to be borne by small businesses. An initial review using the Department of Homeland Security (DHS) numbers reveal that job losses due to terminations for failure to meet the 90-day correction period for documented US workers could exceed 160,000 per year. Costs to businesses using DHS assumptions exceed $300 million per year.

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- One of the greatest potential costs faced by employers as a result of this rulemaking is the increased likelihood of discrimination lawsuits brought about by the required termination of employees who cannot resolve "mismatches." DHS' retraction of the assurances it attempted to provide in the proposed rule only increases the uncertainty that employers face. Moreover, even meritless claims brought by terminated employees will require significant expenses in legal fees and related costs to defend, and unless DHS can remove jurisdiction in all courts in which such actions might be brought, it cannot prevent these expenses.

- The regulation defines what constitutes a "reasonable response" by an employer to a no-match letter and mandates specific steps to be taken by the employer within defined periods of time. The regulation's preamble suggests that taking such measures may allow the employer to avoid liability and mitigate or eliminate potential penalties, but leaves much unanswered. A true safe harbor would provide protection from all worksite enforcement actions taken in relation to the no-match guidance.

- The current times are not practical or fair. Both large and small employers will be faced with challenges to meet this standard. Large employers may receive several no-match letters at a time, which are likely to include hundreds of names. The employer has 90 days from the date of receipt of the letter or notice, to ensure and confirm that the discrepancy has been rectified. Thus, an employee has less than three months to work out a resolution if there is an error between themselves and the SSA, which might not be enough time. Many SSA offices can not remedy errors in such a short period. This will result in termination of lawfully authorized workers.

- Protection from Antidiscrimination Charges for Compliance with the Rule - Out of fear of non-compliance with DHS's proposed regulation, employers might be extra vigilant in trying to verify an employee's identity and eligibility to work in the U.S. However, there is a fine line for the employer between ensuring that the workforce is legal and violating existing anti-discriminations laws. For example, should an employee present documents other than a Social Security card when completing the I-9 Form and there is subsequently a no-match letter issued., the employer might then confront the employee and request to see the Social Security card. Clearly, this would present an issue regarding anti-discrimination laws already in effect. DHS should provide clarification on how an employer should respond to such a situation and ensure protection from liability.

- Tolling of Time for Correction of SSN if SSA is delayed. At a minimum, DHS should allow the employer a tolling of the 90 day rule or an exemption for the time requirement for correction if there has been a legitimate name change by court order or through marriage.

- Accuracy and Effectiveness of the SSA System - If the system does not meet a 99.5% accuracy test, then DHS/SSA should discontinue its use until such accuracy is restored.

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- Clear guidance should given on when DHS will be able to access SSA No-Match information given current legislative constraints. Administrative subpoenas issued by DHS currently seem to run afoul of the information sharing provisions.

- What constitutes receipt according to DHS? When Do Employers "Receive" No-Match Letters? The regulation does not state what happens in the instance where an SSA no-match letter goes directly to an employee at the employer's place of business. Is the employer considered to be on notice and have constructive knowledge? For this particular instance please outline what an employer should do to take advantage of the safe-harbor provision.

- The regulation would significantly increase the scope of constructive knowledge in certain circumstances. It states "the employer's obligations under current law, which is that if the employer fails to take reasonable steps after receiving such information, and if the employee is in fact an unauthorized alien, the employer may be found to have had constructive knowledge of that fact." This expansion of the definition of constructive knowledge is not justified in law.
- As previously noted, one of the ways by which an employer can be put on notice is by receiving a written notification from DHS. Unlike SSA, DHS does not have a mechanism in place that regularly checks and reports mismatched immigration documents. Rather, DHS generally is made aware of mismatched immigration documents in the context of an I-9 Forms audit. As noted in the proposed regulation, if an employer receives a letter from DHS, s/he is expected to resolve the issue by "tak[ing] reasonable steps, within 14 days of receiving the notice, to attempt to resolve the question raised by DHS about the immigration status document or the employment authorization document." However, DHS provides no specific guidance as to what those steps should be and what an employer should do to rectify the situation. We request that this process be outlined and explained and that time be provided for further comment.

- Another reality of this proposal is that if an employer receives a no-match letter, many employees will simply be fired because employers will not want to risk liability by taking unnecessary steps to remedy the situation on behalf of the employee. If terminated, those who lack work authorization will not simply leave the U.S. Rather, they will likely enter the underground workforce.

- This proposed regulation addresses the employers who are trying to comply with the law but it does not address those underground employers who are completely non-compliant and do not complete the required I-9 Form and instead pay workers under the table. These indeed are the bad actor employers, yet the regulation gives them a free pass. By not addressing this real and thriving underground economy and only proposing increased regulations on those employers trying to act in accordance with the law, this regulation acts as an incentive for employers and employees to enter the underground economy. Workers in the black-market economy do not pay taxes and remain in the shadows and employers are not held accountable. Creating further incentives to thrive only within the

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underground economy is neither sound economic policy nor in our country's national security interest. Indeed, DHS' own regulatory flexibility analysis indicates that the costs of this rule increase as an employer's workforce becomes "cleaner." An employer with a higher percentage of unauthorized workers faces lower costs of compliance under DHS' own analysis than an employer with fewer unauthorized workers. This is patently unfair and also creates a perverse set of incentives for employers in conflict with the stated purpose of this rule.

As explained, the proposed regulations are misguided and will have an adverse effect on the nation's economy and its overall national security.

Respectfully submitted,

INSERT NAME AND TITLE