FOOD MARKETING INSTITUTE

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Regulatory Management Division
U.S Citizen and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue NW., 2nd Floor
Washington DC 20529

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

Dear Sir or Madam,

The Food Marketing Institute (FMI)[1] is pleased to submit these comments in response to the Bureau of Immigration and Customs Enforcement (ICE) proposed amended regulation describing an employer's obligations when the employer receives a no-match letter from the Social Security Administration (SSA) or the Department of Homeland Security (DHS). 71 Fed. Reg. 34281 (June 14, 2006).

At the outset it is important to note that FMI's members are committed to hiring and employing only authorized workers and to complying fully with the law and the regulations in this regard. Indeed, our members annually submit and retain millions of W-2 forms for employees and I-9s for newly hired workers. The proposed amended regulation describes safe harbor procedures that an employer can follow when it receives a letter from SSA or ICE indicating that the combination of social security number and employee name submitted does not match agency records. By following these procedures the employer can be certain that it will not be found to have had constructive knowledge that the employee is an alien not authorized to work in the U.S.

We believe that the proposed regulation can help to provide more certainty for employers. However, the proposal does raise issues that need clarification. FMI members, like most employers, do receive "no-match" letters. Most, but not all, of these letters are caused by clerical errors or name changes. The proposed regulation needs modification as described below to ensure that it does not impose new burdens on employers to correct these types of errors. Our comments follow below by issue.

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[1] The Food Marketing Institute (FMI) conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of $340 billion — three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from 50 countries.

**A. The Employer Must Receive the No-Match Letter**

Proposed Section 274a.1(1)(l)(iii)(B) defines information indicating that the employee may be an alien who is not authorized to work, in part as:

> Written notice from the Social Security Administration that the combination of name and social security account number submitted for the employee does not match Social Security Administration records.

At least one of our members reports that there have been times when a group of employees has received letters from the SSA all on the same day. The employer itself has received no such letter, and the letter is addressed to the employee not the employer. In these circumstances, the employer has not "received" the letter from SSA and in many cases it would not have knowledge that those letters have been sent to the employee. The regulation should explicitly state that a letter must be sent to, and be received by, the employer for it to be considered a "no-match" letter.

**B. Employment Verification System Notice of Discrepancy and Notification to SSA of Corrections**

Some of our members participate in the Employment Verification System (EVS) wherein they submit a disk to the SSA every month with the names and Social Security Numbers for all newly hired employees and employees who have changed their names. Each month, they receive back from the SSA a list of any discrepancies from the information they provided.

We believe that this list should not be considered a "no-match" letter. If it is, employers would confront serious practical problems in attempting to comply with the regulation. For example, Proposed Section 274a.1(l)(2)(i)(A)(*1*) requires employers to check:

> …the employer's records promptly after receiving the notice, to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error, and if so, correcting the error(s), informing the Social Security Administration of the correct information (in accordance with the letter's instructions, if any; otherwise in any reasonable way), . . .

If an employer has been notified of a discrepancy through EVS (rather than a No-Match letter), there is no obvious procedure for the employer to correct the error using the EVS system. If employers are required to report this correction through EVS, the regulation should specify the process to be used and provide reasonable alternatives for correcting the information. In addition, as described below, the time frames provided in the regulation would need to be modified to accommodate the EVS process.

**C. 14 Day and 60 Day Time Periods**

Proposed Section 274a.1(l)(2)(i)(A) requires an employer to take certain steps within 14 days to attempt to resolve a discrepancy. First, the employer should check its own records to see if there is a clerical error. If no such error is found, additional steps should be taken, such as asking the employee to confirm his or her name and social security number. If the

employee's name and social security number are correct, the employer may ask the employee to resolve the discrepancy with the Social Security Administration.

If the discrepancy still has not been resolved within 60 days and if the employee's identity and work authorization cannot be verified at that time, the employer then "…must choose between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge the employee was an unauthorized alien . . ."

While this section of the proposed regulation is not completely clear, it appears that the employer will have 14 days to inform the employee that he or she must address the discrepancy and then the employer has 60 days subsequent to the 14 days to check to make sure the employee has resolved the discrepancy. If the 60 days begins to run from the time the letter is first received by the employer, the employee in many cases will not have enough time to resolve the problem.

These time frames are especially ambitious, and likely unworkable, if the EVS notice is considered a "no-match" letter. Therefore, we urge that the initial 14 day period be extended to at least one month and the 60 day time period be extended to 120 days to allow for more reasonable periods to accomplish the goal of clarifying reported discrepancies.

**D. Requirement to Fill Out New I-9s**

Proposed Section CFR 274a.1(l)(2)(iii)(A) requires that an employer verify the employee's identity and work authorization within 60 days following notice of a discrepancy by having the employer complete a "… new Form I-9 for the employee, using the same procedures as if the employee were newly hired."

Requiring a new I-9 every time there is a discrepancy that must be corrected would not accomplish the intended goal of verifying the employee's identity. Instead, the employee should be required to present documentation from the SSA within 60 days showing that the discrepancy has been resolved. Otherwise, the employee would be able to present new false documentation to the employer when filling out the new I-9 and no real verification of identity would have occurred.

Moreover, requiring employers to fill out new I-9s for these discrepancies would be burdensome for several reasons. Large employers that use EVS are informed of hundreds of mismatches every month, the majority of which deal with name changes for female employees who are either recently married or divorced and failed to apply for a new social security card. Requiring employers to fill out new I-9s for every mismatch in this situation require a significant amount of work on the part of the employer, with no corresponding benefit to the government. Additionally, this process would create inconsistent results. For example, some employees change their names and properly report this to the SSA. Therefore, these employees would not have a mismatch, but the employee's name would be different from that listed on the original I-9. So this would require some employees who had a name change to fill out a new I-9 (those who initially forgot to report it to the SSA) but not

others (those who had immediately reported their name change to the SSA). It would seem inconsistent to only require new I-9s for some name changes but not others.

**E. Constructive Notice**

> There is additional language in the Notice that requires further discussion.
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> Finally, it is important that employers understand that the resolution of discrepancies in a no-match letter, or other information that an employee's SSN presented to an employer matches the records for the employee held in the SSA, does not, in and of itself, demonstrate that the employee is authorized to work in the United States.

71 Fed. Reg. at 34284. While this statement may be accurate, we are unclear as to how this would affect the issue of constructive knowledge, which is the subject of this rulemaking. The only means employers have to verify the information provided by the employee is to contact the SSA to see if the information is a match. If, in order to complete the I-9, an applicant presents a drivers license or state ID along with a social security card, an employer is not required to request any other documentation. Section 1 of the I-9 form requires the applicant to attest that he or she is a US citizen or to provide the applicant's permanent resident alien number or the alien authorization to work number. Unless the employee was using this document for Section 2 as verification, the employer would not see the actual document and is not required to do anything more.

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In conclusion, our industry is committed to employing only authorized workers. We appreciate the intent of the proposed amendments to the regulation to provide clear safe harbors so employers can be certain they will not be found to have constructive knowledge that they have hired an unauthorized worker. We urge that the proposed regulation be modified and clarified as discussed above to make it as effective and as practical as possible. We appreciate your consideration of our comments.

Sincerely,

/S/

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