COMMENTS ON DHS' SAFE-HARBOR INTERIM REGULATORY FLEXIBILITY ANALYSIS

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EXECUTIVE SUMMARY

The Department of Homeland Security (DHS) has published for public comment an Interim Regulatory Flexibility Analysis (IRFA), as required by the Regulatory Flexibility Act, in response to the preliminary injunction issued in *AFL-CIO v. Chertoff* (D.E. 135, N.D. California, October 10, 2007). The IRFA shows that the proposed rule establishing safe-harbor procedures for employers who receive no-match letters from the Social Security Administration (SSA) will cost U.S. employers approximately $1 billion per year to implement. This is ten times the threshold for an "economically significant" or "major" regulation under Executive Order 12,866 and the Congressional Review Act, respectively. In its 2006 proposed rule, DHS claimed that the rule "would not mandate any new burdens on the employer and would not impose any new or additional costs on the employer" and "would not result in an annual effect on the economy of $100 million or more" (71 Fed. Reg. 34284). The IRFA shows that these certifications were false.

The Regulatory Flexibility Act does not require agencies to estimate the effects of proposed regulations on *employees*, though nothing in the law forbids agencies from doing so if they are interested in ensuring that their legitimate statutory objectives are achieved at minimum social cost. At best, DHS' analysis adheres to the bare statutory minimum analytic requirement.

Nevertheless, the DHS Safe-Harbor IRFA contains enough information to derive estimates of the social costs the rule imposes on *authorized* employees – persons who are not targeted by either immigration law or the proposed rule. These costs turn out to be substantial. Across the five scenarios DHS examined, the safe-harbor rule would force between 37,000 and 165,000 *authorized* employees into potentially permanent unemployment. An illustrative estimate of the social costs of forced unemployment is derived assuming that the value of each such worker's labor is $25,000 per year and this value is foregone for 15 years. Aggregate social welfare loss to *authorized* workers ranges from $8 billion (assuming 20% of no-matches are authorized workers) to $37 billion (assuming 90% are authorized). These costs would be borne largely by workers least able to navigate multiple state and federal bureaucracies.

The DHS Safe-Harbor IRFA also does not address other unintended but predictable consequences of the safe-harbor rule. For example:

1. The rule does not provide a genuine safe harbor from the twin risks of immigration law enforcement and civil liability under federal civil rights law. The

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[1] These comments were prepared on contract to the U.S. Chamber of Commerce. The analysis presented here is the sole work and intellectual property of the author and may not necessarily reflect the views of the Chamber. Contact information: rbbelzer@post.harvard.edu; 703-780-1850.

IRFA assumes that employers will help employees navigate the federal bureaucracy to correct errors in their records, but the rule itself strongly discourages employers from providing any help whatsoever unless it is provably identical for all no-match employees when judged after the fact in federal court. The rule provides no safe harbor from private litigation.

2. The rule will significantly increase identity theft by making it more valuable (and potentially essential) for unauthorized workers to have names and Social Security Numbers that match. Virtually all matched pairs belong to authorized workers, the vast majority of whom will be citizens and permanent legal residents with Spanish surnames. These workers will face significant new burdens to prove their identity. Those who are unable to do so will be forced into unemployment.

3. The rule will shift some unauthorized workers into independent contracting and the cash (i.e., "underground") economy, where immigration law enforcement enforcement triggered by mismatched names and Social Security Numbers cannot reach them. These workers will face some risk of enforcement by the Internal Revenue Service, but laws protecting the privacy of tax records will shield them from immigration authorities.

4. The rule will be followed by more rounds of rulemaking because the number of unauthorized workers submitting mismatched names and Social Security Numbers will decline faster than the number of unauthorized workers seeking employment. DHS has failed to consider how unauthorized workers will adapt to the rule, but adapt they will. DHS will find itself permanently chasing these adaptations with new regulations that impose rising costs on employers and authorized employees.

5. The rule will intensify concerns about the privacy and security of personal data stored in government databases, and the potential for these data to be compromised by security lapses or used for inappropriate purposes such as surveillance.

The Regulatory Flexibility Act also requires agencies to examine a range of alternatives that would be less burdensome to small entities. The purpose of this requirement is to motivate agencies to think creatively about how to *cost-effectively* address the problem they are trying to solve, taking into account the inherent inability of small entities to take advantage of economies of scale. The DHS Safe-Harbor Rule IRFA does not include a genuine examination of alternatives, nor does it examine cost-effectiveness critically. Instead, DHS merely acknowledges that the rule would require employers to act cost-*in*effectively to maximize their chance of avoiding liability for illegal discrimination.

For any draft regulatory action with likely impacts greater than $100 million in any one year, Executive Order 12,866 requires the preparation of a Regulatory Impact Analysis. For draft regulatory actions with effects exceeding $1 billion, OMB guidance strongly recommends the preparation of a comprehensive uncertainty analysis. These requirements were established not to burden agencies but to improve the quality of the major rules they promulgate. The DHS small-entity impact analysis provides sufficient

evidence that both a Regulatory Impact Analysis and a comprehensive uncertainty analysis are needed to achieve these longstanding good-government objectives.

BACKGROUND

The Department of Homeland Security has published a an Interim Regulatory Flexibility Analysis (IRFA) in support of its determination that this proposed rule will not have a significant effect on a substantial number of small entities.[2] Assuming that the IRFA was performed properly, this document shows that the Department is seriously out of compliance with a presidential directive issued in 1993 and the Office of Management and Budget is in violation of a law enacted in 1996:

1. The proposed rule exceeds by an order of magnitude or more the threshold for an economically significant regulatory action under Executive Order 12,866;[3] and
2. The proposed rule exceeds by an order of magnitude or more the threshold for a major rule under the Congressional Review Act of 1996.[4]

In addition, the analysis clearly shows that proposed rule entails significant new paperwork burdens that must be accounted for under the Paperwork Reduction Act.[5]

The inferences conflict with unambiguous certifications made by DHS in each of its two prior regulatory actions, and somewhat perplexingly, the current one as well.[6] In each case, the Department asserted that the rule was "significant" (but not "economically significant"), that it was not "major," and that it would create no new paperwork burdens.

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[2] Department of Homeland Security, *Small Entity Impact Analysis: Supplemental Proposed Rule 'Safe-Harbor Procedures for Employers Who receive a No-Match Letter,* January 15, 2008 (prepared by Econometrica, Inc.) (hereinafter "DHS Safe-Harbor Rule IRFA" or "IRFA").

[3] Clinton, WJ. *Regulatory Planning and Review* (Executive Order 12,866), 58 Fed. Reg. 51735-51755 (October 4, 1993). An "economically significant" regulatory action is one that meets the test provided in § 3(f)(1). OMB relies on agencies to provide good-faith representations of each rule's likely consequences before submitting them for review.

[4] 5 U.S.C. Chapter 8 (Pub. L 104-121). The definition of a "major" rule is found in § 804(2); it mimics the language in Section 3(f)(1) of Executive Order 12,866. The authority to designate rules as "major" rests with the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget , the same office charged with implementing Executive Order 12,866. Presumably, OMB did not know that the safe-harbor rule was either economically significant or major prior to the publication of the DHS Safe-Harbor Rule IRFA.

[5] 44 U.S.C. 3502 et seq. OMB also implements the PRA; its implementing rule is found at 5 C.F.R. 1320. The definition of "burden" is found at § 1320.2(b). DHS appears to be taking the position that paperwork burdens which re not technically required by law are exempt. This unprecedented argument is inconsistent with the law since its enactment in 1980, and also inconsistent with the longstanding practice of DHS and its component agencies.

[6] DHS is evasive about the nature of the current action with respect to Executive Order 12,866. The Department does not say whether, as a result of its Regulatory Flexibility Act analysis, the safe-harbor rule is economically significant, and instead lapses into passive voice. See 73 Fed. Reg. 15954 ("Because this rule affected a number of different agencies and provides guidance to the public as a statement of policy or interpretive rule, the final rule was referred to the Office of Management and Budget pursuant to Executive Order 12866, as amended.").

The first claim violates Executive Order 12,866. The second and third claims violate the Congressional Review Act and the Paperwork Reduction Act (PRA).

The DHS Safe-Harbor Rule IRFA presents estimates of costs to employers associated with following the safe-harbor procedures set forth in the proposed rule. It excludes certain costs that are not cognizable under the Regulatory Flexibility Act but are crucial for estimating the full social impact of the rule -- most notably, costs borne by employees. These costs are not exempt from being counted under Executive Order 12,866 or the Congressional Review Act.[7]

For these reasons, DHS' cost estimates must be interpreted as a lower-bound estimate of the actual costs associated with the rule.

THE IRFA SHOWS THE SAFE-HARBOR RULE WILL COST EMPLOYERS $1 BILLION PER YEAR

Exhibits 4 and 21 in the IRFA contain the figures necessary to estimate aggregate costs. Exhibit 4 provides estimates of the number of employers expected to receive a no-match letter from the Social Security Administration (SSA). Exhibit 21 reports the summary figures for the cost of complying with the safe-harbor procedures per entity for each entity receiving a no-match letter. DHS did not carry out the obvious next step -- multiplying these figures to obtain the implied aggregate cost of the proposed rule can be obtained. The results of this multiplication are provided in Table 1.

Depending on the assumed percentage of employees who are unauthorized, the implied aggregate cost *to employers alone* from the proposed rule ranges from $950 million to $1,600 million.[8] The threshold for an economically significant or major rule is $100 million.

The proposed safe-harbor rule is unambiguously economically significant under Executive Order 12,866 and major under the Congressional Review Act. Under Executive Order 12,866, a Regulatory Impact Analysis is required. Furthermore, because this rule likely exceeds $1 billion in costs, OMB guidance calls for this RIA to include a comprehensive uncertainty analysis.

MATERIAL DEFICIENCIES IN THE IRFA MAKE IT INVALID FOR ESTIMATING SOCIAL COST AND COMPLYING WITH THE REGULATORY FLEXIBILITY ACT

The DHS Safe-Harbor Rule IRFA does not adhere to long established principles for economic analysis. These deficiencies must be corrected in the Regulatory Impact

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[7] Executive Order 12,866 does not limit counting to costs, nor does the presence of uncertainty exempt the counting process. A regulatory action qualifies as "economically significant" if it is "likely to result in a rule that may [h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities…" See § 3(f))(1), emphasis added. Similarly, costs borne by employees, whether unauthorized or authorized, are within the definition of "effects."

[8] This range is obtained by summing the values in each column. In practice, the correct columns need not be the same for each row.

Analysis that Executive Order 12,866 requires for economically significant regulatory actions.

Dubious or Improper Assumptions about the Regulatory Baseline

OMB guidance directs agencies to use as the regulatory baseline the state of the world that would exist in the absence of a rule.[9] Where there is uncertainty about the interpretation of existing regulatory requirements, multiple alternative baselines can be used.[10] DHS should utilize its vast expertise to estimate actual compliance rates by sector and use these estimates consistently.

The DHS Safe-Harbor Rule IRFA does not follow these guidelines. Depending on the circumstances, DHS assumes that employers either fully comply with the Immigration and Nationalities Act (INA) or do not comply at all. The Department now asserts that the safe-harbor rule is merely interpretive,[11] though at about $1 billion in acknowledged annual costs, this could be one of the largest interpretive rules in U.S. history.

No Proposal and Examination of Alternatives

The Regulatory Flexibility Act requires agencies to identify and analyze alternatives in the IRFA that would make compliance less burdensome for small entities.[12] However, the DHS IRFA does not include any such analysis. DHS justifies this oversight by claiming that any of the standard modifications specifically suggested in the text of the Regulatory Flexibility Act would actually disadvantage small entities by providing them a smaller safe harbor.[13] This displays a disturbing lack of creativity.

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[9] "Benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted." See Office of Management and Budget, *Circular A-4* at 2.

[10] OMB guidance provides an example that is highly analogous to DHS' safe harbor rule. In 1998, the Environmental Protection Agency promulgated a rule reducing the cost of PCB disposal. When examined against an existing 1979 regulation, cost savings were estimated at $740 million. However, this did not reflect EPA's actual implementation of the 1979 regulation. When the actual behavior of both EPA and regulated entities were accounted for, regulatory cost savings declined to $150 million. See *Circular A-4* at 15 and OMB's *1998 Report to Congress on the Costs and Benefits of Federal Regulation* at 68.

[11] "DHS *continues to view* the August 2007 Final Rule and this supplemental rule as interpretive rules, and does not believe that these rulemakings bear any of the hallmarks of a legislative rule.." See Department of Homeland Security, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis," 73 *Fed. Reg.* 15951 (emphasis added). It is unclear what antecedent DHS is referring to. The Department did not claim that the rule was interpretive at either the proposed or final rule stages. In both cases, DHS made certifications that would have been superfluous for an interpretive rule.

[12] 5 U.S.C. § 603(c): Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." The statute lists examples of potential alternatives, but the list is illustrative rather than exhaustive.

[13] See 73 Fed. Reg. 15953-15954.

An obvious alternative that DHS could have examined, and one that would have required little or no change to the structure of the regulation, is to accept some of the burden of resolving mismatches. For example, the government could assign specific staff at local ICE and SSA offices with the responsibility of assisting workers who are the subject of no-match letters. In its response to comments on the proposed rule, the Department stated "DHS does not believe that an outreach program would cost a substantial amount" and that "any costs can be resolved through the regular fiscal budgeting for the Executive Branch."[14] Such a program would significantly assuage employers concerned about litigation claiming civil rights violations if they provide assistance to employees that after the fact might be judged to have been discriminatory.[15] Nevertheless, the Department did not examine such an alternative in the IRFA.

Although DHS "believes" that additional burdens on the Social Security Administration will be insignificant, the IRFA itself suggests otherwise. Table 2 uses the data presented in the IRFA to estimate the number of authorized employees who will need to personally visit the local SSA field office to resolve their mismatched data.[16] Depending on the proportion of no-matches that are unauthorized workers (whom DHS assumes will not seek error correction), the number of additional in-person visits to DHS field offices will range from 611,000 to 2,750,000 per year. For FY 2007, SSA expected 42 million field office visits,[17] but the vast majority of them were for more mundane services than resolving no-matches. Many of these individuals also will require in-person visits to local government offices to retrieve certified birth certificates, marriage licenses, divorce decrees, and similar documents.

Table 2**Error! Reference source not found.** also provides a rough estimate of the incremental cost to SSA of managing this increased workload derived from the IRFA,

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[14] See 71 *Fed. Reg*. 45622. The IRFA suggests otherwise. DHS estimates that 611,000 to 2,700,000 authorized employees will have to resolve their records with SSA.

Nevertheless, DHS neither included such an alternative in its IRFA nor committed to actually fund such a program.

[15] The safe-harbor rule advises employers to treat all no-match employees identically. This means any assistance an employer provides to one employee must be provided to all – ironically, irrespective of whether the employer suspects (but does not have actual or constructive knowledge) that a no-match employee is unauthorized.

[16] This almost certainly must be conducted in person because SSA requires proof of both identity and legal U.S. presence. See SSA's online FAQ response to persons who are the subject of a no-match letter at http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faqid=1127&p_created=1029974062&p_sid=yHKOeu1j&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9MSwxJnBfcHJvZHM9JnBfY2F0cz0wJnBfcHY9JnBfY3Y9JnBfc2VhcmNoX3R5cGU9YW5zd2Vycy5zZWFyY2hfbmwmcF9wYWdlPTEmcF9zZWFyY2hfdGV4dD1uby1tYXRjaA**&p_li=&p_topview=1.

[17] Statement of the Honorable Jo Anne B. Barnhart, Commissioner, Social Security Administration; Testimony before the Subcommittee on Social Security of the House Committee on Ways and Means, May 11, 2006 (http://www.socialsecurity.gov/legislation/testimony_051106.html).

assuming that each case requires time and services valued at just $100 per case.[18] Depending on the proportion of no-matches who are unauthorized, these additional outlays range from $61 million to $275 million per year. Without additional dedicated funding, service quality at SSA field offices will decline for *all* of its in-person customers.

DHS also did not consider the option of third-party certification even though its Transportation Security Administration subsidiary has such a program for Registered Travelers.[19] TSA has approved several nongovernmental vendors to provide third-parry proof of identity sufficient to ensure safety onboard commercial aircraft, a much higher-risk concern than unauthorized workers generally. Like the RT program, participation in a third-party verification system would be voluntary and not all employers (or employees) would choose to join. Nevertheless, in the search for alternative "safe harbors" that could provide employers bullet-proof assurance that they are in compliance with federal immigration law *and* give them absolute immunity from discrimination lawsuits, it is surprising that DHS did not give any attention to such a program. This raises doubts as to whether DHS seeks to leverage no-match reporting into a more comprehensive federal database that could be used to monitor workers, not just verify that they are authorized to work.

Costs of the Statute

The DHS Safe-Harbor Rule IRFA ignores certain costs on the ground that they should be attributed to the law and not to this rulemaking. However, OMB guidelines direct agencies to account for all regulatory (i.e., non-budgetary) costs.[20] 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. Nevertheless, all regulatory (i.e., non-budgetary) costs must be accounted for exactly once. Although DHS may well have little or no experience with these procedures, the procedures themselves have been around since 1981 and apply to DHS no less than they apply to other federal agencies.[21]

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[18] This figure is admittedly arbitrary, but there is some basis for believing it is reasonable. SSA's FY 2009 budget request for administration is $9.496 billion. This would fund approximately 60,000 FTEs at an average cost of $155,000 per FTE. Dividing by 2000 hours per year yields $78 per hour. Field office visits are more expensive for SSA than telephone contacts. For FY 2009 budget figures, see http://www.socialsecurity.gov/budget/2009bud.pdf.

[19] See Transportation Security Administration, *Registered Traveler* (http://www.tsa.gov/approach/rt/index.shtm).

[20] "In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you should use a pre-statute baseline. If you are able to separate out those areas where the agency has discretion, you may also use a post-statute baseline to evaluate the discretionary elements of the action." See *Circular A-4* at 15-16.

[21] The requirement for regulatory impact analysis was first established as a general policy and practice in Executive Order 12,291. OMB has issued guidance on the preparation of regulatory impact analyses in 1990, 1996, 2000, and 2003.

A prominent example of this error is DHS' refusal to estimate the real costs employers will bear recruiting and retraining replacement employees. The Department argues that these costs ought to be attributed to the law, but even if this is true, it does not justify excluding them from the IRFA. It is analytically disingenuous to simply ignore them. From employers' perspective, whether these costs are assigned to the rule or to the law is arbitrary; they must be borne in either case. Nothing in the Regulatory Flexibility Act or its implementing guidance justifies excluding real costs that employers actually bear just because they may be attributable to an underlying law.[22] That is especially true when the law is given new life through the exercise of a an agency's discretionary rulemaking.[23]

Costs Borne by Employees, Unauthorized *and* Authorized

The DHS Safe-Harbor Rule IRFA ignores all costs borne by employees, whether authorized or unauthorized. This is justified on the ground that *employee* costs are not cognizable under the Regulatory Flexibility Act.[24] Whatever the merits this procedure might have under the Regulatory Flexibility Act, it is unambiguously wrong for estimating aggregate regulatory impact analysis, which must take account of *all* costs.

Costs borne by *authorized* employees are especially important because they are innocent bystanders. Authorized employees who are the subject of no-match letters must undertake potentially time-consuming and expensive steps to correct their records with the Social Security Administration. These are real costs. For some, the task may be relatively simple, but for others wending through the SSA bureaucracy may be very challenging indeed. For good reason, SSA requires original documents to prove identity and citizenship or legal residence. Similarly, original documents also are needed to prove name changes due to marriage or divorce.[25]

Some authorized employees will be unable to correct their SSA records and be forced to abandon the labor market. For these employees, the effect of employer reliance on the safe-harbor procedures is starker: they lose their jobs and may not be able to work again. In its analysis, DHS assumes that 2% of authorized employees who are the subject of no-match letters will be unable to correct their records and thus would face

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[22] See footnote 12 for the relevant statutory text. See also Small Business Administration Office of Advocacy, *A Guide for Government Agencies: How to Comply with the RFA* (2003).

[23] If an agency were to implement by rule a statute directly affecting the rights and privileges of workers irrespective of their legal status, and in doing so it imposed significant costs on a substantial number of small entities, the rule would be subject to the Regulatory Flexibility Act.

[24] The law does not contain the exemption DHS claims. Rather, it directs agency IRFAs to "describe the impact of the proposed rule on small entities" (5 U.S.C. § 603(a)) and "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule" (5 U.S.C. § 603(b)(4)).

[25] The benefits of enduring these costs also are real, but the fact that benefits exist does not excuse DHS from its obligation to properly estimate costs. Benefits must be accounted for in a separate benefits assessment.

termination.[26] The estimated number of authorized employees who would be terminated because of the safe-harbor rule is a serious concern, as should be the social costs of forced unemployment.

Table 3 uses the data and estimates from the IRFA combined with the summary of data provided by SSA and reported in Exhibit A.5. The expected number of authorized employees that would be terminated as a predictable result of the safe-harbor rule is calculated by multiplying the number of no-match employees reported by SSA for each employer size category by the proportion of employees assumed to be authorized, and multiplying this product by 2%. If 80% of no-match employees are assumed to be unauthorized (the column in light green), then 36,655 authorized employees are expected to be terminated (0.40% of all no-match employees).[27] However, if 10% of no-match employees are assumed to be unauthorized (the column in pink), 164,946 authorized employees are expected to be terminated (1.82% of all no-match employees).[28] Uncertainty about the proportion of authorized employees who will not be able to correct their SSA records is clearly a very important parameter for estimating social costs, but it is one that DHS has so far neglected because the Department is narrowly focused on estimating effects on small entities, not on employees.[29]

Table 3 also provides an illustrative estimate of the social costs of forced unemployment that would result from employers' adherence to the safe-harbor procedures set forth in the rule. It is assumed that each person forced into unemployment otherwise would work for 15 more years, earn $25,000 per year ($2008), and has a real discount rate of 7%. The present value of this income stream is approximately $225,000.[30] When this figure is multiplied by the estimated forced unemployment

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[26] The IRFA assumes that 94% (31.33% of 33.33%) of those employees who need to visit SSA to correct their records will require 8 hours to do so; for the remaining 6% (2% of 33.33%), an infinite amount of time will be required. See IRFA at 29-32.

[27] 9.136,658 × [1 – 80%] × 2% = 36,655.

[28] 9,136,658 × [1 – 10%] x 2% = 164,460.

[29] A crucial margin for analysis is uncertainty about the distribution of costs authorized employees would face resolving no-matches with SSA, including the proportion of such employees who would be unsuccessful. Uncertainty analysis is strongly recommended by OMB for proposed regulations of this magnitude: "For major rules involving annual economic effects of $1 billion or more, you should present a formal quantitative analysis of the relevant uncertainties about benefits and costs." See OMB *Circular A-4* at 39. Instead of performing an uncertainty analysis in accordance with these guidelines, DHS is content to assume (without benefit of any disclosed empirical foundation) that employer recordkeeping errors are responsible for 1/3rd of no-match errors; another 1/3rd are attributable to employees failing to provide employers with correct and readily available documentation; and 1/3rd will require resolution in concert with SSA. Two percentage points of this final 1/3rd are resistant to resolution.

[30] Present value cost is sensitive to all three parameters. Doubling the annual average wage or unemployment time increases it by 100% and 37%, respectively; doubling the discount rate decreases it by 32%. There are only two practical ways to make these social costs insignificant: (1) assume that the value of labor produced by authorized workers who cannot resolve no-matches is negligible; or (2) assume that these workers have extraordinarily high rates of time preference (e.g., a 50% annual discount rate reduces these social costs by about 80%).

numbers, social costs range from $8.2 billion (assuming 80% of no-match workers are unauthorized) to $37 billion (assuming 10% of no-match workers are unauthorized).[31]

Other Unintended Consequences

With a small amount of additional effort, a number of other unintended consequences can be identified. Each one significantly increases social costs.

Increased incidence of identity theft

The safe-harbor rule is intended to target a particular form of subterfuge: the use of mismatched names and Social Security Numbers. If the rule were to prove effective at deterring mismatches, it will significantly increase the value to unauthorized employees of having illicit name and SSN combinations that do match. This portends a significant increase in the market demand for stolen identities, which will be satisfied by a significant increase in the level of identity theft. The practical result would be a serious diminution of the effectiveness of using no-matches to identify unauthorized workers. That is, at the same time that the social benefits of the safe-harbor rule decline, its social costs would rise.

The costs of identity theft will be borne by citizens and aliens authorized to work in the United States, and potentially their minor children. Most workers victimized by identity theft will have Spanish names. They would stand falsely accused, explicitly or implicitly, of both violating immigration law and committing identity fraud. It is they, and not the unauthorized workers targeted by the rule, who would bear the burden of having to prove their identities to the government's satisfaction. Some would not succeed and be added to the pool of authorized workers forced into unemployment. Estimates of the current social costs of identity theft are staggeringly large, and under the safe-harbor rule the declines that have been observed recently could be reversed.[32]

Shift of unauthorized workers to independent contracting

Neither independent contractors nor the firms they work for submit I-9s to DHS, so the safe-harbor rule cannot detect unauthorized workers within their ranks. Thus, a significant increase can be expected in the number of unauthorized workers identifying themselves as independent contractors. Some employers will find it less expensive to redesign jobs so that they fall within Internal Revenue Service rules for independent contractors rather than adhere to the safe-harbor procedures. The difference in tax liability between wage employment and independent contractor employment is likely to

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[31] Expenditures on public assistance such as Food Stamps, WIC, housing vouchers, and subsidized health care, are all omitted because they are transfer payments.

[32] In 2007, the Government Accountability Office reported that identity theft cost $50 billion per year. See GAO, GAO-07-705 (http://www.gao.gov/new.items/d07705.pdf). Although this estimate is widely attributed to GAO, its actual source is a 2007 consulting report. See Javelin Research, "Identity Fraud Is Dropping According to New Research" (press release), February 1, 2007 (http://www.javelinstrategy.com/idf2007). Javelin also reports that persons with low-income (< $15,000 per year) have thus far been least likely to be victims of identity theft, it takes them 70% longer to detect fraud and 75% more time (44 hours on average) to resolve it. A predictable consequence of the safe-harbor rule is a significant increase in the number of low-income persons whose identities are stolen.

be negligible, and if so, the Internal Revenue Service is unlikely to make enforcement of its independent contractor rules *for the purpose of immigration law enforcement* a high priority.[33]

Shift of unauthorized workers to the underground economy

As the cost of remaining in the legal labor market increases, some unauthorized workers will choose to work in the underground economy instead. These individuals (and their employers) will be lost to all governmental efforts to use labor markets to enforce immigration law. Governments will lose their tax payments.

Loss of privacy rights by authorized workers

When the Social Security Act was passed in 1935, President Roosevelt assured the American people that Social Security Numbers would never become a national identity card. Over the past 70 years, however, the use of the SSN has expanded to the point that it is exactly that – a de facto identity. In 1943, Roosevelt directed all federal agencies to use the SSN for identification purposes. In 1961 and 1965, respectively, SSNs became the standard identifier for federal employees and beneficiaries of the newly enacted Medicare program. The IRS adopted the SSN as its official taxpayer identification number in 1962. Beginning in 1972, legally admitted aliens were required to obtain SSNs. Dozens of governmental actions since then have expanded the domain of life circumstances in which U.S. residents need a Social Security number to survive. Occasional efforts to constrain the use of SSNs, such as the Privacy Act of 1974, have slowed but not stopped the SSN's long march toward becoming the universal ID card that President Roosevelt promised it would never be.

It is entirely reasonable to predict that DHS' safe-harbor rule will not be the last governmental action intended to leverage government databases in the pursuit of social policies. This is especially true if the rule fails to significantly reduce illegal immigration, perhaps in large part because unauthorized workers cost-effectively adapt to the new rules. Public-choice economists have for years noted that the usual response to government failure is not a retreat from regulation in favor of markets, but instead to add more layers of government regulation. If regulatory tools are relied on, the process cannot reach equilibrium at least until a universal biometric national identity card is created, one that American citizens and permanent legal residents would need to conduct any public and most private business. As a technical matter, such an identity card easily permits governmental surveillance of any or all American citizens, permanent legal residents, and legal visitors. Only illegal aliens -- who presumably would not obtain these identification cards -- would be exempt from the government's technical capacity to monitor them.

It is easy to envision a plausible first step along that path subsequent to the safe-harbor rule. As unauthorized workers respond by providing fraudulent but matched names and SSNs, no-match screening by SSA will be decreasingly able to detect presumptive immigration law violations. DHS may want to expand its program to notify

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[33] Independent contractor status solves a host of potential legal problems for an unauthorized worker. Tax records must be kept private, even from DHS. Firms that hire independent contractors have neither the responsibility nor the right to demand proof of legal U.S. presence.

employers when an employee appears "too often" in the SSA database, thus implying that the worker is not legitimately employed. Employers would be encouraged to take specific actions to re-verify the legal status of employees listed in "too-often letters."[34] More unauthorized workers will be detected, but the number of authorized workers with legitimate multiple W-2s also will increase. Unauthorized workers will then move to the next costliest method of evading immigration law. The costs will be borne by employers and authorized workers caught up in the dragnet.

Larger Lessons from the DHS Safe-Harbor Rule IRFA

In its 2006 and 2007 *Federal Register* notices, DHS asserted that the rule would not have a significant effect on a substantial number of small entities. This determination appears to have been based on intuition or wishful thinking; no supporting analysis was provided. Having now been compelled by a court to perform an analysis of impacts on small entities, important new information about the rule's likely social costs has now come to light. If DHS were to consider only those employers that will receive a no-match letter, and aggregate those impacts, it would immediately see that the broad economic impacts predicted by the plaintiffs in *AFL-CIO v. Chertoff* are real.[35]

The IRFA shows that the safe-harbor rule is unambiguously economically significant (per Executive Order 12,866) and major (per the Congressional Review Act). Thus, it proves that the Department's 2006 and 2007 certifications and determinations to the contrary were at best mistaken. In its request for comment, the Department no longer maintains the fiction that it is not, but nevertheless refuses to be candid about economic impacts.[36] Even a small amount of analysis, conducted in a short amount of time such as the 6-8 week period during which the IRFA was performed, is sufficient to make this showing.

Executive branch officials often complain that regulatory analysis is overly burdensome and that it delays the government from taking timely and effective action. As

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[34] How often is "too often" is a discretionary choice much like SSA's decision to limit no-match letters to employers with 10 or more no-matches comprising 2% or more of their workforce.

[35] The Department clearly knows that the safe-harbor rule imposes significant costs on small entities *if costs are aggregated.* Note the conditional nature of its no significant impact determination: "DHS does not believe that the direct costs incurred by employers who choose to adopt the safe harbor procedures set forth in this rule would create a significant economic impact *when considered on an average cost per firm basis*." See 73 *Fed. Reg*. 15953, emphasis added.

[36] In the section of the preamble reserved for declaring Executive Order 12,866 applicability – the same section that in the 2006 proposed and 2007 final rule preambles DHS denied that the safe-harbor rule was economically significant, there appears the following text:

> Because this rule affected a number of different agencies and provides guidance to the public as a statement of policy or interpretive rule, the final rule was referred to the Office of Management and Budget pursuant to Executive Order 12866, as amended. Multiple agencies reviewed and considered the draft and substantial consultation between agencies occurring during that process. This supplemental proposed rule reflects that consultation.

See 73 *Fed. Reg.*15954. DHS is suddenly silent about whether the rule is major under the Congressional Review Act.

the IRFA shows, regulatory analysis also can be very useful for identifying potential problems and unintended consequences that decision-makers presumably would want to be informed about before they act, and prevent them if possible. Deciding early to perform regulatory analysis, and do so in accordance with established guidance and generally accepted methods, may instead improve both the quality of regulatory design and expedite the process toward a successful conclusion.

Table 1: DHS Estimates of Employer-Borne Compliance Costs, per Employer and Aggregate

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	DHS Estimate of Compliance Cost per Firm, $ (Exhibit 21)				
		Percent of Employees Assumed to be Unauthorized				
		10%	20%	40%	60%	80%
1-4	0	$ -	$ -	$ -	$ -	$ -
5-9	4,866	$ 3,737	$ 3,633	$ 3,425	$ 3,217	$ 3,009
10-19	24,840	$ 4,020	$ 3,891	$ 3,634	$ 3,376	$ 3,119
20-49	46,102	$ 5,786	$ 5,568	$ 5,132	$ 4,695	$ 4,259
50-99	23,286	$ 7,517	$ 7,214	$ 6,606	$ 5,998	$ 5,391
100-499	33,653	$ 22,488	$ 7,214	$ 18,469	$ 15,789	$ 13,110
500+	8,088	$ 33,759	$ 21,148	$ 27,462	$ 23,265	$ 19,067
All	***140,835***					

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	Implied DHS Estimate of Total Compliance Cost, $ Millions (implied by Exhibit 21 but not reported)				
		Percent of Employees Assumed to be Unauthorized				
		10%	20%	40%	60%	80%
1-4	0	$ -	$ -	$ -	$ -	$ -
5-9	4,866	$ 18	$ 18	$ 17	$ 16	$ 15
10-19	24,840	$ 100	$ 97	$ 90	$ 84	$ 77
20-49	46,102	$ 267	$ 257	$ 237	$ 216	$ 196
50-99	23,286	$ 175	$ 168	$ 154	$ 140	$ 126
100-499	33,653	$ 757	$ 243	$ 622	$ 531	$ 441
500+	8,088	$ 273	$ 171	$ 222	$ 188	$ 154
All	***140,835***	***$ 1,590***	***$ 953***	***$ 1,341***	***$ 1,175***	***$ 1,009***

Table 2: Incremental Costs to SSA for Managing Authorized Employees Seeking Error Corrections

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	Reported Number of No Match Employees (Exhibit A.5)	Number of Authorized Employees Expected to Seek SSA Assistance Resolving Mismatched Records (Assumes 33% of Authorized No-Matches) Source: IRFA at 26				
			Percent of Employees Assumed to be Unauthorized				
			10%	20%	40%	60%	80%
1-4	0	0	0	0	0	0	0
5-9	4,866	84,732	25,420	22,595	16,946	11,298	5,649
10-19	24,840						
20-49	46,102	770,529	231,159	205,474	154,106	102,737	51,369
50-99	23,286	1,088,449	326,535	290,253	217,690	145,127	72,563
100-499	33,653	2,557,994	767,398	682,132	511,599	341,066	170,533
500+	8,088	4,661,954	1,398,586	1,243,188	932,391	621,594	310,797
Total	***140,835***	***9,163,658***					

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	Reported Number of No Match Employees (Exhibit A.5)	Implied Incremental Government Outlays to Serve Authorized Employees Expected to Seek SSA Assistance Resolving Mismatched Records, $ Millions (Assumes $100 per Case)				
			Percent of Employees Assumed to be Unauthorized				
			10%	20%	40%	60%	80%
1-4	0	0	$ -	$ -	$ -	$ -	$ -
5-9	4,866	84,732	$ 3	$ 2	$ 2	$ 1	$ 1
10-19	24,840						
20-49	46,102	770,529	$ 23	$ 21	$ 15	$ 10	$ 5
50-99	23,286	1,088,449	$ 33	$ 29	$ 22	$ 15	$ 7
100-499	33,653	2,557,994	$ 77	$ 68	$ 51	$ 34	$ 17
500+	8,088	4,661,954	$ 140	$ 124	$ 93	$ 62	$ 31
Total	***140,835***	***9,078,926***	***$ 275***	***$ 244***	***$ 183***	***$ 122***	***$ 61***

Table 3: Forced Unmployment of Authorized Employees and Illustrative Social Costs Implied by DHS Safe-Harbor IRFA

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	Reported Number of No Match Employees (Exhibit A.5)	Implied but Unreported Number of Authorized Employees Terminated				
			Percent of Employees Assumed to be Unauthorized				
			10%	20%	40%	60%	80%
1-4	0	0	0	0	0	0	0
5-9	4,866	84,732	1,525	1,356	1,017	678	339
10-19	24,840						
20-49	46,102	770,529	13,870	12,328	9,246	6,164	3,082
50-99	23,286	1,088,449	19,592	17,415	13,061	8,708	4,354
100-499	33,653	2,557,994	46,044	40,928	30,696	20,464	10,232
500+	8,088	4,661,954	83,915	74,591	55,943	37,296	18,648
Total	140,835	9,163,658					
Number of No-Match Employees Terminated			**164,946**	**146,619**	**109,964**	**73,310**	**36,655**
Percent of No-Match Employees Terminated			***1.80%***	***1.60%***	***1.20%***	***0.80%***	***0.40%***

Employee Size Categories	Number of Employers Receiving No-Match Letters (Exhibit 4)	Reported Number of No Match Employees (Exhibit A.5)	Implied Social Costs of Forced Unemployment, $ Millions ($225,000 Present Value per Case)				
			Percent of Employees Assumed to be Unauthorized				
			10%	20%	40%	60%	80%
1-4	0	0	$ -	$ -	$ -	$ -	$ -
5-9	4,866	84,732	$ 343	$ 305	$ 229	$ 153	$ 76
10-19	24,840						
20-49	46,102	770,529	$ 3,121	$ 2,774	$ 2,080	$ 1,387	$ 693
50-99	23,286	1,088,449	$ 4,408	$ 3,918	$ 2,939	$ 1,959	$ 980
100-499	33,653	2,557,994	$ 10,360	$ 9,209	$ 6,907	$ 4,604	$ 2,302
500+	8,088	4,661,954	$ 18,881	$ 16,783	$ 12,587	$ 8,392	$ 4,196
Total	***140,835***	***9,078,926***	***$ 37,113***	***$ 32,989***	***$ 24,742***	***$ 16,495***	***$ 8,247***