

September 25, 2007

**Via E-Mail**

The Honorable Michael Chertoff  
Secretary of Homeland Security  
Nebraska and Massachusetts Avenues, N.W.  
Washington, DC 20528

Dear Secretary Chertoff:

I am writing to you concerning the Department of Homeland Security (DHS) Immigration and Customs Enforcement's final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter"<sup>1</sup> (the "Final Rule"). I ask that you stay implementation of the Final Rule pending the completion of a proper regulatory flexibility analysis, and ultimately reconsider promulgating it. The Final Rule describes the obligations of an employer when an employer receives a no-match letter from the Social Security Administration (SSA). It also describes "safe harbor" procedures that the employer can follow in response to such a letter and thereby be certain that DHS will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the United States.

The Final Rule will have a significant economic impact on small businesses. The Committee on Small Business has heard from a wide range of small businesses who have stated that this rule will have such an impact on them. The comments received by DHS in the rulemaking from organizations representing small firms also discuss this impact. Unfortunately, DHS has not contemplated the impact of this regulation on small businesses to the extent it is obligated to do so pursuant to the Regulatory Flexibility Act<sup>2</sup> (RegFlex). I have also been informed by the small business community that DHS did not conduct meaningful outreach to small businesses during the rulemaking process. They state that DHS failed to solicit small business perspectives by not convening meetings or even maintaining a regular dialogue. The rulemaking process that resulted in the Final Rule does not comply with RegFlex and is inconsistent with the spirit—if not the letter—of the Administrative Procedures Act.

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<sup>1</sup> 72 Fed. Reg. 45611 (August 15, 2007).

<sup>2</sup> 5 U.S.C. § 601 et. seq.

## **Obligations Pursuant to RegFlex**

RegFlex requires regulatory agencies to estimate the impacts of their rules on small entities such as small businesses. RegFlex mandates that agencies conduct an initial regulatory flexibility analysis on all rules having a significant economic impact on a substantial number of small entities. Agencies are also required to conduct a final regulatory flexibility analysis when promulgating final rules. A regulatory flexibility analysis is not required if an agency head certifies the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. RegFlex requires that this certification be accompanied by “a statement providing the factual basis for such certification.”<sup>3</sup>

## **DHS Has Not Provided a Factual Basis for Certification**

Secretary Chertoff, you have certified that the rule will not have a significant economic impact on a substantial number of small entities but you failed to provide a factual basis for the certification. RegFlex requires a statement providing the factual basis for all such certifications.

Courts have remanded rules back to agencies for inadequate regulatory flexibility analyses. In *North Carolina Fisheries Ass’n. Inc. v. Daley* the court remanded a rule to the Commerce Department regarding fishing quotas stating: “A simple conclusory statement that . . . there would be no significant impact, is not an analysis.”<sup>4</sup>

RegFlex requires DHS to provide a factual basis supporting its conclusion of no impact rather than stating an unsupported assertion dismissing the concerns of small businesses. “Surely, Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.”<sup>5</sup>

## **DHS Did Not Analyze the Impact on Small Employers Separately**

DHS merely concludes in the regulatory flexibility analysis of the Final Rule that “The rule does not mandate any new burdens on the employer and does not impose any new or additional costs on the employer, but merely adds specific examples and a description of a “safe-harbor” procedure to an existing DHS regulation for purposes of enforcing the immigration laws and providing guidance to employers.”<sup>6</sup>

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<sup>3</sup> 5 U.S.C. § 605(b).

<sup>4</sup> *North Carolina Fisheries Ass’n v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997).

<sup>5</sup> *North Carolina Fisheries Ass’n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

<sup>6</sup> 71 Fed. Reg. 34284 (June 14, 2006).

Despite being required to by RegFlex, DHS does not make a meaningful effort to describe the impact of the Final Rule on small employers in its analysis. In response to the concerns of the small business community, DHS summarily dismisses their arguments and simply states: “All employers have the ability to establish their own mailing addresses for personnel management operations.”<sup>7</sup> A review of the rulemaking record makes it clear that DHS did not consider the concerns of a broad range of small businesses.

### **DHS is Relying on An Error Filled Database Which Will Result in Disruptions to the Small Business Workforce and Impose New Paperwork Burdens**

No-match letters are generated from data contained in the Social Security Administration’s (SSA) Earnings Suspense File (ESF). The ESF contains data on persons whose names are inconsistent with SSA’s records due to errors or obsolete data; persons using false Social Security Numbers (SSNs) or SSNs belonging to others with an incorrect name; and persons for whom the employer has no SSN. The ESF data was never intended to be relied on for immigration enforcement purposes. By relying on it for immigration enforcement, DHS will be imposing a major new paperwork headache on small businesses.

According to the Government Accountability Office (GAO), the ESF contains over 255 million mismatched records. In recent years, 8 million to 11 million new records have been added per year.<sup>8</sup>

GAO has identified several problems with this database including:

- The ESF contains information on persons whose information does not match SSA’s records for unintentional reasons.
- A significant number of earnings reports in the ESF still belong to U.S. citizens and work-authorized noncitizens.
- Listing employers by number of records in file could be misleading. For example, an employer with 35 different employer identification numbers in more than ten states may appear lower on a list of employees by number of records in the file than an employer with fewer identification numbers.<sup>9</sup>

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<sup>7</sup> 72 Fed. Reg. 45621 (August 15, 2007).

<sup>8</sup> GAO-06-814R DHS Use of Earnings Data (July 11, 2006) at 8.

<sup>9</sup> *Id.*

The last factor could lead to an enforcement bias towards small businesses if DHS focuses enforcement efforts on employers by number of records per employment identification number. Small businesses will have less employer identification numbers than larger firms and therefore are likely to have a higher ratio of no-matches per employment identification number.

The utility of this information for immigration enforcement purposes has been questioned by GAO:

. . . it is not clear that the ESF . . . would be manageable or allow for targeted enforcement. The ESF contains hundreds of millions of records, many unrelated to unauthorized work, making it difficult to use for targeting limited resources. While the ESF may help identify some of the most egregious employers of unauthorized workers, in terms of poor earnings reporting, its focus is not on unauthorized workers. Our work has shown that most of the reinstatements from the file belong to U.S.-born citizens, not to unauthorized workers.<sup>10</sup>

Because DHS is relying on the error filled ESF database in establishing a new standard for “constructive knowledge” of employing unauthorized aliens, all small businesses will undoubtedly face new administrative burdens and paperwork headaches in working to resolve issues relating to legal workers pursuant to an unreasonable timeframe.

Paperwork and recordkeeping burdens continue to be top concerns for small businesses. According to the National Federation of Independent Business, the average per hour cost of paperwork and recordkeeping for small businesses is \$48.72.<sup>11</sup> Government-wide paperwork burdens increased from 8.24 billion hours in FY 2005 to 8.92 billion hours in FY 2006, a rise of more than 8 percent.<sup>12</sup> As small businesses contend with a growing federal paperwork burden, regulatory flexibility is imperative.

Studies show that small businesses bear a disproportionate share of the federal regulatory burden. A recent comprehensive study on regulatory costs found that the annual cost of federal regulations totals \$1.1 trillion. The study determined that the annual cost per employee for firms with fewer than 20 employees is \$7,647—nearly 45 percent more than the costs for large employers, which is \$5,282.<sup>13</sup> Minimizing excessive paperwork burdens is an important way of reducing regulatory costs for small businesses.

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<sup>10</sup> GAO-06-458T Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work (February 16, 2006) at 9.

<sup>11</sup> NFIB National Small Business Poll, Vol. 3, Issue 5, Paperwork and Recordkeeping (2003).

<sup>12</sup> FY 2007 Information Collection Budget of the U.S. Government.

<sup>13</sup> W. Mark Crain, The Impact of Regulatory Costs on Small Firms (Sept. 2005).

I urge you to stay implementation of the Final Rule pending the completion of a proper regulatory flexibility analysis. Small businesses are entitled to be fully aware of the impact that regulations will have on them and your regulatory promulgation process will be stronger and better informed by the effort. I ask that you carefully contemplate their views and reconsider promulgating the Final Rule. I appreciate your consideration of this very important matter.

Sincerely,

Nydia M. Velázquez  
Chairwoman  
Committee on Small Business