

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[DHS Docket No. ICEB–2021–0010]

RIN 1653–AA86

Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I–9)

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations to create a framework under which the Secretary of Homeland Security (the Secretary) may, as an optional alternative to the in-person physical document examination method that employers have followed as part of the Form I–9 process set forth in current regulations, authorize alternative document examination procedures. The Secretary may authorize such alternative procedures with respect to some or all employers as part of a pilot program, upon the Secretary’s determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to section 319 of the Public Health Service Act, or a national emergency declared by the President pursuant to sections 201 and 301 of the National Emergencies Act. In addition, in a separate document published in this edition of the **Federal Register**, DHS is announcing the Secretary’s authorization of an alternative document examination procedure and the conditions for participation.

DATES: The effective date of this final rule is August 1, 2023.

FOR FURTHER INFORMATION CONTACT: Sharon Hageman, Deputy Assistant Director, Office of Regulatory Affairs and Policy, U.S. Immigration and Customs Enforcement, Department of Homeland Security, 500 12th Street SW, Washington, DC, 20536. Telephone 202–732–6960 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. Purpose of the Regulatory Action

This rule responds to lessons learned during the COVID–19 pandemic, which demonstrated the substantial practical benefits of an optional alternative to the

physical documentation examination procedures required by the employment eligibility verification regulations at 8 CFR 274a.2(b)(1)(ii)(A). The rule creates a framework under which DHS may implement permanent flexibilities under certain conditions, initiate pilot procedures with respect to the examination of documents, or respond to emergencies similar to the COVID–19 pandemic.¹ DHS is also adding a box to the Form I–9; employers will use the box to document the use of a DHS-authorized alternative procedure.

This action is also consistent with the goals of Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*, which directs agencies to “reduce administrative hurdles and paperwork burdens to minimize ‘time taxes’” and “redesign compliance-oriented processes to improve customer experience and more directly meet the needs of the people of the United States.”² The reduction of “time taxes,” consistent with law, is a national priority; it has the potential to promote social welfare generally and equity in particular. Many of the public comments are consistent with this point. For example, many of the comments were from employers and employees who have adopted permanent telework and remote work arrangements that no longer require employees to physically report to an employer worksite on a regular, consistent, or predictable basis.

Authorizing an alternative procedure offers potential benefits to new and rehired employees because they no longer need to travel to a worksite to present documentation for the Form I–9. DHS believes that authorizing an alternative option can be done without compromising the integrity of the employment eligibility verification process. Therefore, this final rule amends 8 CFR 274a.2 to allow the Secretary to authorize optional alternatives for examining the documentation presented by individuals seeking to establish identity and employment authorization for the purpose of completing the Form I–9. This final rule also summarizes an optional alternative procedure for the examination of the documentation presented by individuals seeking to establish identity and employment authorization for the purpose of completing the Form I–9, as announced by DHS in a document (*Optional Alternative 1 to the Physical Document*

Examination Associated with Employment Eligibility Verification (Form I–9)) concurrently published in this edition of the **Federal Register**. This final rule does not change the standard employers must follow when examining documentation; employers who examine documentation in person (physical examination) or remotely through an alternative procedure authorized by the Secretary are still required to accept documentation that “reasonably appears to be genuine and to relate to” the employee presenting the documentation.³

B. Legal Authority

In 1986, Congress reformed U.S. immigration laws by passing the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603,⁴ to amend the Immigration and Nationality Act (INA). Among other reforms, the IRCA amendments made it unlawful for employers to knowingly hire individuals who are unauthorized to work in the United States and established a system for verifying the identity and U.S. employment authorization of all employees hired after November 6, 1986.⁵ IRCA imposed employer sanctions, codified in section 274A of the INA, 8 U.S.C. 1324a, including financial, criminal, and other penalties for those who failed to verify the identity and the employment authorization of all new employees, or those who knowingly hired, recruited, or referred for a fee, or continued to employ “unauthorized aliens” after November 6, 1986.⁶ Among other goals, IRCA sought to ensure that only authorized individuals were hired for employment in the United States, and that employers did not discriminate against any employee on the basis of national origin or citizenship status.⁷ IRCA prompted the creation of the Form I–9 as the designated means of documenting that the employer verified an employee’s identity and U.S. employment authorization. See 8 CFR 274a.2. Employers must complete the Form I–9 to document verification of the identity and employment authorization of each employee (both citizen and noncitizen) hired after November 6,

³ 8 U.S.C. 1324a(b)(1)(A)(ii). As explained in the accompanying **Federal Register** notice, employers must allow employees who are unable or unwilling to submit documentation using the optional alternative procedure the option to submit documentation in person for physical examination.

⁴ Immigration Reform and Control Act, Public Law. 99–603 100 Stat. 3445.

⁵ *Id.*

⁶ *Id.*

⁷ See 8 U.S.C. 1324a and 8 U.S.C. 1324b.

¹ See 87 FR at 50789.

² See 86 FR 71357 (published Dec. 16, 2021).

1986, to work in the United States.⁸ If an employee's temporary employment authorization expires, the employer must reverify the employee's employment authorization to ensure that the employee continues to be authorized to work in the United States.⁹ If an employee is rehired, the employer must also ensure that the employee is still authorized to work in the United States at the time of rehire.¹⁰ The employer must retain the Form I-9 in a paper, electronic, or other format, or in an acceptable combination of such formats, for as long as the individual works for the employer and for a specified period after the individual's employment has ended.¹¹

The authority of the Secretary to implement the regulatory amendments in this rule can be found in the Homeland Security Act of 2002, Public Law 107-296, which transferred the responsibility for overseeing the examination of documentation evidencing identity and employment authorization from the former U.S. Immigration and Naturalization Service, previously a component of the U.S. Department of Justice, to DHS. *See, e.g.*, 6 U.S.C. 111, 557; 8 U.S.C. 1103, 1324a, 1324b. Within DHS, U.S. Citizenship and Immigration Services (USCIS) issues most employment authorization documentation to noncitizens and administers an electronic employment eligibility confirmation program called E-Verify,¹² and U.S. Immigration and Customs Enforcement (ICE) monitors and enforces compliance with the requirements of the Form I-9. Within the U.S. Department of Justice, the Civil Rights Division's Immigrant and Employee Rights Section enforces the INA's anti-discrimination provision found at 8 U.S.C. 1324b. This law prohibits certain types of employment discrimination based on citizenship,

immigration status, and national origin, including discrimination in the Form I-9 and E-Verify processes.

C. COVID-19 Flexibilities

Due to the physical proximity precautions implemented by employers related to combating the COVID-19 pandemic, on March 20, 2020, ICE posted an announcement on its website that stated DHS would defer the physical examination requirements associated with the Form I-9.¹³ Under that guidance, an employer, or an authorized representative acting on the employer's behalf, could inspect Form I-9 documents remotely (*e.g.*, over video link, fax, or email) within three business days of the employee's first day of employment. If inspecting Form I-9 documents remotely, the employer was required to obtain, inspect, and retain copies of the documents within three business days. Such employers were further directed to enter COVID-19 as the reason for the physical examination delay in the Section 2 "Additional Information" field, of the Form I-9. Under the guidance, the employer would be required, once normal operations resumed, to physically examine the documents and enter the notation "documents physically examined" along with the date of inspection in the Section 2 "Additional Information" field. DHS initially allowed these provisions to be in place for a period of 60 days from the date of the notice (or within three business days after the termination of the national emergency, whichever came first).

This guidance applied only to employers and workplaces that were operating remotely. Specifically, the guidance stated: "[i]f there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis."

ICE periodically extended this announcement as the COVID-19 national emergency¹⁴ continued. On March 31, 2021, ICE updated the announcement made on March 20, 2020, stating that, as of April 1, 2021, only those employees who physically

reported to work at a company location on any regular, consistent, or predictable basis needed to undergo an in-person examination of their Form I-9 identity and employment eligibility documentation.¹⁵ Further, the announcement indicated that employees who were hired on or after April 1, 2021, and who worked exclusively in a remote setting due to COVID-19-related precautions, were temporarily exempted from the physical examination of their Form I-9 documents until they undertook non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements was terminated, whichever occurred earlier.¹⁶ Subsequently, due to the continuation of the COVID-19 pandemic, ICE extended these flexibilities several times.¹⁷

On October 26, 2021, USCIS published a notice in the **Federal Register** seeking input from the public regarding document examination practices associated with the Form I-9.¹⁸ Of the 315 public comments received, the vast majority supported a remote document examination option, stating that such an option reduces burdens on employers and employees. Some commenters raised concerns about document fraud, while others recommended measures to mitigate such risk.

On October 11, 2022, ICE announced that the COVID-19 flexibilities would be extended until July 31, 2023.¹⁹ On

⁸ In the Commonwealth of the Northern Mariana Islands, employers complete the Form I-9 for each new employee (both citizen and noncitizen) hired after November 27, 2011. Additional information about completing the Form I-9 is available at <https://www.uscis.gov/i-9-central> (last visited May 24, 2023).

⁹ 8 CFR 274a.2(b)(1)(vii).

¹⁰ 8 CFR 274a.2(c).

¹¹ Employers must retain and store Forms I-9 for three years after the date of hire, or for one year after employment is terminated, whichever is later. Additional information for employers and employees about the Form I-9 is available at <https://www.uscis.gov/i-9> (last visited May 24, 2023).

¹² E-Verify is an internet-based system that compares information entered by an employer from an employee's Form I-9, Employment Eligibility Verification, to records available DHS and the Social Security Administration to confirm the employee's employment eligibility. More information is available at <https://www.e-verify.gov/> (last visited Mar. 14, 2022).

¹³ ICE, DHS announces flexibility in requirements related to Form I-9 compliance (Effective Apr. 1, 2021), <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance> (last visited May 20, 2023).

¹⁴ *See* 85 FR 15337 (Mar. 18, 2020).

¹⁵ *See* "ICE announces extension, new employee guidance to I-9 compliance flexibility," U.S. Immigration and Customs Enforcement (Effective Apr. 1, 2021), available at <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility> (last visited May 20, 2023).

¹⁶ *See* USCIS, DHS Extends Form I-9 Flexibility (Effective Mar. 31, 2021), available at <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-mar-31-2021> (last visited May 20, 2023); ICE announces extension, new employee guidance to I-9 compliance flexibility (Apr. 1, 2021), available at <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility> (last visited May 20, 2023).

¹⁷ *See, e.g.*, DHS Extends Form I-9 Requirement Flexibility (Effective May 1, 2022), available at <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-may-1-2022> (last updated May 24, 2023); ICE announces extension to I-9 compliance flexibility, available at <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3> (last updated May 24, 2023).

¹⁸ 86 FR 59183.

¹⁹ ICE, ICE Announces Extension to I-9 Compliance Flexibility, available at <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3> (last visited May 20, 2023).

May 4, 2023, ICE announced that, instead of the previously announced three-day period for physically examining the documents of employees hired under the COVID-19 flexibilities, employers would have 30 days to comply with the Form I-9 document examination requirements after the COVID-19 flexibilities sunset on July 31, 2023.²⁰

D. Notice of Proposed Rulemaking

On August 18, 2022, DHS published a notice of proposed rulemaking (NPRM), *Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)*.²¹ DHS received 512 public comments before the close of the comment period. The vast majority of comments expressed support for the proposed rule. These comments generally supported the availability of an alternative procedure similar to the temporary flexibilities DHS initially announced on March 20, 2020 to address the physical proximity precautions implemented by employers to combat the COVID-19 pandemic. Many commenters said the ability to apply a remote inspection procedure reduced burdens on employers, expanded employers' access to eligible employees, and aligned with the shift to new workplace realities. A minority of the commenters expressed opposition to the proposed rule. Some commenters opposed to remote inspection expressed concerns about the reliability of inspecting a document remotely. Some supported remote inspection but questioned the need for more training and recordkeeping requirements. DHS considered all public comments before issuing this final rule. A discussion of the public comments and responses follows later in this preamble.

E. Changes From Proposed Rule to Final Rule

As discussed in the comment and response sections below in this final rule, DHS has considered the input provided by commenters in response to the NPRM, the vast majority of which supported the proposed changes, and is adopting the changes proposed in the NPRM, with certain modifications. This final rule amends 8 CFR 274a.2 to allow the Secretary to authorize optional

alternatives to the in-person physical document examination method employers have followed as part of the Form I-9 process set forth in current regulations. Under this rule, the Secretary may authorize alternative documentation examination procedures with respect to some or all employers, and such procedures may be adopted as part of a pilot program, or upon a determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services (pursuant to Section 319 of the Public Health Service Act) or a national emergency declared by the President (pursuant to Sections 201 and 301 of the National Emergencies Act).

On the basis of a review of public comments, the final rule makes two changes as compared to the proposed regulatory text. First, the proposed rule stated that the Secretary may authorize alternative documentation examination procedures with respect to some or all employers. *See* 87 FR at 50794. DHS has revised this text to make clear that any such procedures must be consistent with applicable law and authorized via a notice published in the **Federal Register**. *See* 8 CFR 274a.2(b)(1)(ix). Second, the proposed rule conditioned the issuance of permanent alternative procedures upon the Secretary's determination that such procedures offer an equivalent level of security. *See* 87 FR at 50794. DHS has revised this text to clarify that the level of security must be equivalent to that of physical examination as indicated by, for instance, observed measures of system integrity (such as error or fraud rates) or the procedure's capacity for confirming certain documents or information. *See* 8 CFR 274a.2(b)(1)(ix)(B). DHS notes that it would also consider other relevant factors, such as potential discrimination based on a protected characteristic in the administration of an alternative procedure.

F. Optional Alternative Procedure for Document Examination

Concurrent with the issuance of this rule, and following consideration of the comments received on the NPRM and the calls for comments contained therein, DHS is proceeding with an optional alternative procedure that includes various requirements to ensure an equivalent level of security. In the accompanying document, *Optional Alternative 1 to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)*, DHS describes an optional alternative to the in-person physical

document examination (physical examination) method employers have followed as part of the Form I-9 process set forth in current regulations. As detailed in the notice, to ensure an equivalent level of security, the alternative procedure currently includes certain requirements, such as conditions for participation and parameters that employers who choose to use the alternative procedure must adhere to.

At this time, the alternative procedure is available only to qualified employers, meaning those employers who are enrolled, and participate in good standing, in E-Verify. A qualified employer does not need to use the alternative procedure, but if a qualified employer chooses to offer the alternative procedure to new employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site, without discrimination. However, a qualified employer may choose to offer the alternative procedure for remote hires only but continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic, *i.e.*, their citizenship, immigration status, or national origin.²² Under no circumstances can employers unlawfully discriminate, such as by deciding who is eligible for the alternative procedure based on a protected characteristic.

Qualified employers must retain clear and legible copies of all documents presented by the employee seeking to establish identity and employment eligibility for the Form I-9 through the alternate procedures.²³ New E-Verify employers and any users who manage and create E-Verify cases must complete an E-Verify tutorial that includes fraud awareness and anti-discrimination training. The tutorial is free and accessible as part of the E-Verify enrollment process to any users who manage and create E-Verify cases.

Within three business days of an employee's first day of employment, a qualified employer (or an authorized representative acting on the employer's behalf, such as a third-party vendor)

²⁰ ICE, ICE Updates Form I-9 Requirement Flexibility to Grant Employers More Time to Comply with Requirements (May 5, 2023), available at <https://www.ice.gov/news/releases/ice-updates-form-i-9-requirement-flexibility-grant-employers-more-time-comply> (last visited May 20, 2023).

²¹ *See* Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9), 87 FR 50786 (Aug. 18, 2022).

²² *See* 8 U.S.C. 1324b(a)(1).

²³ E-Verify employers who do not apply the alternative procedure are only required to retain a photocopy of the following documents with an employee's Form I-9: U.S. passport, U.S. passport card, Form I-551, Permanent Resident Card, Form I-766, Employment Authorization Document, available at <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf> (last visited May 25, 2023).

who chooses to use the alternative procedure must:

1. Examine copies (front and back, if the document is two-sided) of Form I–9 documents²⁴ or an acceptable receipt²⁵ to ensure that the documentation presented reasonably appears to be genuine;

2. Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video interaction;

3. Indicate on the Form I–9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable;²⁶

4. Retain, consistent with applicable regulations,²⁷ a clear and legible copy of the documentation (front and back, if the documentation is two-sided);²⁸ and

²⁴ The Lists of Acceptable Documents are included with the Form I–9.

²⁵ Occasionally, employees may present a “receipt” in place of a List A, B, or C document. An acceptable receipt is valid for a specified period of time so an employer can complete Form I–9, Employment Eligibility Verification. Employers cannot accept receipts if employment will last less than three days. An acceptable receipt may be a receipt for the application to replace a List A, B, or C document that was lost, stolen, or damaged; the arrival portion of Form I–94 (Arrival/Departure Record) with a temporary Form I–551 stamp and a photograph of the individual; the departure portion of Form I–94 (Arrival/Departure Record) with an unexpired refugee admission stamp; or an admission code of “RE.” See 8 CFR 274a.2(b)(1)(vi) and USCIS, Handbook for Employers, M–274, available at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/40-completing-section-2-of-form-i-9/43-acceptable-receipts> (last visited May 24, 2023).

²⁶ The new edition of the Form I–9 is effective on August 1, 2023. Employers may continue to use the 10/21/2019 edition of the Form I–9 from August 1, 2023 until the end of October 31, 2023. As described elsewhere in this rule and accompanying notice, if during this grace period an employer uses the 10/21/2019 edition of the Form I–9 for the alternative procedure, the employer must indicate its use of the alternative procedure by writing “alternative procedure” in the Additional Information field in Section 2. No later than November 1, 2023, employers must begin using the August 1, 2023, edition of the Form I–9. When using the August 1, 2023, edition of the Form I–9, an employer must indicate their use of the alternative procedure by completing the corresponding box in Section 2 or in the section corresponding to reverification (which is Supplement B in the August 1, 2023 edition of Form I–9), as appropriate.

²⁷ See 8 CFR 274a.2(b)(3), (e), (f), (g).

²⁸ Employers must retain and store the Form I–9 for three years after the date of hire, or for one year after employment ends, whichever is later. See 8 U.S.C. 1324a(b)(3); 8 CFR 274a.2(b)(2). Additional information for employers and employees about the Form I–9 is available at <https://www.uscis.gov/i-9> (last visited June 8, 2023).

5. In the event of a Form I–9 audit or investigation by a relevant federal government official, make available the clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.²⁹

DHS will monitor and evaluate data and other information from its own Form I–9 audits to assess any measurable impacts on system integrity (such as error or fraud rates).

G. Pilot

Additionally, this rule allows the Secretary to conduct a pilot program to acquire and assess more data. Based on this data and information, the Secretary may announce new procedures or changes to the alternative procedure.

II. Discussion of Public Comments on the Proposed Rule

A. Summary of Public Comments

DHS received 512 public comments from a variety of persons and entities, including businesses, nonprofits, advocacy organizations, human resource professionals, and individual members of the public. DHS reviewed all the public comments received in response to the NPRM and addresses those comments in this final rule. As noted, most commenters expressed support for the proposed rule, stating that remote examination is comparable to physical examination, reduces unnecessary burdens on employees and employers, expands employers’ access to eligible employees, better accommodates new workplace realities, and provides other environmental, public health, and safety benefits.

A minority of the commenters expressed concern about inspecting documents remotely, including the risk of fraud. Some commenters voiced support for remote inspection but expressed concern about additional burdens related to implementation and recordkeeping. Some commenters requested additional training and guidance.

B. Comments Expressing General Support

1. Reduction in Burden and Errors

Comment: Some commenters stated that the rule would reduce burdens for employees and employers. Many cited the benefits of establishing a permanent optional alternative procedure, such as that it would increase the likelihood

that document inspection would be completed quickly and correctly by an employer rather than by an authorized representative, would reduce costs (such as those associated with using an authorized representative) and would eliminate unnecessary travel or maintenance of on-site human resources (HR) staff.

Many commenters described challenges associated with authorized representatives. Commenters stated that it is time-consuming to train and manage authorized representatives and that it is difficult to avoid errors made during the Form I–9 process even when using an authorized representative. A commenter remarked that many businesses no longer have brick and mortar offices so staffing firms are increasingly forced to rely on authorized representatives to complete physical inspections of identity and work authorization documentation for the Form I–9. Commenters explained that it is better to have someone familiar with how to properly complete the Form I–9 do so remotely, rather than to have this done by someone who is simply able to be physically present to complete the form, which often results in mistakes and delays.

One commenter stated that, typically, authorized representatives are not professionals familiar with the Form I–9 process. The commenter stated that they conduct a timely second tier review of forms completed by authorized representatives and, in most situations, have to send the Form I–9 back for corrections. The commenter stated that they also have to completely trust the authorized representative to understand the gravity of their document review and attestation on the form. Another commenter listed a variety of errors made by authorized representatives, and estimated that for hires since May 1, 2022, 54 percent of authorized representatives engaged by the commenter had filled out Section 2 of the Form I–9 incorrectly.

Some commenters noted that errors by authorized representatives can delay the employment start date for an employee. Commenters stated that it is burdensome to repeatedly engage new authorized representatives and provide guidance and training materials to such persons. A commenter stated that employees are sometimes hesitant to use an authorized representative due to privacy concerns. Commenters stated that compliance is easier with remote verification and employees prefer that a person who works directly for the company view their personal information. A few commenters provided the estimated costs that

²⁹ See 8 U.S.C. 1324a, 1324b; 8 CFR part 274a; 28 CFR part 44.

employers incur to use an authorized representative, which ICE has incorporated into the regulatory analysis later in this preamble.

Commenters provided examples of how employers comply with document examination requirements in the absence of this rule, such as by (1) flying in new employees to the nearest office in order for a member of their HR team to advise the employee on how to complete Section 1 of the Form I-9, followed by HR staff completing Section 2 and examining the documentation on-site; (2) directing HR staff to travel long distances to multiple worksites to assist with the I-9 process; and (3) paying a third-party vendor to complete Section 2 and inspect documentation on the company's behalf at a local facility nearest to the employee. Commenters stated that these options are costly and difficult to coordinate.

Commenters stated that allowing an alternative procedure for the inspection of Form I-9 documentation would create a uniform, streamlined, and less burdensome process which would enable companies to accommodate employees with remote work arrangements as well as those employees who physically report to an employer worksite. Furthermore, commenters stated that remote verification of Form I-9 documents would lower costs by streamlining HR operations and allowing companies to centralize onboarding functions and the storage of records. Commenters stated that providing basic Form I-9 and E-Verify training at each individual worksite is onerous and leaves businesses open to inadvertent non-compliance. One commenter suggested that DHS should allow employers to centralize Form I-9 processing at a single company site to ensure that the personnel conducting document examination are fully trained in the process. Additionally, commenters stated that this rule would result in increased compliance and fewer errors because it allows the employer to keep the verification within their control, rather than depending on an authorized representative for new employees with remote work arrangements. Some commenters stated that digital document retention is already embedded in company practices and guidance—particularly among E-Verify users—and that, therefore, a new requirement to retain all documentation would not pose a significant burden.

Some commenters stated that although any increased investments in new technology to facilitate remote document examination may impose additional costs, an alternative

procedure would still be a more affordable option compared to physical examination. Commenters stated that the implementation of a new system would, over time, be offset by the cost savings associated with not engaging in physical examination of documents.

Other commenters stated that it is within DHS's authority to align the Form I-9 process with the evolving realities of U.S. workplaces. Commenters also stated that the meaning of "physical examination" should evolve to include virtual methods. Some commenters said that DHS should update the Form I-9 verification process to align with new workplace situations, like telework.

Some commenters suggested that DHS remove all references to the word *physical* in governing regulations or define "physical examination" or "physically examine" in a way that allows employers (or their agents) to use video conferencing to examine documents.

Commenters stated it is more important to have someone who is more familiar with the Form I-9 process complete the form rather than someone who is simply physically present to complete the Form I-9 for the employer but less familiar with how to properly do so. They stated that DHS should act on the meaningful opportunity to help U.S. businesses compete in the global labor market and adapt laws and regulations to align with the evolving nature of work. They asserted that an alternative procedure would result in significant time and cost savings for employers.

Commenters urged DHS to authorize an alternative procedure and to pursue other Form I-9 modernization programs to meet evolving workforce needs like remote onboarding. They stated that other methods for the examination of identity and work authorization documents would help modernize the Form I-9 process, which is long overdue, and that the current in-person procedures are a roadblock to employment for many individuals.

Response: DHS appreciates these comments and acknowledges that many commenters support the authorization of an alternative procedure for Form I-9 document examination. DHS acknowledges that the use of an alternative procedure by qualified employers and their employees may alleviate some of the challenges associated with the current process, such as finding authorized representatives and requiring new employees to travel long distances to submit their Form I-9 documentation. Although some of the commenters

shared suggestions that are beyond the scope of this rule, such as removing the term "physical" in the regulation, DHS believes that establishing an optional alternative procedure aligns with many of the sentiments expressed.

2. Accessibility

Comment: Commenters indicated that remote inspection would remove barriers for eligible employees who are disabled and for whom it is difficult or impossible to travel to an office. A few commenters stated that an alternative procedure is needed for physically disabled employees and others so that they are no longer burdened by having to travel to complete the Form I-9 process in-person.

Commenters also stated that the proposed rule would create a more inclusive environment for those who are financially disadvantaged or otherwise unable to travel by allowing them to complete the Form I-9 process online. Commenters stated that an alternative procedure would align with the benefits of remote work for individuals who live in rural areas or have a job that does not require them to report regularly to a single location, such as a construction worker or a home health aide.

Response: DHS acknowledges that there could be several benefits for employees who experience difficulties with the current Form I-9 process and agrees with the sentiments expressed by these commenters. DHS acknowledges, in particular, the value of producing an inclusive environment, including for physically disabled employees, to the extent consistent with law. DHS appreciates and acknowledges that many commenters support the authorization of an alternative procedure for Form I-9 physical examination because travel may be difficult or impossible for some employees.

C. Comments Expressing General Opposition

1. Need for the Rule

Comment: Some commenters stated that, because there is no longer a public health emergency, there is no need for the change. Another commenter stated that an emergency should not change the requirements for Form I-9 processing. A commenter stated that DHS overstated the burden of completing the Form I-9, because employees who telework on a normal basis can nonetheless visit the employer's place of business in person once to have their documents examined.

Response: DHS acknowledges the commenters' concerns. As stated in the

NPRM, this final rule, and the accompanying **Federal Register** notice, DHS believes that an optional alternative method for examining the documentation presented by individuals seeking to establish identity and employment authorization can offer an equivalent level of security and that its use may alleviate some of the challenges associated with the current process, such as finding authorized representatives or requiring employees to travel long distances to submit their Form I-9 documentation.

The rule also codifies a mechanism under which DHS can be more responsive and nimble when addressing public health or national emergencies.³⁰ DHS believes this rule aligns with new workplace realities. With respect to the concurrently published alternative procedure, DHS believes the combination of requiring E-Verify participation, fraud awareness training, expanded document retention (to include clear and legible copies of the identity and employment authorization documents presented by employees to complete the Form I-9), and live video interaction like remote videoconferencing for real-time verification, offers an equivalent level of security to physical examination. DHS agrees that for some employers and employees, the burden of traveling to a physical office to present documents can be low. DHS understands that some employees are fully remote and live long distances from their home office, some employers do not have a physical workspace at all, and some employers use contracted firms to perform human resource functions that are not located in the same geographic vicinity. DHS also understands that for some employers, there are significant efficiencies to be gained by using the alternative procedure.

2. Fraud

Comment: Some commenters who expressed opposition stated that, without a physical examination of Form I-9 documents, the occurrence of fraud associated with unreliable documents would increase. For instance, commenters said that counterfeit documents could pass with ease through electronic inspection procedures, leaving U.S. workers' jobs unprotected. One commenter stated that remote document examination increases

the likelihood that an employee will present fraudulent documents to support their claim of work authorization and give corrupt employers additional cover to knowingly hire unauthorized workers in violation of statute. Some commenters suggested DHS instead expand worksite enforcement efforts or rescind other policies. Another commenter stated that DHS should explore the potential negative impacts of a change before moving forward. The commenter cited the "unprecedented numbers of illegal alien apprehensions and encounters along the southern border and the ever-growing crisis that we are presently witnessing." This commenter stated that any procedure that diminishes the current Form I-9 verification process will be exploited by smugglers, traffickers, and unscrupulous employers and will erode the intent of the underlying statute that aims to ensure that only authorized individuals can work in the United States.

Response: DHS shares commenters' concern for the integrity of the employment verification system. As stated in the NPRM, in this final rule, and in the concurrently published **Federal Register** notice describing the alternative procedure, DHS is authorizing an optional alternative method for examining the documentation presented by individuals seeking to establish identity and employment authorization that ensures at least an equivalent level of security. The intent of this final rule and the accompanying alternative procedure is not to weaken employment verification requirements or negatively impact U.S. workers; it is to acknowledge new workplace realities and create a more regular mechanism for making compliance easier. This rule does not change the employer's responsibility to ensure that documents appear to be genuine and relate to the individual presenting them. DHS recognizes that physically examining identity and employment authorization documents offers important security benefits to help evaluate whether the document reasonably appears to be valid and to relate to the person who presents it. Employers who physically examine identity and employment authorization documents can touch and more clearly see identification security features like holograms and microprinting, as well as the card stock on which certain documents are printed. Remote document examination, by itself does not provide this level of detailed inspection. However, DHS believes the combination of limiting participation to

E-Verify participants in good standing, fraud awareness training, expanded document retention requirements (to include clear and legible copies of all the identity and employment authorization documents presented by employees to complete the Form I-9), and live video interaction after the employee transmits a copy of the document(s) to the employer to verify that the document relates to the person presenting it, offers important benefits that are absent in the standard physical examination process, providing at least an equivalent level of security to physical examination.

As it relates to E-Verify specifically, E-Verify electronically compares information entered by an employer from an employee's Form I-9, Employment Eligibility Verification, to records available to DHS and the Social Security Administration (SSA) to confirm the validity of identity and employment authorization documents. E-Verify confirms List A documents that evidence identity and employment authorization, such as U.S. passports, Permanent Resident Cards, and Employment Authorization Documents (EADs), and electronically sends the photograph from the official record to the employer to compare with the photo on the document provided by the employee. E-Verify requires all cases to include the employee's Social Security number (SSN), and E-Verify electronically compares employer-entered data with SSA records. E-Verify requires that all List B identity documents presented by employees contain a photo and uses data sources available to DHS to electronically verify the identity information provided on most state-issued identification cards and driver's licenses. E-Verify proactively prevents processing of SSNs that are known to have been used fraudulently.

Further, the E-Verify tutorial, which is required of all E-Verify users, ensures that E-Verify users are informed about fraudulent documents, anti-discrimination, and other Form I-9 employer responsibilities, compared to employers who just use the Form I-9 and do not receive such training.

Retention of all documents, which is not required for Form I-9 alone, ensures that ICE can review all documents for fraud in case of an ICE Form I-9 audit.

Finally, the requirement for a live video interaction after the employee transmits a copy of the document(s) to the employer provides a further measure of assurance that the document(s) presented by the employee relates to the employee.

³⁰ Either as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services (pursuant to Section 319 of the Public Health Service Act), or a national emergency declared by the President (pursuant to Sections 201 and 301 of the National Emergencies Act).

The measures required by the alternative procedure mitigate risk of increased fraud associated with remote examination of documents under the alternative procedure, including the possible use of counterfeit documents.

DHS has no reason to believe that the alternative procedure described in this rule would result in an increased use of fraudulent documents as compared to a circumstance under which employers or their authorized representatives physically examine documents without confirming such documents or related information, receiving any training, or retaining copies of documents. Given the intangible benefits of physical inspection and DHS's lack of data to assess the impact of the Form I-9 flexibilities, DHS is proceeding with an alternative procedure that includes additional requirements that offers at least an equivalent level of security. Additionally, the final rule authorizes the Secretary to conduct a pilot program to acquire and assess more data. DHS will evaluate all data and information collected through ICE Form I-9 audits and pilot programs to ensure the security of alternative procedures.

DHS will also monitor and evaluate data and information from ICE's Form I-9 audits conducted after the implementation of this alternative procedure to assess any measurable impacts to system integrity between the alternative procedure and the physical examination of Form I-9 documents. DHS remains vigilant in monitoring and enforcing compliance with the requirements of the Form I-9 so unauthorized workers and unscrupulous employers do not exploit the Form I-9 process. Given the current lack of data, DHS believes these requirements appropriately address concerns about the potential for increased fraud in the Form I-9 process while allowing some employers to have access to this alternative procedure.

Comment: A commenter asserted that an alternative procedure would not comply with best practices and standards as set by the National Institute of Standards and Technology (NIST) Special Publication 800-63A, *Digital Identity Guidelines: Enrollment and Identity Proofing Requirements*, section 5.3.3.2 (Requirements for Supervised Remote In-person Proofing). The commenter asked whether the government is required to follow NIST standards when having individuals interact with its systems, such as E-Verify.

Response: Consistent with the Federal Information Security Management Act

of 2002, as amended,³¹ and applicable OMB memoranda,³² DHS is required to ensure that identity proofing for Federal digital services provided to public consumers complies with NIST guidance and Government-wide identity, credential, and access management requirements.³³ Current NIST guidance is contained in Special Publication 800-63-3, *Digital Identity Guidelines*.³⁴ DHS is working towards compliance with these and future standards.

The NIST standards provide minimum requirements for remote identity verification prior to access to federal agency systems, but the NIST standards do not govern the current employment verification process or the alternative procedure discussed in this rule and accompanying **Federal Register** notice. The applicable statutory and regulatory requirements for employment authorization require the employer or their authorized representative to examine the documents presented by the employee. See 8 U.S.C. 1324a(b)(1); 8 CFR 274a.2(b)(1). There is no requirement for the employee to access a federal agency system in order to either interact with the employer or present their relevant identity documents during a live session as part of the alternative procedure. As such, the NIST standards for remote identity proofing do not apply to the I-9 document examination process itself. Applicable regulations at 8 CFR part 274a only require physical examination of the documents presented by the employee to the employer to comply with the I-9 requirements.

D. Legal Authority

1. Immigration and Nationality Act (INA)

Comment: Some commenters expressed concern that the rule would undermine statutory assurances that only authorized individuals can work in

³¹ See Public Law 107-347 (codified as amended at 44 U.S.C. 3551 *et seq.*).

³² See OMB Memorandum for Heads of Executive Departments and Agencies, *Enabling Mission Delivery through Improved Identity, Credential, and Access Management* (M-19-17). See also OMB Memorandum for the Heads of Executive Departments and Agencies, *Modernizing Access to and Consent for Disclosure of Records Subject to the Privacy Act* (M-21-04).

³³ See *id.* at 9.

³⁴ The NIST Special Publication 800-63-3 is a suite of documents that cover enrollment (NIST 800-63-3—*Digital Identity Guidelines*, NIST 800-63A—*Enrollment and Identity Proofing*, NIST 800-63B—*Authentication and Lifecycle Management*, and (NIST 800-63C—*Federation and Assertions*), available at <https://www.nist.gov/identity-access-management/nist-special-publication-800-63-digital-identity-guidelines> (last visited May 24, 2023).

the United States. A commenter stated that the law states that employers must physically examine workers' documents to establish the workers' identity and work authorization status. This commenter suggested that the requirement to physically examine documents and determine their authenticity precludes employers from reviewing documents solely through electronic means. Commenters stated that the proposed rule was vague and the provision on "an equivalent level of security," as determined by the Secretary, did not offer employers an understanding of the procedure.

Response: The relevant statutory provision refers to the employer's duty to "examin[e]" or undertake an "examination" of documents without qualification as to the manner in which such examination must be performed. See 8 U.S.C. 1324a(b)(1). Specifically, the statute requires that any employer who hires, recruits, or refers an individual for employment in the United States make certain attestations about the employee's employment eligibility status ". . . after [the] examination of documentation" that would establish the individual's identity and employment authorization (8 U.S.C. 1324a(b)(1)). It is the implementing regulations found at 8 CFR 274a.2(b)(1)(ii)(A) that require an employer or an authorized representative acting on the employer's behalf to "[p]hysically examine" the documentation offered by the employee to establish identity and employment authorization. DHS is using its regulatory authority through this rulemaking to authorize an optional alternative to the in-person physical document examination method employers have followed as part of the Form I-9 process set forth in current regulations.

With respect to the commenters' opinion that the rule is unduly vague, DHS maintains that the NPRM stated a goal and standard. The NPRM stated that DHS was proposing to create a framework under which the Secretary could authorize alternative options for Form I-9 document examination procedures with respect to some or all employers. DHS requested and welcomed comments on the effects of the changes with respect to employers, employees, and on the associated burdens or benefits, such as reducing risks to the integrity of the alternative procedure(s), avoiding discrimination in the process, and protecting privacy interests. See, e.g., 87 FR at 50790. After careful consideration of the comments received, DHS describes, in this final rule and in an accompanying **Federal**

Register notice, the framework for an alternative procedure that incorporates suggestions from commenters. DHS has implemented various requirements in the alternative procedure to offer an equivalent level of security.

In addition, consistent with the NPRM and the alternative procedure contained in accompanying **Federal Register** notice, DHS has expanded upon the equivalence concept in regulatory text of this final rule. Whereas the proposed rule conditioned the issuance of permanent alternative procedures upon the Secretary's determination that such procedures offer an equivalent level of security, *see* 87 FR at 50794, DHS has, following review of the above comments, clarified that the level of security must be equivalent to that of physical examination as indicated by, for instance, observed measures of system integrity (such as error or fraud rates) or the procedure's capacity for confirming certain documents or information. *See* 8 CFR 274a.2(b)(1)(ix)(B). The alternative procedure contained in the accompanying **Federal Register** notice is consistent with the latter example.

DHS will evaluate data and information from ICE's Form I-9 audits to assess any measurable impacts to system integrity (such as error or fraud rates) in connection with the accompanying alternative procedure or a future such procedure. DHS remains vigilant in monitoring and enforcing compliance with the requirements of the Form I-9 regardless of the permissible procedure an employer uses to examine employees' identity and employment authorization documentation. Additionally, the final rule authorizes the Secretary to conduct a pilot program to acquire and assess more data. DHS will evaluate all data and information collected through ICE audits and pilot programs with a continued goal of expanding the availability of an alternative procedure to the widest group of employers while balancing the security of any alternative procedures implemented under the rule. The Secretary will announce any such pilot programs, new procedures, or changes to this alternative procedure in the future.

Comment: A commenter objected to the suggestion that only an alternative procedure must offer an equivalent level of security, whereas pilot procedures and procedures to respond to a public health emergency or national emergency would not. The commenter stated that under 8 U.S.C. 1324a(d)(2), any changes to the employment verification system (including, for instance, temporary measures to address a public health

emergency under proposed 8 CFR 274a.2(b)(1)(iv)(C)) must meet certain requirements, as set forth in 8 U.S.C. 1324a(d)(2)(A)–(G). The commenter stated that the Public Health Service Act and the National Emergencies Act provides no basis to avoid these requirements.

Response: The requirements of § 1324a(d)(2)(A)–(G) do not apply to this rulemaking, because this rulemaking is not issued under § 1324a(d)(1). Under § 1324a(d)(1), the President or the President's designee may implement such changes in (including additions to) the requirements of § 1324a(b) as may be necessary to establish a secure system to determine employment eligibility in the United States. *See* 8 U.S.C. 1324a(d)(1)(B). But as explained earlier in this section of the preamble, this rule and the accompanying **Federal Register** notice do not make any changes to the requirements of § 1324a(b), and therefore need not invoke the authority at § 1324a(d)(1). This rule relates solely to the physical examination of documents, which is a regulatory requirement, and is not a requirement of § 1324a(b). *See, e.g.,* 8 U.S.C. 1324a(b)(1)(A) (referencing examination but not physical examination). This rule exercises the Secretary's authorities under 8 U.S.C. 1103(a)(3), 1324a(b)(1)(A).

DHS is nonetheless cognizant of the considerations listed in § 1324a(d)(2)(A)–(G) and has authorized an alternative procedure that offers an equivalent level of security without undermining privacy and other considerations, consistent with the congressional purpose underlying those and other provisions. DHS has no immediate plans to authorize an additional procedure to address a public health emergency or national emergency, as was necessary during the COVID-19 pandemic, but if DHS does so, DHS will act with similar considerations in mind.

2. Administrative Procedure Act (APA)

Comment: Commenters stated that the NPRM did not allow the public to assess the efficacy of, or provide meaningful input on, the alternative procedure. A commenter inquired whether DHS had already developed the alternative verification option it alluded to in the NPRM and stated that, if such an approach had been created, DHS should provide information to the public as part of this rule. Commenters stated that failing to provide the public an opportunity to comment on the alternative procedure is inconsistent with DHS's duty to give interested persons an opportunity to participate in

rulemaking through submission of written data, views, or arguments.

Response: This rulemaking fully complies with the APA. As noted above, on August 18, 2022, DHS published an NPRM, *Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)*, 87 FR 50786, and provided the public 60 days to comment on the proposed changes. The NPRM clearly stated a "reference to the legal authority under which the rule is proposed," *see* 5 U.S.C. 553(b)(2), and "the terms and substance of the proposed rule or a description of the subjects and issues involved," *see* 5 U.S.C. 553(b)(2). Specifically, DHS described—

- the legal authority for the Form I-9 and the employment authorization verification system, *see* 87 FR at 50786–50787, 50794;
- the requirements of existing regulations and the flexibilities announced following the onset of the COVID-19 pandemic, *see* 87 FR at 50787–50789;
- the clear need for a framework under which to authorize optional alternative procedures that could make permanent some of the COVID-19 pandemic-related flexibilities, *see* 87 FR at 50789–50790;
- Specific potential conditions for such alternative procedures, including integrity measures such as document retention requirements, training, and E-Verify participation, *see* 87 FR at 50790; and
- Examples of potential effects of an alternative procedure, *see* 87 FR at 50791.

Consistent with the above explanation, DHS proposed to revise the language in 8 CFR 274a.2 to allow the Secretary to authorize an optional alternative to the in-person physical document examination method that employers have followed as part of the Form I-9 process set forth in current regulations, and that such procedures may be adopted as part of a pilot program, or upon the Secretary's determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services or a national emergency declared by the President. *See* 87 FR at 50794. DHS also proposed changes to the Form I-9 and its accompanying instructions that would allow employers to indicate that alternative procedures were used if one was authorized. *See* 87 FR at 50792.

DHS welcomed comments on the effects of the potential changes with respect to employers, employees, and

DHS, including comments on the associated burdens or benefits, such as reducing risks to the integrity of the alternative procedure(s), avoiding discrimination in the process, and protecting privacy interests. *See, e.g.*, 87 FR at 50790. By the end of the comment period in October 2022, DHS had received 512 public comments, the vast majority of which expressed support for the NPRM. Many comments provided suggestions that are consistent with this final rule and the alternative procedure announced in the accompanying **Federal Register** notice.

Consistent with the NPRM, this final rule responds to public comments and amends 8 CFR 274a.2 to allow the Secretary to authorize an optional alternative to the in-person physical document examination method employers have followed as part of the Form I-9 process set forth in current regulations. In addition, consistent with the NPRM, DHS is announcing an optional alternative procedure featuring a number of the specific integrity measures described in the NPRM.

As recognized in the NPRM, DHS believes this rule aligns with new work arrangements for qualifying employers' employees. DHS believes the combination of requiring E-Verify participation, fraud awareness training, expanded document retention (to include clear and legible copies of the identity and employment authorization documents presented by employees to complete the Form I-9), and live video interaction after the employee transmits a copy of the document(s) to the employer for real-time verification offers at least an equivalent level of security to physical examination.

Comment: A commenter stated that any reform to the Form I-9 document examination process would directly affect how U.S. employers must comply with statutory verification requirements and that, therefore, any such change should be considered subject to the APA's notice-and-comment requirements. Other commenters recommended that DHS provide relief from the physical inspection burden now, rather than at some uncertain point in the future or after a second round of notice-and-comment. A commenter stated that the NPRM was so broad that it could allow the Secretary to implement—or not implement—any remote inspection process by notice without the prospect of public input. Commenters stated that the substantive changes resulting from this rule could come by “guidance,” rather than regulation, which according to the commenter would amount to a violation of the APA.

Response: Neither this final rule nor the accompanying optional alternative procedure changes the statutory or regulatory requirements for employment eligibility verification. The alternative procedure will provide qualified employers with an option other than physical in-person examination. The alternative procedure will not, however, eliminate the core regulatory option of physical examination, for either the employer or the employee. Similarly, a future authorization by the Secretary to bypass the regulatory requirement to “physically” examine documents, whether as part of a pilot or as a temporary measure to address a public health emergency or national emergency, would leave existing regulations in place while a single regulatory requirement is waived under certain conditions and for a specific period.

DHS will solicit feedback from the public again as appropriate and consistent with law prior to implementing any permanent changes to the Form I-9 document examination process, including additional alternative procedures. Any such changes will be noticed in the **Federal Register**. Partly in response to the above comments, DHS has revised the regulatory text accordingly. *See* 8 CFR 274a.2(b)(1)(ix).

Comment: A commenter stated that because DHS did not accept comments on the NPRM by mail, it failed to provide an opportunity to comment to the subset of the population that neither owns nor has access to a computer and/or internet service.

Response: Although the NPRM stated that “comments submitted in a manner other than the Federal eRulemaking Portal, including emails or letters sent to DHS, will not be considered comments,” 87 FR at 50786, DHS provided an alternative method to allow members of the public without access to a computer or internet a way to provide comments by listing a telephone number and address for a person to contact for alternate instructions on how to submit comments, *see id.* In doing so, DHS ensured that all interested parties were provided an adequate opportunity to comment on the NPRM.

E. The Alternative Procedure and Proposed Integrity Measures

1. Timing of the Alternative Procedure

Comment: Some commenters encouraged the authorization of a permanent alternative procedure as soon as possible, and emphasized that employers will be more likely to find the alternative procedure useful if it is in place permanently. A commenter

asked when the Secretary would decide on an alternative procedure, and whether that would only be after a pilot program was completed. A commenter asked about what employers should do regarding remote worker verification until such time as the Secretary decides on an alternative procedure. A commenter asked what employers should do regarding remote worker verification until such time as the Secretary decides on an alternative procedure. Commenters stated that DHS should allow a reasonable period for employers to update their systems and forms to align with the change and should extend the current version of the form until the alternative procedure is finalized to reduce any disruptions to company operations.

Response: At this time, the Secretary is authorizing a permanent optional alternative procedure as outlined in the accompanying **Federal Register** notice. The Secretary has determined that it is not necessary to first conduct a pilot program due to the integrity measures included in the alternative procedure, as explained further below and in the accompanying **Federal Register** notice describing the alternative procedure. The alternative procedure includes transition measures under which employers may implement the procedure prior to transition to the new Form I-9.³⁵ However, the Secretary may authorize a pilot program to explore other optional alternative procedures or collect additional data.

2. Changes to the Form I-9 and Tracking Use of the Alternative Procedure

Comment: A commenter asked if employers are expected to request permission to use an alternative procedure and, if so, how they would make such a request. Some commenters suggested that DHS should track the use of the alternative procedure and completion of the Form I-9 to understand any added risks. A commenter supported the proposal to

³⁵ The new edition of the Form I-9 is effective on August 1, 2023. Employers may continue to use the 10/21/2019 edition of the Form I-9 from August 1, 2023 until the end of October 31, 2023. As described elsewhere in this rule and accompanying notice, if during this grace period an employer uses the 10/21/2019 edition of the Form I-9 for the alternative procedure, the employer must indicate its use of the alternative procedure by writing “alternative procedure” in the Additional Information field in Section 2. No later than November 1, 2023, employers must begin using the August 1, 2023, edition of the Form I-9. When using the August 1, 2023, edition of the Form I-9, an employer must indicate their use of the alternative procedure by completing the corresponding box in Section 2 or in the section corresponding to reverification (which is Supplement B in the August 1, 2023 edition of Form I-9), as appropriate.

add a checkbox to the Form I-9 for this purpose but recommended that the checkbox be added to the Employer Certification field rather than the Additional Information field.

Commenters stated that the complexity of the Form I-9 provides opportunities for user error so any modifications to the Form I-9 related to the alternative procedure should favor simplicity. Some commenters stated that employers need assistance in completing the new version of the Form I-9.

Response: As proposed, DHS is adding a box to the Form I-9; employers will use the box to document the use of a DHS-authorized alternative procedure. DHS decided to place the box in the Additional Information field to ensure the overall length of the Form I-9 did not increase. DHS has updated the Form I-9 instructions and E-Verify training materials to ensure employers have resources available to accurately complete the new version of Form I-9.

Comment: A commenter asked about what would occur if an employer used the remote inspection procedure but failed to indicate that it had done so on the revised Form I-9. A commenter asked if employers or authorized representatives completing Section 2 of the Form I-9 by hand would need to physically see Section 1 first, or if they could view an electronic copy of a Form I-9 containing the completed Section 1 instead.

Response: DHS is updating the Form I-9 to add a box to be completed by employers to indicate if an alternative procedure was used for Section 2 or for reverification. The qualified employer (or an authorized representative acting on an employer's behalf) must select whether the employee's documentation was examined consistent with the alternative procedure. Employers or authorized representatives must review the information entered in Section 1 of the Form I-9 and ensure that employees (and their preparer/translator, if applicable) fully and properly completed Section 1.³⁶ Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the standards specified under 8 CFR 274a.2(e), (f), (g), (h), and (i), as applicable, are met.³⁷

As stated on the Form I-9, employers are liable for errors in the completion of

the form. Therefore, employers should read the accompanying **Federal Register** notice carefully to understand the applicable requirements of the alternative procedure. Employers are also encouraged to refer to the information and guidance about applying the alternative procedure on I-9 Central. Furthermore, E-Verify and I-9 Central provide free, online webinars, training, and various resource materials to ensure employers have the necessary information to assist in enrolling in E-Verify or completing the Form I-9.

3. E-Verify

Supporting E-Verify

Comment: Some commenters expressed support for limiting the eligible population of employers who may use the alternative procedure to employers enrolled in and in good standing in E-Verify. Commenters listed several benefits of using E-Verify, such as the rapid confirmation of documents and information presented by employees, existing policies on the retention of copies of certain documentation, increased fraud detection, improved efficiency of internal audits, and decreased burdens on employers.

Commenters suggested that DHS resume worksite audits and increase information sharing with the Internal Revenue Service (IRS) and Social Security Administration (SSA) to ensure employers' compliance with federal labor and immigration laws. A commenter suggested that documents presented for the Form I-9 could be maintained in E-Verify and a reverification request could be submitted when documents expire and need to be renewed. Commenters suggested that E-Verify provide statistics for participating employers during a pilot period and provide a photograph match by linking photos from government agencies that issue photo identification.

Response: DHS agrees with commenters that an employer's participation in good standing in E-Verify provides meaningful security benefits. At this time, E-Verify-enrolled employers in good standing will be eligible to use the alternative procedure. However, nothing prevents an employer from continuing to physically examine documents presented for the Form I-9³⁸

and not applying the alternative procedure.

E-Verify-enrolled employers confirm the employment eligibility of their employees by electronically comparing information from an employee's Form I-9 with records available to DHS. Specifically, E-Verify confirms identity and employment eligibility for List A documents such as U.S. passports, Permanent Resident Cards, and EADs, and electronically sends the photograph from the official record to the employer to compare with the photo on the document provided by the employee. E-Verify requires all cases to include the employee's SSN, and E-Verify compares employer-entered data with SSA records. E-Verify proactively prevents processing of SSNs that are known to have been used fraudulently. Finally, E-Verify requires that all List B documents presented by employees contain a photo and uses data sources available to DHS to verify the identity information provided on most state-issued identification cards and driver's licenses. Because employment authorization and identity verification are processed concurrently, the enrolled employer usually receives a response from E-Verify within a few seconds that either confirms employment eligibility or indicates that further action is needed to complete the case.

DHS currently assesses that limiting eligibility for the alternative procedure to qualified employers, coupled with various requirements as outlined in the **Federal Register** notice, is necessary to ensure an equivalent level of security to the physical examination of Form I-9 documents. For this reason, DHS has determined that, as a condition for participation in the alternative procedure, only those employers enrolled and participating in good standing in E-Verify may use the alternative procedure. Participant in good standing in E-Verify refers to an employer that has enrolled in E-Verify with respect to all hiring sites in the United States that use the alternative procedure; is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees in the United States; and continues to be a participant in good standing in E-Verify at any time during which the employer uses the alternative procedure. Employers opting

to continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic, *i.e.*, their citizenship, immigration status, or national origin. See 8 U.S.C. 1324b(a)(1).

³⁶ See Handbook for Employers M-274, § 3.0, available at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (last visited May 24, 2023).

³⁷ See 8 CFR 274a.2(a)(2).

³⁸ A qualified employer does not need to use the alternative procedure, but if a qualified employer chooses to apply the alternative procedure to some employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site, without discrimination. However, a qualified employer may choose to continue to offer the alternative procedure for remote hires only but

to use the alternative procedure at one or more hiring sites must not adopt a practice for a discriminatory purpose of treating employees differently based on a protected characteristic. Treating employees differently based on these criteria would violate the INA's anti-discrimination provision, 8 U.S.C. 1324b, and may violate or other federal, state, or local laws.

Qualified employers will not be required to prove their compliance with Form I-9 requirements before using the alternative procedure but as stated in this final rule, an E-Verify-enrolled employer who is not in good standing (e.g., not in compliance with the E-Verify Memorandum of Understanding) is ineligible to use the alternative procedure.

DHS continues to explore ways to improve the Form I-9 process and E-Verify, including how to improve compliance. DHS agrees that worksite audits and increased information sharing with government partners are critical elements in assisting employers to maintain compliance with Form I-9 requirements. Although DHS is confident that the alternative procedure offers at least an equivalent level of security, DHS will monitor and evaluate data and information from ICE's Form I-9 audits after the implementation of this alternative procedure to assess any measurable impacts to system integrity (such as error or fraud rates) and, based on this information, the Secretary may announce new procedures or requirements, implement a pilot program to collect further data, or seek public comment thereon, as appropriate, in the **Federal Register**.

Opposing E-Verify

Comment: Some commenters opposed allowing only E-Verify-enrolled employers to use an alternative procedure because that would increase burdens on other employers who are otherwise compliant with the Form I-9 requirements but who do not use E-Verify. Commenters stated that small businesses in particular would be burdened by a requirement to use E-Verify.

A commenter stated that E-Verify lacks the capacity to support a large influx of users on its system, citing an August 2021 report that according to the commenter stated that the then-current capacity of E-Verify was only 10,430 concurrent users with a projected goal of 29,515 concurrent users.³⁹ The commenter expressed concern about E-

Verify's ability to function properly at increased capacity, and recommended that before incentivizing a large-scale increase in potential E-Verify usage, DHS test and confirm the capacity of E-Verify to scale up sufficiently to meet the demands of all existing and potential users. Another commenter suggested that to the extent that E-Verify enrollment is a condition for participation in the alternative procedures, it would encourage a phased roll-in process based on employer headcount, company revenue thresholds, or both.

Another commenter stated that the hourly cost and burden of completing the E-Verify new user tutorial "can be substantial," particularly for compliant employers with high turnover, no internal HR team, or prospective employees who may distrust the E-Verify system. Another commenter stated that the use of E-Verify is not required by federal law, that an alternative procedure available only to E-Verify participants would effectively render E-Verify use mandatory for some employers, and that, for some, E-Verify creates an additional "hardship" with no impact on an employer's obligation to review Form I-9 documents. Another commenter remarked that requiring employers to be enrolled in E-Verify as a condition for using the alternative procedure overlooks that many employers need relief from physical examination requirements.

Response: Employers who are already enrolled in E-Verify are not required to re-enroll in E-Verify to use the alternative procedure, and E-Verify has the capacity to support an increased number of employers who may choose to newly enroll in E-Verify to use the alternative procedure. E-Verify does not replace the examination of Form I-9 documents and completion of the Form I-9. E-Verify supports the employer by comparing information entered by an employer from an employee's Form I-9 to records available to DHS, including those maintained by the SSA, to confirm the employee's identity and employment eligibility. Because employment authorization and identity verification are processed concurrently, the enrolled employer usually receives a response from E-Verify within a few seconds that either confirms employment eligibility or indicates that further action is needed to complete the case. E-Verify prioritizes security interests, limits the risk of fraud, mitigates verification errors, helps employers maintain compliance, and protects the worker from unfair employment competition. DHS disagrees that E-Verify imposes

substantial burdens on large or small employers, and DHS currently assesses that enrollment in and use of E-Verify related to an alternative procedure to examine identity and work authorization documents is necessary to maintain an equivalent level of security. Employers who choose to use the alternative procedure will only do so if the benefits of doing so outweigh the costs. Over 1.1 million employers, representing varying workforce sizes and all types of U.S. industries, are already enrolled in E-Verify⁴⁰ and DHS estimates that employers created E-Verify cases for nearly 62% of new hires in the United States in fiscal year 2022.⁴¹ The program is responding to the aforementioned August 2021 report to demonstrate improved scalability to handle increases in query volume and continuously pursuing technical improvements to increase and improve automation and streamline case processing. The alternative procedure itself does not require or permit the employer to use E-Verify to confirm the identity and employment authorization of existing employees, but only of new hires,⁴² unless the employer is a federal contractor and is required to by the Federal Acquisition Regulation (FAR) E-Verify clause.⁴³ DHS estimates that the one-time E-Verify enrollment process takes new participants 2.26 hours to enroll review and sign the Memorandum of Understanding (MOU), review the user guides, and complete the tutorial.⁴⁴ DHS estimates one hour for each additional user for an enrolled employer to complete the tutorial.⁴⁵ Finally, nothing in this final rule

⁴⁰ USCIS, E-Verify Usage Statistics, <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-usage-statistics> (last updated Jan. 12, 2023) and USCIS, How To Find Participating Employers, <https://www.e-verify.gov/about-e-verify/e-verify-data/how-to-find-participating-employers> (last updated Jan. 12, 2023).

⁴¹ According to the U.S. Department of Labor, Bureau of Labor Statistics, there were approximately 77.6 million new hires in fiscal year 2022 (<https://www.bls.gov/bls/news-release/jolts.htm>) compared to 48.0 million queries processed through the E-Verify system in the same period available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited June 8, 2023).

⁴² In the case of reverification, a qualified employer that applies the alternative procedure would examine documents remotely according to the alternative procedure but would not create a new case in E-Verify.

⁴³ The FAR E-Verify clause, found at 48 CFR, Subpart 22.18, requires federal contractors verify all new hires and existing employees assigned to the federal contract. Federal contractors may also opt to verify their entire workforce with E-Verify.

⁴⁴ See USCIS, Supporting Statement for E-Verify Program (OMB Control No. 1615-0092) (uploaded May 20, 2023), available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202305-1615-001 (last visited May 20, 2023).

⁴⁵ See *id.*

³⁹ See DHS, Office of Inspector General, OIG-21-56, USCIS Needs to Improve Its Electronic Employment Eligibility Verification Process (Aug. 23, 2021).

requires an employer who is already enrolled in E-Verify to use the alternative procedure or for their employees to complete the tutorial more than once.

DHS will monitor and evaluate data and information from ICE's Form I-9 audits conducted after the implementation of this alternative procedure to assess any measurable impacts on system integrity (such as error or fraud rates). Given the absence of reliable data at this time, DHS believes that the requirements outlined in this final rule and in the accompanying **Federal Register** notice appropriately address concerns about the risks of increased fraud.

4. Document Retention

Comment: Several commenters expressed that document retention requirements would increase burdens and/or costs to employers and that employers may face challenges with respect to the secure and efficient storage of electronic documentation as a result of any new process. Commenters asserted that it is unfair to assume that all businesses have the resources to store physical and electronic records for all employees in a way that prevents sensitive information from being stolen or compromised. Another commenter said that clarification about such requirements would be expected with the emergence of new technologies, such as new and more secure ways to send and store documents electronically. A commenter expressed concern about the unsecured transmission of document images under the alternative procedure, noting that document images contain sensitive personal information, and that employers may be subject a range of laws and regulations intended to protect employee privacy.

Some commenters stated that a new requirement for employers to retain copies of all documents presented for the Form I-9 would amount to a requirement stricter than the law requires. A commenter stated that employers are not required to prove that a document is "real"; rather, the issue is whether documents can be examined remotely to determine if they reasonably appear to be genuine and associated with the employee who presents them. Another commenter stated that retaining copies only indicates that an employer has seen the presented documents, not whether they conducted a compliant document examination.

Some commenters suggested that DHS should require that remote verification be conducted with a video link, rather than by transmitting the document

through email, fax, or another cloud-based medium. The commenters stated that document transmission and verification via video would align with statutory and regulatory requirements because the employer (or the employer's authorized representative) could see the employee and confirm that the documents both reasonably appear to be genuine and related to that individual.

Response: DHS understands that the retention of all identity and employment authorization documentation examined by an employer to complete the Form I-9 may add administrative and operational burdens such as intake, storage, and handling of documents, and may require the employer to expend some economic resources. However, examination of documentation using an alternative procedure rather than a physical in-person examination provides direct and immediate cost savings and operational efficiencies, such as the reduced costs associated with needing to use an authorized representative and increased opportunities to centralize document examination functions. The requirement to retain all identity and employment eligibility documentation examined by an employer to complete the Form I-9 is only applicable to the alternative procedure. If an employer believes that applying the alternative procedure is burdensome, nothing prevents the employer from physically examining Form I-9 documents under longstanding regulatory procedures. See 8 CFR 274a.2(b)(3).

To ensure the security of the alternative procedure, DHS is requiring any qualified employer who chooses to use the alternative procedure to retain clear and legible copies of any of the Form I-9 documents presented to establish identity and employment authorization. This retention requirement allows DHS to assess the documents that were presented to, and remotely examined by, the employer in the event of an audit, and help to determine whether the documents examined by the employer reasonably appeared on their face to be genuine and to relate to the employee, that the employer has not discriminated against employees, and that the employer has complied with other Form I-9 requirements as required by statute (8 U.S.C. 1324a(b)(1)(A)(ii)) and regulation (8 CFR 274a.2(b)(1)(ii)(A)).

A qualified employer does not need to use the alternative procedure, but if a qualified employer chooses to offer the alternative procedure for some employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site. However,

a qualified employer may choose to offer the alternative procedure for remote hires only but continue to use physical examination procedures for all employees who work onsite at an employer worksite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic.⁴⁶ Under no circumstances can employers unlawfully discriminate, such as by deciding who is eligible for the alternative procedure based on a protected characteristic.⁴⁷ For employees whose documents are examined via physical examination under the longstanding regulations, the document retention requirements of the alternative procedure do not apply.

With respect to the suggestion that some businesses may lack the resources to store physical and electronic records for all employees in a way that prevents sensitive information from being stolen or compromised, DHS notes that businesses that choose to adopt the alternative procedure would likely have already adapted their business practices consistent with general Form I-9 document storage and retrieval requirements, *see, e.g.*, 8 CFR 274a.2(b)(3) (option to store certain documentation with the Form I-9), (e) (standards for electronic retention of Form I-9), (f) (documentation of certain business processes), and (g) (implementation of an effective records security program). Copies retained under the alternative procedure must meet these standards. In addition, under existing procedures, E-Verify participants must photocopy and retain certain documents if the employee voluntarily provided them for Section 2 of the Form I-9.⁴⁸ For these reasons, the additional burden on the employer to manage copies of documents securely and effectively will typically not be high. DHS agrees with commenters that employers have an incentive to ensure the security of such records in transit and at rest, and notes that employees may opt to not use the procedure, and instead avail themselves of the physical examination process under longstanding regulations, for any reason, including

⁴⁶ *See, e.g.*, 8 U.S.C. 1324b(a)(1), which prohibits discrimination based on citizenship, immigration status, and national origin.

⁴⁷ *See* 8 U.S.C. 1324b(a)(1).

⁴⁸ *See* Handbook for Employers M-274, § 9.2, available at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (last visited May 24, 2023) and Article II.A.6. of the E-Verify Memorandum of Understanding, available at <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf> (last visited May 24, 2023).

concerns about personal privacy. Should DHS become aware of significant gaps in this area, DHS may recommend or require further measures at a future date.

Comment: Multiple commenters asked DHS to include clear guidance and protocols on Form I-9 document retention requirements and stated that the objective of document retention was unclear from the regulatory text. Commenters questioned where and for how long electronic documents should be retained under the alternative procedure, and who would have access to those records. A commenter suggested that DHS should establish consistent Form I-9 document retention requirements relevant to E-Verify and non-E-Verify-participating employers using the alternative procedure.

Response: DHS understands it is important for employers to have access to clear and thorough guidance on the alternative procedure, including any requirements for using the alternative procedure such as document retention. As detailed in the accompanying notice and this final rule, to offer an equivalent level of security, at this time, the alternative procedure includes certain requirements including a condition for participation and parameters that employers who choose to use the alternative procedure must follow. Qualified employers who use the alternative procedure must retain a clear and legible copy of all documents presented by the employee seeking to establish identity and employment eligibility for the Form I-9. Conversely, E-Verify enrollees who do not use the alternative procedure and only physically examine identity and work authorization documentation for Form I-9 would only be held to the existing requirements for E-Verify participants to retain copies of U.S. passports and passport cards, Permanent Resident Cards, and EADs.⁴⁹ All employers who retain documents for Form I-9 must abide by the Form I-9 document retention timeframe set forth in federal regulations, namely three years after the employee's first day of employment, or one year after the date employment ends, whichever is later. See 8 CFR 274a.2(b)(3). Document retention requirements related to the Form I-9, as well as up-to-date instructions and related guidance for the alternative procedure, will be available on I-9 Central and in USCIS' Handbook for Employers (M-274).⁵⁰ The objective of

retaining all documents presented to establish identity and employment authorization (from the Lists of Acceptable Documents on the Form I-9), is to create additional accountability by enabling a federal government official to assess during a Form I-9 audit if the employer's determination at the time of examination regarding whether the documents appear to be genuine and relate to the individual who presented them (8 CFR 274a.2(b)(1)(ii)(A)), as required by statute and regulation (8 U.S.C. 1324a(b)(1)(A)), was reasonable.

Although DHS is confident that the alternative procedure offers at least an equivalent level of security, DHS will monitor and evaluate data and information from ICE's Form I-9 audits after the implementation of this alternative procedure to assess any measurable impacts to system integrity (such as error or fraud rates) and, based on this information, the Secretary may announce new procedures or changes to the alternative procedure.

Comment: Commenters suggested that DHS provide clarification about each electronic document transmission method available to qualified employers and how to show documents remotely under each method (e.g., requirements to show the front and back of a document). A commenter asked if employers would need to see copies of both the front and back of presented Form I-9 documentation. A commenter asked if there would be quality standards for acceptable Form I-9 documentation.

Response: At this time, DHS believes that many employers have already updated their onboarding processes to accommodate remote workers and those employers who, as a result of this rule, choose to update their systems can do so in a manner that suits their processes, including making updates in order to transmit documents electronically. Nothing in this rule or the accompanying alternative procedure requires qualified employers to adopt a specific transmission method for copies of the documents.

Information about how to conduct the alternative procedure is contained in the accompanying **Federal Register** notice. DHS also maintains online information about the Form I-9 online at the I-9 Central website (I-9 Central),⁵¹ a central repository for information about the Form I-9 that will include instructions, guidance on applying the alternative procedure, and other learning resources.

resources/handbook-for-employers-m-274 (last visited May 23, 2023).

⁵¹ See <https://www.uscis.gov/i-9-central> (last visited May 24, 2023).

DHS is updating the instructions to the Form I-9 to state that copies of presented documents must be clear and legible, and must display the front of the document, and the back of the document, if two-sided.

5. Training

Supporting Training

Comment: Some commenters supported fraudulent document awareness training and anti-discrimination training as a prerequisite for applying the alternative procedure. Some commenters supported web-based training on fraudulent document detection and anti-discrimination as a critical component of any verification process to assess if the documents presented to complete the Form I-9 were genuine, while precluding immigration-related discrimination and ensuring compliance by both employees and employers. Specifically, one commenter provided examples of employers who refuse to accept an identity document listed on the Lists of Acceptable Documents provided with the Form I-9 and insist that employees produce an alternate identity document. Furthermore, those commenters stated that training should be free, web-based, and accessible to every U.S. employer to ensure compliance, enhance fraudulent document detection, reduce discrimination, and minimize the overall burden of the employment eligibility verification process.

Another commenter recommended that DHS borrow document authentication training materials from the ICE Mutual Agreement between Government and Employers (IMAGE) program.⁵² Various commenters urged DHS to create training plans, monitor completion rates, and make the training easily accessible online and free of charge.

Response: DHS agrees with the commenters and supports additional training as a sound safeguard against the occurrence of fraud in the Form I-9 process. DHS believes that such training, including anti-discrimination training, protects the integrity of the Form I-9 process.

8 U.S.C. 1324b prohibits employers from discriminating against individuals based on their citizenship or

⁵² DHS's IMAGE program is a membership certification program that focuses reducing unauthorized employment and the use of fraudulent identity documents by providing education and training on proper hiring procedures, fraudulent document detection, and use of the E-Verify employment eligibility verification program, available at <https://www.ice.gov/outreach-programs/image> for more information (last visited May 24, 2023).

⁴⁹ See *id.*

⁵⁰ See Handbook for Employers M-274, available at <https://www.uscis.gov/i-9-central/form-i-9>

immigration status, or their national origin, during the hiring, firing, recruiting, Form I-9, or E-Verify processes. Employers should develop, implement, and enforce anti-discrimination policies, practices, and procedures, and ensure that all employees who complete the Form I-9 (and their authorized representatives) or create E-Verify cases on the employers' behalf comply with all applicable statutory and regulatory requirements.

Employers must examine the documentation the employee presents for the Form I-9, but are not required to be document experts. Instead, employers must accept documents that reasonably appear to be genuine and relate to the person presenting them. See 8 U.S.C. 1324a(b)(1)(A), 8 CFR 274a.2(b)(i)(2)(A). For example, when a passport appears to be reasonably genuine and to relate to the individual presenting it, an employer cannot refuse to accept it just because the individual may have limited English proficiency.⁵³ However, if the employee provides a document that does not reasonably appear to be genuine and to relate to the employee, the employer must reject that document, ensure that the Lists of Acceptable Documents are available to the employee, and give the employee an opportunity to provide other documentation that satisfies the requirements of Form I-9. See, e.g., 8 U.S.C. 1324a(b)(1)(A). If an employee believes that they have been discriminated against by the employer based upon citizenship, immigration status, or national origin, unfair documentary practices, or retaliation, the employee should contact the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER), at 1-800-255-7688. IER hotlines are available Monday through Friday from 9 a.m. to 5 p.m. (Eastern). Calls can be anonymous, and language services are available. Additional information is available at <https://www.justice.gov/ier>.

DHS will ensure the availability of free online fraud awareness training through the required tutorial offered as part of the E-Verify enrollment process for qualified employers who choose to use the alternative procedure. As part of the E-Verify registration process, new employers and users must complete a free tutorial that includes fraud awareness and anti-discrimination training. DHS will also continue to encourage best employment practices by supporting employers who seek to become IMAGE Certified.

DHS will monitor and evaluate data and information from ICE audits conducted to assess any impacts on system integrity (such as error or fraud rates) as between the alternative procedure and the physical examination of Form I-9 documents. Additionally, this final rule authorizes the Secretary to conduct a pilot program to acquire and assess more data. DHS will evaluate all data and information collected through ICE audits and pilot programs with a continued goal of offering an alternative procedure to the widest group of employers while balancing the security of any alternative procedures implemented under the rule.

Comment: Commenters suggested that DHS publish a “job aid” for identifying fraudulent documents as a reference for Form I-9 document examiners. Commenters suggested that DHS provide written resources to employers or authorized representatives or provide a structured certification program that would help ensure compliance. Additionally, commenters stated that DHS should align or incorporate the required training with E-Verify and create training content that is more digestible for employers. Some commenters said that the current Form I-9 instructions lack descriptions for valid documentation such as the Form I-797 and the Form I-766, and information about whether any documents must be accompanied by additional supporting documents or an expiration date.

Response: DHS agrees with commenters that guidance should be easily understood and descriptive, and that the Form I-9 process is strengthened when training resources are readily available. I-9 Central is updated as needed to ensure employers know how to properly complete the Form I-9. DHS also provides current information and guidance in the M-274, Handbook for Employers, which is available online, and contains detailed examples with images of different document types and information about acceptable document combinations, including when supplemental documents are needed to qualify as an acceptable document combination for the Form I-9.

DHS will provide fraudulent document awareness training through E-Verify which will be free and readily accessible for qualified employers who choose to use the alternative procedure. DHS understands that creating a “job aid” for identifying fraudulent documents would be useful; however, employers can join ICE IMAGE and receive HSI-provided training and

guidance on proper hiring procedures and fraudulent document awareness.⁵⁴

Opposing Training

Comment: Several commenters opposed associating access to remote document examination with government-provided mandatory training because they said doing so would defeat the purpose of the proposed rule, which is to ease—not add to—the burden on employers. They also indicated that the alternative procedure would impose substantial costs on small business owners by diverting resources and attention away from business activities. Commenters stated that the burden of compliance rests on the employer so DHS should make training resources available but defer to employers on how to train employees to examine identity and employment authorization documents presented for the Form I-9.

Commenters stated that companies leveraging authorized representatives are already aware of their liability for any Form I-9 violations and may already have internal processes to reduce the potential for errors, including training programs.

Response: DHS is committed to providing employers useful learning resources to help them complete the Form I-9 correctly and agrees that completing Form I-9 training and accessing these resources should not be unduly onerous. For qualified employers who choose to use the alternative procedure, free training, instructions, and guidance for completing the Form I-9 using the alternative procedure will be available on I-9 Central. Under the parameters of the alternative procedure outlined in this final rule, nothing prevents a qualified employer from centralizing their Form I-9 process.

DHS disagrees that mandatory training would defeat the purpose of the alternative procedure or would impose substantial costs on small businesses. At this time, DHS is requiring employers who seek to use the alternative procedure and that are not already enrolled in E-Verify to complete the E-Verify new user tutorial, which includes fraud awareness and anti-discrimination training. The tutorial is free and accessible online as part of the E-Verify enrollment process. DHS estimates that the one-time E-Verify enrollment process takes new participants 2.26 hours to enroll, review and sign the MOU, review the user

⁵³ See 8 CFR 274a.1(l)(2).

⁵⁴ For more information see <https://www.ice.gov/outreach-programs/image> (last visited June 5, 2023).

guides, and complete the tutorial. DHS estimates one hour for each additional user for an enrolled employer to complete the tutorial.⁵⁵ Finally, nothing in this final rule requires an employer who is already enrolled in E-Verify to use the alternative procedure or for their employees to complete the tutorial more than once.

Comment: A commenter stated while they supported mandatory fraudulent documentation detection training for employers, they would not support mandatory training for all authorized representatives. This commenter stated that requiring such training for all authorized representatives would place an undue burden on individuals who might never need to complete another Form I-9 in the future, create an obstacle for already disadvantaged individuals who may not have the means to easily submit digital copies of documents, and preclude employers from using authorized representatives as a method of verification. Another commenter reasoned that companies leveraging authorized representatives are already aware of their liability for any verification violations and may already have internal processes to reduce the potential for errors, including training programs.

Response: This rule and the alternative procedure announced in the accompanying **Federal Register** notice do not require training for authorized representatives specifically.

6. Live Video Interaction

Comment: A commenter asked if, when confirming that Section 2 documents are related to the person presenting them, the employer would be required to see the employee via live video.

Response: The alternative procedure outlined in the accompanying **Federal Register** notice states that the employer must conduct a live video interaction with the employee. The employee must first transmit the copy of the document(s) to the employer and then present the same documents during the live video interaction to ensure that the documentation presented appears reasonably related to the individual presenting it.

Comment: A commenter expressed concern that the NPRM did not adequately address the potential costs associated with certain integrity measures and the potential negative

impacts on a portion of the population (such as employees who lack internet access).

Response: DHS appreciates the concern that employers implementing an alternative procedure could encounter costs and that some persons, such as employees without internet access, might not wish to use the alternative procedure. This final rule allows the Secretary to authorize an alternative procedure for Form I-9 document examination procedures for qualified employers but does not eliminate the physical in-person examination option for the employer or the employee. Nothing in this rule requires employers to offer, or employees to use, the alternative procedure. DHS understands that choosing to use the alternative procedure may require an employer to engage in certain activities that may incur a cost, including enrolling in E-Verify (or remaining a participant in E-Verify in good standing), collecting and retaining copies of Form I-9 documents presented by employees, and completing training. Any of these factors, and others, may influence an employer's decision to offer the alternative procedure, and the employee's decision to use it. However, DHS also understands that there are possible benefits to using the alternative procedure, such as improved operational and administrative efficiencies which may result in fewer Form I-9 mistakes and savings on third-party verification costs. DHS expects that affected persons will choose to use the alternative procedure if they believe it is in their best interests to do so.

Comment: A commenter asked if DHS could, to avoid any misunderstanding by employers, define what a remote employee is.

Response: A definition of "remote worker" is not necessary for this alternative procedure, because unlike the temporary flexibilities announced by DHS in March 2020 to address physical proximity precautions implemented by employers to combat the COVID-19 pandemic, the optional alternative procedure described here is available to employers with respect to all employees of qualified employers, including non-remote employees. As noted above, however, a qualified employer may choose to offer the alternative procedure for remote hires only but continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat

employees differently based on a protected characteristic.⁵⁶

F. Pilot Program

Comment: Multiple commenters asked for further explanation of the goal of a potential pilot program, as well as how it will affect employers and employees. Commenters questioned what a potential pilot program would involve, what kind of pilot program would be added (and when), what authorities it would grant, and how employers and employees would be fully impacted both during the pilot phase and in the long-term. Commenters stated that because there were information gaps in the NPRM, the public was unaware of all aspects of any proposed changes and therefore could not provide adequate comment.

Another commenter suggested that the pilot program should focus on industries with high turnover rates, remote workforces, and businesses that provide staffing services for construction, food service, restaurants, hospitality, higher education, and the healthcare fields should be considered for participation in the pilot.

Response: At this time, the Secretary is authorizing a permanent alternative procedure as outlined in the accompanying **Federal Register** notice. The Secretary has determined that it is not necessary to first conduct a pilot program. However, in the future, the Secretary may authorize a pilot program to explore other optional alternative procedures or collect additional data. At this time, DHS believes it is prudent to authorize an alternative option for examining employees' identity and employment eligibility Form I-9 documents because one of the lessons learned during the COVID-19 pandemic was that there is a need for an optional alternative to the in-person physical examination method employers have followed as part of the Form I-9 process set forth in current regulations.

After careful consideration of the comments received and concerns raised by the public, DHS created the framework for an alternative procedure that is detailed in this final rule and in an accompanying **Federal Register** notice. Additionally, the final rule authorizes the Secretary to conduct a pilot program to acquire and assess more data. DHS will evaluate all data and information collected through audits after the implementation of this alternative procedure and pilot programs with a continued goal of expanding the availability of an alternative procedure to other

⁵⁵ As estimated in the supporting statement for the currently approved information collection at the time of publication, 1615-0092, E-Verify Program, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202103-1615-015 (last visited May 24, 2023).

⁵⁶ See 8 U.S.C. 1324b(a)(1).

employers while ensuring the level of security offered by any alternative procedure implemented under the rule. With respect to commenters' stated concern that DHS has not sought comment on a specific proposed pilot, DHS appreciates commenters' concern, and notes that any pilot authorized by DHS would be entirely optional, time-limited, and designed to help DHS assess potential alternative procedures.

DHS appreciates the suggestion to consider industries with high turnover rates, and to consider allowing participation across multiple industries, in a future pilot program.

Comment: Commenters suggested that, if DHS were to proceed with a pilot program, any such pilot program should last for at least five years to allow employers and vendors sufficient time to recoup any necessary investments to participate. This should also provide ample time to transition to a permanent program or revert to pre-COVID-19 processes. Commenters noted that employers have learned many important lessons from the temporary flexibilities first announced in March 2020 that would render any future pilot program redundant.

Response: This final rule authorizes the Secretary the option to conduct a pilot program to explore other possible alternative procedures. DHS will evaluate all data and information collected through Form I-9 audits and pilot programs with a continued goal of expanding the availability of an alternative procedure to the widest group of employers while balancing the security of any alternative procedures implemented under the rule. The Secretary will announce any such pilot programs, new procedures, or changes to this alternative procedure in the future. DHS will consider the suggestion that any future pilot program should last for an appropriate length of time that would allow as many employers as possible to participate. During the period when the Form I-9 flexibilities were in place, DHS did not collect additional information to evaluate the impacts of the flexibilities on the integrity of the Form I-9 process. However, DHS will monitor and evaluate data and information from ICE's Form I-9 audits conducted after the implementation of this alternative procedure to assess any measurable impacts on system integrity (such as error or fraud rates). In addition, DHS may conduct a pilot program to acquire and assess more data. DHS will evaluate all data and information collected to ensure the security of any alternative procedures implemented under this final rule.

G. Suggestions for Additional Changes or Alternative Procedures

1. Past Fines, Settlements, and Convictions

Comment: Some commenters suggested that DHS require employers who have failed to follow Form I-9 instructions in the past to physically examine documentation and prove their compliance before being considered eligible for an alternative procedure. Another commenter stated that although it might seem "reasonable at face value" to restrict participation if an employer has been the subject of a fine, settlement, or conviction related to noncompliance with Form I-9 requirements, this approach could make compliance more difficult for these employers. Further, the commenter stated that if the goal is compliance, restricting participation would not be an effective strategy. An individual commenter said that, while they understood the inclination to treat an alternative procedure as a "privilege," employers found to have ongoing technical errors could become more compliant by centralizing their Form I-9 process and tasking document verification to a trained, experienced team with the ability to complete Section 2 remotely.

Response: DHS has not included such a restriction in the alternative procedure accompanying this rule, because DHS believes that the measures included in the alternative procedure offer at least an equivalent level of security. DHS recognizes that past violations are not necessarily indicative of current noncompliance, and currently lacks a clear methodology to distinguish between past violators on the basis of (for instance) type or number of violations. DHS may, however, prioritize audits on the basis of past violations, consistent with available resources and law enforcement prerogatives. In addition, DHS has included a condition that qualified employers be E-Verify participants in good standing, for the reasons explained above.

2. Document Examination by Other Parties or by Mail

Comment: Several commenters recommended that DHS allow the U.S. Postal Service, licensed notaries, library employees, clerks in local government, or DMV employees to conduct Form I-9 document examinations, or allow physical document examination be done by local, certified third parties, such as notaries. A commenter recommended that DHS allow employers and HR staff, specifically, to verify the Form I-9

documentation showing work authorization by mail and then allow a manager to confirm the employee's identity in-person.

Response: DHS appreciates these suggestions and will continue to explore ways to improve the Form I-9 process. At this time, DHS believes that the accompanying alternative procedure offers sufficient flexibility for employers while DHS continues to evaluate other options to facilitate compliance and reduce burdens on employers and employees. DHS notes that existing regulations continue to allow the use of authorized representatives. *See, e.g.,* 8 CFR 274a.2(b)(1)(ii).

3. Existing Digital Tools

Comment: Some commenters suggested that DHS permit, as part of the Form I-9 process, the use of existing virtual and digital tools and services that examine documents and verify the identity of the individual. Commenters stated these services are used by other federal and state agencies to authenticate an individual's identity. Another commenter suggested allowing for alternative processes as long as they complied with established federal government authentication standards, presenting ID.me as an example. One commenter suggested that DHS should allow for effective and sustainable digital identification solutions in the future, with consideration given to those services that currently overlap with the Form I-9. Another commenter referenced the increasing use of digital driver's licenses, which some U.S. states have begun issuing, making the case that requiring physical documents is outdated.

A commenter stated that due to added protections provided by participation in E-Verify, coupled with advances in technology, remote verification poses a lower risk than in the past. Another commenter stated that commercial platforms and scanning technology already enable the employee to share images of verification documents through fax, email, or other means in advance of, or simultaneous to, a video meeting. Thus, an employer can "toggle" between a copy of the verification documents received and the video screen, effectively approximating the in-person verification experience.

A commenter suggested that DHS allow digital document submission rather than requiring physical document copies because it would allow businesses to realize the efficiencies offered by digital innovations, noting that some U.S. states have begun issuing digital driver's licenses. Another commenter suggested that DHS work

with state governments to create and share photos in a database.

Various technological approaches were suggested for uploading and collecting Form I-9 documentation, including webcam or video recording, facial recognition software, email, a secure document portal, or a document scanner (similar to methods used by other government agencies or by sending a link to the employee's telephone). A commenter stated that DHS should allow employers to select how to conduct alternative procedures because a requirement to use a specific set of methods would add undue and burdensome expenses.

Response: DHS agrees that the Form I-9 process may benefit from the use of existing and future digital services, whether private or public. The use of E-Verify and remote document examination under the alternative procedure is one example of the ways in which information technology can reduce burdens while ensuring the integrity of the employment verification system. As another example, DHS is also currently developing E-Verify NextGen, an exciting new product that modernizes and streamlines the Form I-9 and verification process for employees and employers.⁵⁷ DHS will continue to explore opportunities to leverage public and private information technology resources to improve the Form I-9 process, consistent with available resources and statutory authorities. At this time, however, DHS is not requiring employers to use a specific technology as a condition of implementing the alternative procedure.

A number of the suggested alternative approaches to document examination path would carry risks that could impact employers' ability to implement the alternative procedure, as well as the incidence of fraud, data security, national security, or other equities. For instance, digital identification systems, including systems that involve interaction with government databases, may pose different or additional privacy risks. In a digital identity-check environment, a person's entry into a particular area can be recorded and the information stored for some period of time. If not properly protected, this information, which includes PII, could also be repeatedly shared or used for secondary purposes, even potentially used for broader surveillance. The Privacy Act of 1974, the E-Government Act of 2002, and other authorities, to

include DHS privacy policies, govern DHS's collection, maintenance, and use of PII to prevent and mitigate privacy risks, to include identity theft or other adverse, unauthorized misuses of individuals' PII. In addition, as DHS has certain law enforcement functions involving counterterrorism and intelligence, it abides by certain standards for data sharing, which makes systems integration more complicated to protect law enforcement missions in the areas of border security, criminal law enforcement, criminal investigations, and immigration enforcement. For these and other reasons, DHS believes that the suggested alternatives are infeasible at this time.

Furthermore, this rule and accompanying notice are providing an option to qualified employers to use an alternative method to verify employees' identity and employment authorization for the Form I-9. The employer may use various communication platforms to conduct a live video- and audio-conferencing interaction to examine the document with the employee who presents the documents. In contrast, 'verification sites' or 'digital identity' platforms may use artificial intelligence or other facial recognition software in place of document examination, and raise a host of issues that DHS cannot fully address at this time. DHS may consider using a secure digital identity verification in combination with video conferencing in the future after conducting further analysis and assessment. This rule is providing an option to employers to use an alternative procedure for examining the identity and employment authorization documents of an employee to complete the Form I-9.

With regards to digital licenses, not every state provides digital licenses and this rule does not change the acceptable Form I-9 documents to demonstrate identity and employment authorization. DHS will continue to engage with state motor vehicles departments on information sharing and may consider partnerships in the future.

DHS may explore additional options in the future after further assessments and analysis are conducted.

4. Emerging Technology

Comment: A commenter stated that DHS should authorize a procedure that allows for employment eligibility verification via mobile application transactions, in order to accommodate future innovation in this area. The commenter stated that employers are not forensic document examiners and should be encouraged to use remote document acquisition and extraction

solutions that, according to the commenter, are continually being improved, including via the use of artificial intelligence. The commenter stated that such applications could report fraud risk to the employer and that such applications could mitigate privacy risks. The commenter suggested that DHS work with NIST to develop minimum standards for such artificial intelligence-based fraud detection, while accounting for potential unintentional discrimination impacts. The commenter stated that a standardized remote mobile application process could in theory enable DHS to assure all employees are treated fairly and without discrimination.

Response: Under the alternative procedure announced in the accompanying notice, DHS will require qualified employers who choose to use the alternative procedure to conduct a live video interaction with the employee, among other measures. The employee must first transmit a copy of the document(s) to the employer and then present the same document(s) during the live video interaction to ensure that the documentation reasonably appears genuine and related to the individual.

DHS does not believe it is appropriate at this time to include an open-ended authorization for the use of mobile applications or artificial intelligence in this context. DHS will, however, continue to explore other alternative procedures that could allow employers to determine if documents reasonably appear to be genuine and relate to the individual who presents them. DHS may conduct further analysis and assessments into various technologies to ensure an equivalent level of security is met. DHS may also solicit further feedback from the public as appropriate prior to implementing additional alternative procedures for the Form I-9 document examination process. Any such changes will be noticed in the **Federal Register**. At this time, however, DHS is not requiring employers to use a specific technology as a condition of implementing the alternative procedure.

5. Utilize Other Forms of Remote Identity Verification

Comment: Commenters asked why remote identity verification systems used by other government agencies cannot be used for the Form I-9 process. Commenters stated that some federal government agencies currently use a third-party service to verify the identity of agency customers. Commenters also suggested that DHS work with state governments to access facial photos that would help employers verify the

⁵⁷ See E-Verify, Coming Soon: E-Verify NextGen, available at <https://www.e-verify.gov/about-e-verify/whats-new/coming-soon-e-verify-nextgen> (last visited May 20, 2023).

identity of the individuals presenting Form I-9 documents.

Response: DHS will continue to explore options to partner with other entities to ensure effectively implement the employment verification system consistent with law, while reducing unnecessary burdens to the extent feasible. As part of E-Verify, DHS currently leverages its own and other government databases such as those of the U.S. Department of State to access Employment Authorization Documents (Form I-766), Permanent Resident Cards (Form I-551) and U.S. passport and U.S. passport card images. DHS will continue to engage with a variety of stakeholders such as state motor vehicle administration representatives, government information specialists, technology professionals, and privacy and legal experts to understand how best to address the technical, privacy, and policy issues inherent in sharing sensitive identity information.

6. DHS Verification Mechanism

Comment: Commenters suggested that DHS create a mechanism for employers to request DHS's assistance in checking the authenticity of a document if the employer questions the condition or authenticity of the document.

Commenters stated that DHS should only allow employers to inspect documents that DHS can authenticate because it would encourage states to provide DHS access to their identification data and discourage fraud.

Response: DHS agrees that the Form I-9 process is strengthened when the authenticity of documents can be verified. E-Verify is a mechanism by which employers can confirm the validity of most documents because it electronically compares information from numerous data sources, both internal and external to DHS, with the information provided on an employee's Form I-9. Specifically, E-Verify uses biographical records, such as name and date of birth, to confirm employment eligibility by determining if the records belong to an individual who is authorized to work with DHS records.

At the same time, E-Verify checks the validity of U.S. passports, Permanent Resident Cards, and EADs with the issuing authority, and electronically sends the photograph from the official record to the employer to compare with the photo on the document provided by the employee. E-Verify requires all cases to include the employee's SSN, and E-Verify electronically compares employer-entered data with SSA records. E-Verify requires that all List B identity documents presented by employees contain a photo. E-Verify

uses data sources available to DHS to electronically verify the identity information provided on most state-issued identification cards and driver's licenses.

H. Regulatory Analyses

1. Executive Order 12866 Analysis

Comment: Commenters stated that the proposed rule failed to include an adequate economic analysis that effectively illustrated the costs and benefits of implementing the rule on the affected population, as well as on the government. Commenters further suggested that the NPRM failed to consider the costs associated with an alternative procedure or identify what an alternative option would entail. One commenter stated that the economic analysis is inconclusive because it addressed only the additional time needed for an employer to complete a new box on the Form I-9.⁵⁸ A commenter requested that DHS calculate the time it takes for employers to locate an authorized representative in the cities and towns where newly hired employees reside.

Response: DHS disagrees that it failed to include an adequate economic analysis of the effects of the NPRM. DHS proposed to authorize the use of an alternative procedure, *see* 87 FR at 50789-50790; specifically sought comment on a range of potential measures to include in such an alternative procedure, *see* 87 FR at 50790; and included an analysis under Executive Orders 12866 and 13563 that included quantitative estimates related to the proposed form changes and qualitative discussion of potential alternative procedures, *see* 87 FR at 50790-50792. Consistent with the NPRM, this final rule allows an alternative procedure only when certain conditions are met, including upon the Secretary's determination that such procedures offer an equivalent level of security. Also consistent with the NPRM, and following consideration of the comments received, DHS is announcing an alternative procedure in a separate **Federal Register** notice, concurrently published in today's edition of the **Federal Register**.

Although not required, DHS has included in this final rule an analysis of the costs and benefits of the alternative procedure requirements outlined in the corresponding **Federal Register** notice.

⁵⁸ DHS is adding a box to the Form I-9 that an employer (or an authorized representative acting on an employer's behalf) would select to indicate that the employee's documentation was examined consistent with the alternative procedure(s). DHS is also updating the instructions to the Form I-9 to provide additional information about the new box.

DHS acknowledges that employers face and consider diverse conditions when choosing how to inspect new employee documents but expects that employers who choose to use the alternative procedure will only do so if the benefits of doing so outweigh the costs. DHS therefore concludes, although not required to do so, that the alternative procedure would not have a significant economic impact on a substantial number of small entities.

2. Regulatory Flexibility Act (RFA)

Comment: A commenter stated that the proposed rule would not guarantee that physical examination would remain an option to all employers and, therefore, lacked the assurance that small businesses would not be required to incur the costs associated with future remote inspection procedures. A commenter requested that DHS conduct another regulatory flexibility analysis to accompany any future actions announcing new alternative procedures because DHS's assertion that the rule does not have a significant economic impact on a substantial number of small entities is insufficient without further analysis.

Response: The commenter's premise that this rule does not guarantee that physical in-person examination would remain an option to all employers is misplaced. This rule simply provides a framework that enables DHS to allow an optional alternative to the in-person physical documentation examination procedures. This rule in no way requires employers or employees to use an alternative procedure. *See* 8 CFR 274a.2(b)(1)(ii). DHS reviewed this final rule in accordance with the Regulatory Flexibility Act (RFA) and determined that it does not impose any new requirements on employers. Employers may either physically examine, or otherwise examine pursuant to an authorized alternative procedure, identity and employment authorization documents to ensure they reasonably appear to be genuine and relate to the person presenting them to complete the Form I-9.

Because participation in the alternative procedure is voluntary, DHS believes this rule will not have a significant economic impact on a substantial number of small entities and that employers who choose to use the alternative procedure will only do so if the benefits of doing so outweigh the costs. Moreover, the RFA analysis presented in the NPRM and in this final rule comply with the requirements of the RFA. Neither the APA nor the RFA require additional analysis.

3. Paperwork Reduction Act (PRA)

Comment: In response to a call for comment regarding the accuracy of the burden estimate associated with the Form I–9, *see* 87 FR at 50792, a commenter stated that completing the Form I–9 on a mobile application can reduce the estimated time for employers from an average of 21 minutes to approximately one minute. For employees who have their documentation ready, can read English, and do not require a notary, the commenter stated this burden is reduced from 17 minutes to approximately one and a half to four minutes to complete and sign the Form I–9.

Response: DHS appreciates the suggestion and recognizes that the burden for employers to complete the Form I–9 may be lower for some employers and employees. DHS uses average estimates to account for employers and employees who may require additional time to complete the Form I–9. For this final rule, DHS is evaluating the impacts of the changes implemented through this rule, specifically the box added to the Form I–9 that an employer (or an authorized representative acting on an employer’s behalf) must select to indicate that the employer is using any available alternative procedure(s), and to make corresponding edits to the form’s instructions. DHS estimates these revisions will add one minute of burden to the overall Form I–9 burden. To isolate the impacts of this final rule, DHS is not making any other changes to the burden estimates in the current Collection of Information, OMB Control Number 1615–0047. DHS will consider any changes to the overall burden estimates during the regular renewal of the Collection of Information.

Comment: A commenter stated that the Paperwork Reduction Act (PRA) request for comment was so broad that it did not reasonably permit a logical response.

Response: DHS respectfully disagrees. In the NPRM, DHS estimated that if employers used an alternative procedure, it would take them one minute to read the revised instructions and mark the new box on the Form I–9 (if needed). *See* 87 FR at 50791. DHS also described multiple potential integrity measures to include in an alternative procedure, *see* 87 FR at 50790, and encouraged the public to provide comments on any burden(s) associated with using an alternative procedure, *see* 87 FR at 50791–50792. DHS also posted to the public docket proposed changes to the Form I–9 and

its instructions.⁵⁹ The preamble to the proposed rule contained an information collection notice in accordance with the PRA and invited comment on a range of potential changes to the collection of information. *See* 87 FR at 50792; 5 CFR 1320.11. DHS also called commenters’ attention to the proposal to add boxes to Sections 2 and 3 of the Form I–9 and to revise the form instructions to refer to alternative procedures should they be authorized. *See* 87 FR at 50792. In addition, DHS asked for comments on the effects of the potential changes with respect to employers, employees, and DHS, including comments on the associated burdens or benefits, such as reducing risks to the integrity of the alternative procedure(s), avoiding discrimination in the process, and protecting privacy interests. *See* 87 FR at 50790.

I. Out of Scope

1. Out of Scope Generally

Comment: Commenters suggested that DHS take other actions that were well beyond the scope of the NPRM or DHS’s authority, such as eliminating all Form I–9 requirements; enabling electronic signature programs to allay concerns about inaccurate signatures; extending the three-day timeframe for completing all Forms I–9; extending the time period for employees who have experienced a natural disaster or emergency that caused their identity or work authorization documentation to be lost or destroyed; adding certain documents (such as expired driver’s licenses and concealed-carry licenses) to the List of Acceptable Documents; and clarifying whether the Form I–20, Certificate of Eligibility for Nonimmigrant Student Status, is a DHS-issued document that falls under List A.

Response: These comments are outside the scope of the rulemaking and require no further response.

2. M–274 Handbook for Employers

Comment: Commenters requested clear and concise training materials when updates are made to the M–274 Handbook for Employers.⁶⁰ Commenters suggested that it would be helpful if all current and previous Form I–9 “procedures” referenced in the M–274

Handbook for Employers were easily accessible for reference during periodic internal audits.

Response: All instructions and guidance for completing the Form I–9, including information about the alternative procedure, will be available on I–9 Central. When any important updates are made to the I–9 Central website and the M–274, Handbook for Employers, employers enrolled in E-Verify are informed about the changes when logging into E-Verify. Currently, DHS does not have a single, collected mechanism for employers to access previous Form I–9 guidance but will take this suggestion under consideration as it continues to explore ways to improve the Form I–9 process.

III. Statutory and Regulatory Requirements

DHS developed this rule after considering numerous statutes and executive orders related to rulemaking. The below sections summarize the analyses based on a number of these statutes or executive orders.

A. Administrative Procedure Act

The APA authorizes agencies to dispense with certain rulemaking procedures under certain circumstances. Although the APA typically requires a 30-day delayed effective date for substantive rules, 5 U.S.C. 553(d)(1) provides that the 30-day delayed effective date requirement does not apply to a substantive rule that grants or recognizes an exemption or relieves a restriction. DHS has determined that this rule is exempt from the 30-day delayed-effective-date requirement on that basis. The rule creates a framework under which the Secretary can, as an optional alternative to the in-person physical document examination method employers have followed as part of the Form I–9 process set forth in current regulations, authorize alternative documentation examination procedures with respect to some or all employers. Such an optional alternative would only be adopted on an optional basis and would relieve a restriction. The rule therefore falls squarely within the § 553(d)(1) exception to the 30-day delayed effective date requirement.

B. Executive Orders 12866, 13563, and 14094: Regulatory Review

Executive Orders 12866 (“Regulatory Planning and Review”), as amended by Executive Order 14094 (“Modernizing Regulatory Review”), and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is

⁵⁹ *See* Table of Changes—Instructions for Form I–9 Employment Eligibility Verification (Aug. 19, 2022), available at <https://www.regulations.gov/document/ICEB-2021-0010-0012> (last visited May 18, 2023); Table of Changes Form I–9 Employment Eligibility Verification (Aug. 19, 2022), available at <https://www.regulations.gov/document/ICEB-2021-0010-0010> (last visited May 18, 2023).

⁶⁰ *See* Handbook for Employers M–274, available at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274> (last visited May 24, 2023).

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Management and Budget (OMB) has designated this rule a significant regulatory action as defined under section 3(f) of E.O. 12866, as amended by E.O. 14094, although not significant under section 3(f)(1) because its annual effects on the economy do not exceed \$200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

This final rule allows the Secretary to authorize alternative procedures as part of a pilot program, or upon the Secretary's determination that such procedures offer an equivalent level of security for Form I-9 document examination, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to Section 319 of the Public Health Service Act or a national emergency declared by the President pursuant to Sections 201 and 301 of the National Emergencies Act.

In this final rule, DHS responds to the public comments on the NPRM. DHS is concurrently publishing a corresponding notice in the **Federal Register** that describes the framework for the optional alternative procedure to in-person examination of the Form I-9 documentation. This final rule also addresses the potential impacts attributed to the alternative procedure announced in the corresponding **Federal Register** notice. It also assesses the cost associated with adding a box on the revised Form I-9 to indicate whether the alternative procedure was applied. A regulatory assessment follows, pursuant to OMB Circular A-4. DHS expresses quantified impacts in 2022 dollars.

1. Summary of the Analysis

The rule allows the Secretary to authorize an optional alternative procedure to the physical examination of the documents that employees must present to their employers for the completion of the Form I-9. Without this rule (or without the Secretary's authorization of an alternative procedure, even if the rule were in place), employers would, in all situations, be required to physically examine the Form I-9 documents of an employee in person as was practiced prior to the COVID-19-related

flexibilities. However, with this rule in place and with the corresponding notice, the Secretary is establishing an alternative procedure that will allow for remote examination of I-9 documents for qualified employers.

The finalization of this rule is not anticipated to have any compliance costs because it simply establishes a path for the Secretary to establish an alternative procedure. Because the Secretary is at the same time authorizing an alternative procedure, following review of the comments received, as announced by DHS in a notice concurrently published in today's edition of the **Federal Register**, DHS has chosen to include an analysis of that alternative procedure in this final rule. Under the alternative procedure, qualified employers will have the option to apply an alternative method of examining Form I-9 documents presented by employees to ensure they appear to be genuine and to relate to the individual. This option will be extended to all new employees (and those who require reverification) of qualified employers who are enrolled in E-Verify, whether or not those employees will be working in a remote setting.

The alternative procedure has the potential to produce cost savings and benefits to both the public and the government while also imposing various costs. Employers who may exercise this option are required to be enrolled in good standing in E-Verify, examine copies of documents for new employees, conduct a live video interaction with the employee, undergo training, and maintain records.

Because the alternative procedure is optional for qualifying employers, DHS anticipates that any employer will likely only make use of the alternative procedure when it is in their interest to do so—that is, when the benefits and cost savings exceed the costs. Therefore, in the absence of any direct and substantial impact of the alternative procedure on the government or other entities, the alternative procedure is almost certainly net beneficial. Precisely quantifying those net benefits, however, would be complex and inherently uncertain, due to the diversity of employers and the range of geographic and other circumstances of new employees. In the discussion below, DHS includes quantitative analysis where feasible.

Over 1.1 million employers are enrolled in E-Verify, with an estimated 70,565 new employers enrolling each year.⁶¹ In 2022, E-Verify employers used

the system to check over 48 million new hires.⁶² DHS believes that employers may be most likely to use the alternative procedure for employees hired in remote positions or for those for whom reporting to the office is difficult, although non-remote employees can participate as well. DHS estimates that approximately 16 percent of new employee cases created by E-Verify enrolled employers, or approximately 7.7 million per year, will be remote positions for which the employer would be motivated to use an alternative to in-person examination of Form I-9 identification documents.

Allowing for the remote examination of Form I-9 documents will allow employers to gain operational and administrative efficiencies, which may result in fewer mistakes in completing the Form I-9 and save on third-party verification costs. Additionally, employees may also benefit from the alternative procedure in the form of expanded work opportunities, travel cost-savings, and supplemental benefits relating to avoided travel. DHS estimates that if qualified employers use the authorized procedure for the 16 percent of new employees estimated to be remote, employers and employees will save between \$281.1 million and \$476.6 million in avoided travel time and costs per year. As a result of these benefits, DHS expects the availability of the alternative procedure to increase the number of employers who enroll in E-Verify annually. Employers who enroll in E-Verify to exercise this option will help to ensure that documents presented by the employee are valid and unexpired because the system compares their documents against various government databases.

An employer's voluntary decision to use the alternative procedure may also result in costs to participating employers and employees. These costs may include time for familiarization with the requirements of the alternative procedure; time for employers to read the updated Form I-9 instructions; time for employees to provide electronic copies of documents and employers to store them; and time for enrollment and use of E-Verify for employers who choose to enroll in the program to use the alternative procedure. ICE estimates that reading the new checkbox instructions when onboarding each new employee will cost employers \$59.9 million per year and familiarization

data/e-verify-usage-statistics (last updated Jan. 12, 2023).

⁶² Available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited March 24, 2022).

⁶¹ USCIS, E-Verify Usage Statistics, available at <https://www.e-verify.gov/about-e-verify/e-verify->

with the requirements of the alternative procedure will cost employers \$3.4 million in the first year.
The implementation of the alternative procedure outlined in the

accompanying **Federal Register** notice will produce the following effects, relative to the baseline of how Form I-9 documents were inspected prior to the

COVID-19 flexibilities (see Table 1).⁶³ Not all employers and employees will realize all the potential impacts described below.

TABLE 1—SUMMARY OF EXPECTED IMPACTS

Provision	Cost	Benefit
Use of Optional Procedures by E-Verify Participants.	<ul style="list-style-type: none"> Burden of time for qualified employers to familiarize with the notice. Burden of time for all employers to review revised I-9 Form instructions for each new hire. Employers who enroll in E-Verify in order to use the alternative procedure will also incur the following costs: <ul style="list-style-type: none"> Burden of time for E-Verify enrollment Burden of time to use E-Verify, including time to copy or scan Form I-9 documentation. Burden for employees to make a copy of identification documents and send via email or other electronic means. 	<ul style="list-style-type: none"> Travel time and cost savings for employer and employees. Cost savings to employers from removing the need for third-party verification. Improved operational and administrative efficiencies, resulting in fewer mistakes. Additional security from use of E-Verify (New E-Verify enrollees). Improved staffing reach/diversity. Potential saving on building space, work equipment, etc. Advances equity for workers for whom it is difficult or impossible to travel to an office. Potential increased employment opportunities due to remote verification option. Improved accuracy of recordkeeping. Provides audit trail to flag suspected fraudulent documents during audits.
Document Retention	<ul style="list-style-type: none"> Burden for qualified employers to collect and/or retain copies of identification documents (Employers must retain copies of employee documentation with Form I-9; Form I-9 retention calls for three years after the date of hire, or one year after the date employment ends, whichever is later.) This burden may also have other impacts due to privacy laws in certain States. 	

2. Background, Need, and Assumptions

The use of in-person examination as the sole means of verifying documents for the Form I-9 has presented several limitations in the wake of both technological advancements and global events. For example, one of the primary changes to the U.S. economy that came as a result of the COVID-19 pandemic was the increased adoption of telework and remote work arrangements for employees. This was enabled by new technology and work arrangements which made it possible for employees to work without physically reporting to an employer worksite on a regular basis. As these arrangements became more commonplace, so too did the impression by employers that the burden to coordinate, schedule, and verify employment eligibility by physically examining I-9 identification documents in person could be significantly reduced through the means of an alternative procedure. Such an alternative would no longer require that new employees expend the time and risk of transporting these documents for examination, while allowing employers to save on third-party verification and increase operational efficiencies. As a result, and for the reasons explained earlier in this preamble, DHS believes it is prudent to

offer an alternative option for examining employees' identity and employment authorization documents.

This rule amends regulations to allow the Secretary to authorize an optional alternative for examining the documentation presented by individuals seeking to establish identity and employment authorization for the purpose of completing the Form I-9. DHS is announcing an optional alternative procedure through a **Federal Register** notice that will be published concurrently with this final rule and which describes the procedure.

The measures comprising the alternative procedure will continue to ensure the integrity of the employment eligibility verification process. E-Verify provides employers with assurance that certain employee identity and employment authorization documentation is genuine by electronically comparing the information with data available to DHS. Employers choosing to use the alternative procedure also will conduct a live video interaction with the employee presenting the document(s) to ensure that the documentation appears reasonably related to the individual presenting them. The employee must first send a copy of the document(s) to

the employer and then present the same document(s) during the live video interaction. Providing fraud awareness training to new E-Verify users provides employers with up-to-date information about fraud detection and instills an additional safeguard against its occurrence. The retention of Form I-9 documentation supports DHS auditors in enforcing Form I-9 requirements for employers who participate in alternative procedures.

DHS estimates the economic effects of the alternative procedure will be sustained indefinitely. DHS bases this analysis on the following information:

(1) The parameters for the alternative procedure are not set nor determined by this analysis, but rather are set by the Secretary in the accompanying **Federal Register** notice.

(2) The alternative procedure described in the **Federal Register** notice includes remote examination of copies of acceptable Form I-9 identification documents by E-Verify enrolled employers (or an authorized representative acting on the employer's behalf) for new employees and those whose employment eligibility is being reverified to work in the United States. The term 'remote examination' in this analysis refers to the remote

⁶³ The COVID-19 flexibilities will sunset on July 31, 2023. See ICE, *ICE Updates Form I-9 Requirement Flexibility to Grant Employers More*

Time to Comply with Requirements (May 4, 2023), available at www.ice.gov/news/releases/ice-updates-

[form-i-9-requirement-flexibility-grant-employers-more-time-comply](https://www.ice.dhs.gov/form-i-9-requirement-flexibility-grant-employers-more-time-comply) (last visited May 24, 2023).

examination of digital or original copies of Form I-9 documents that have been submitted (via mail or online) to employers by employees. The details for conducting this alternative procedure are described below.

(3) The alternative procedure offers a level of security equivalent to in-person inspection of the Form I-9 documents. Accordingly, DHS believes use of the alternative procedure will not materially increase rates of fraud or error for qualified employers.

(4) Any employer opting to exercise the alternative procedure does so because they perceive that the gains to efficiency, and time and materials cost savings of this alternative, outweigh the costs of enrollment and use of E-Verify and required document retention. Given the strongly positive public response to the current flexibilities, DHS expects the majority of employers who desire the benefits of the alternative procedure are also willing to incur the costs, as applicable, depicted in the analysis below.

Affected Population

This alternative procedure primarily affects E-Verify enrolled employers, including employers who enroll in E-Verify in order to take advantage of the alternative procedure, and their new employees. In accounting for any costs, cost-savings, and benefits to these affected populations, DHS utilized the following information:

To estimate the population of E-Verify-enrolled employers, DHS assessed account data from 2021, and found the total number of E-Verify enrollees to be 1.1 million. To determine the number of active E-Verify enrolled employers, DHS eliminated accounts with inactive or slow hiring and accounts for businesses who had shut down but not closed their E-Verify accounts. DHS determined that there remained 292,195 employers who have created at least one E-Verify case within the preceding 12 months. These were considered current “active” accounts. Then, for these active accounts, the current number of total active users was 496,732.⁶⁴ In addition, DHS reviewed this data across consecutive years and determined that the average number of newly enrolled employers was 70,565 per year. DHS will use these figures in estimating the costs and benefits to employers. The alternative procedure may prompt additional employers to enroll in E-Verify to take advantage of the flexibilities provided; however, because the alternative procedure is

new relative to the baseline, and may alter the trend in usership, ICE is not able to estimate the number of new enrollees into E-Verify, but rather provides point estimates for the unit cost faced by new enrollees.

Next, DHS examined the number of new employees hired by qualified employers. Reviewing data provided by E-Verify, DHS determined that the number of new cases created by employers in fiscal year 2022 was 48,042,413, with each case representing a new hire.⁶⁵ To estimate the affected employee population for the purposes of this analysis, DHS assumes employees applying for remote positions are those most likely to use the alternative procedure, although non-remote employees can participate in the alternative procedure as well.

Accordingly, DHS examined a number of sources that estimated the percentage of the U.S. workforce that will fully utilize remote work in 2022 and beyond. Data in this regard covers a broad range of contexts and is often dependent on factors such as the type of industry and whether employers offer full or part-time remote work. For example, according to a Business Response Survey conducted between July and September 2020, 31 percent of establishments increased telework offered to employees because of the COVID-19 pandemic.⁶⁶ Notably, there was substantial variation by establishment size and industry. Large establishments (those with 500 or more employees) were more than twice as likely to have increased telework than were smaller establishments. In the sectors of educational services, finance and insurance, information, and management of companies, more than 50 percent of establishments increased telework. By contrast, in both agriculture and accommodation and food services, less than 10 percent of establishments did so.⁶⁷

Data on economy-wide full-time remote work also vary. Although there is general agreement that companies are making long-term plans to embrace remote work to a greater degree than before the COVID-19 pandemic, there is

still debate around the extent to which workplaces will remain remote. Specifically, there is debate regarding whether firms will mostly utilize a fully remote model, or a hybrid approach that requires workers to come into the office a few days a week. Using data from the 2021 Business Response Survey, DHS found that between July and September 2021, 13 percent of jobs in U.S. private sector businesses involved teleworking full time and 22 percent involved teleworking at least some of the time. One-third (33 percent) of establishments increased telework for some or all employees during the COVID-19 pandemic.⁶⁸ DHS found another source that tracked remote work availability from North America’s largest 50,000 employers, projecting that 25 percent of all high paying jobs will be available remotely by 2022.⁶⁹ Similarly, another source found that as of 2022, 26 percent of U.S. employees were working remotely, and projected that by 2025, there could be as many as 36.2 million Americans working remotely.⁷⁰ Another study estimated that fully remote workers would represent some 27.7 percent of the workforce by 2022.⁷¹

DHS also examined which industries, based on NAICS codes, contained the highest concentration of remote work employment, and then compared this information with the NAICS codes of businesses which utilized E-Verify in 2022.⁷² DHS first reviewed E-Verify usage statistics for each industry sector (via NAICS codes) to determine which industries are the most likely to use E-Verify. DHS then utilized BLS Telework data based on a 2021 Business Response Survey⁷³ to determine the percentage of

⁶⁸ *Ibid.*

⁶⁹ 25% of all professional jobs in North America will be remote by end of . . . (n.d.), 2022, available at <https://www.theladders.com/press/25-of-all-professional-jobs-in-north-america-will-be-remote-by-end-of-next-year> (last visited May 24, 2023).

⁷⁰ 25 trending remote work statistics [2022]: Facts, trends, and projections. Zippia 25 Trending Remote Work Statistics 2022 Facts Trends and Projections Comments. (n.d.), available at <https://www.zipppia.com/advice/remotework-statistics/#:~:text=26%25%20of%20U.S.%20employees%20work,U.S.%20companies%20are%20fully%20remote> (last visited May 24, 2023).

⁷¹ “Future Workforce Report 2021, Ozimek, Adam, Upwork, available at www.upwork.com/research/future-workforce-report (last visited October 12, 2022).

⁷² See <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-usage-statistics> (last visited May 24, 2023).

⁷³ U.S. Bureau of Labor Statistics. (n.d.). Telework during the COVID-19 pandemic: Estimates using the 2021 business response survey: Monthly labor review. U.S. Bureau of Labor Statistics available at <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm> (last visited May 24, 2023).

⁶⁴ 1.7 users per account = 496,732 total active users/292,195 active employers.

⁶⁵ Available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited June 8, 2023).

⁶⁶ U.S. Bureau of Labor Statistics, 2020 Results of the Business Response Survey, available at <https://www.bls.gov/brs/2020-results.htm> (last visited May 3, 2023).

⁶⁷ See U.S. Bureau of Labor Statistics. (n.d.). Telework during the COVID-19 pandemic: Estimates using the 2021 business response survey: Monthly labor review. U.S. Bureau of Labor Statistics, available at <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm> (last visited May 24, 2023).

full-time telework positions within each industry sector (via NAICS code), from which DHS then assigned a percentage of full-time telework to each E-Verify industry sector. Lastly, DHS utilized BLS Industry-Specific Occupational Employment and Wage Statistics⁷⁴ to determine the employee populations for each industry. Table 2 depicts this information below. Across all hiring

sites, DHS found that some 16 percent of positions hired through E-Verify represented positions which were likely to be full-time telework. This figure likely represents a lower bound estimate since DHS expects E-Verify users to have a higher tendency toward hiring full-time telework employees when compared to other employers because the use of E-Verify provides additional

flexibility to employers who hire full-time telework positions via the alternative procedure. In addition, DHS recognizes that qualified employers may use the alternative procedure for positions other than those that are fully remote in order to, for example, consolidate HR functions.

TABLE 2—ESTIMATED POPULATION OF E-VERIFY INDUSTRIES WITH FULL-TIME TELEWORK (2022)

E-Verify top 20 industries nationwide	Remote (%)	Employee pop.	% of pop.
541—PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES	30.8	9,606,220	2,958,716
722—FOOD SERVICES AND DRINKING PLACES	0.7	11,651,910	81,563
561—ADMINISTRATIVE AND SUPPORT SERVICES	30.8	8,904,300	2,742,524
238—SPECIALTY TRADE CONTRACTORS	3.3	4,701,140	155,138
621—AMBULATORY HEALTH CARE SERVICES	7.4	7,747,840	573,340
813—RELIGIOUS, GRANTMAKING, CIVIC, AND PROF. ORG	13.4	1,214,290	162,715
624—SOCIAL ASSISTANCE	7.4	3,918,800	289,991
611—EDUCATIONAL SERVICES	20.3	12,488,260	2,535,117
551—MANAGEMENT OF COMPANIES AND ENTERPRISES	30.8	2,540,030	782,329
423—MERCHANT WHOLESALERS, DURABLE GOODS	14.6	5,556,180	811,202
522—CREDIT INTERMEDIATION AND RELATED ACTIVITIES	27.5	2,622,670	719,923
811—REPAIR AND MAINTENANCE	13.4	1,306,120	175,020
236—CONSTRUCTION OF BUILDINGS	3.3	1,619,240	53,435
519—OTHER INFORMATION SERVICES	52.2	362,800	189,382
448—CLOTHING AND CLOTHING ACCESSORIES STORES	3.7	1,031,410	38,162
531—REAL ESTATE	30.8	1,671,940	514,958
623—NURSING AND RESIDENTIAL CARE FACILITIES	7.4	3,062,530	226,627
452—GENERAL MERCHANDISE STORES	3.7	3,084,830	114,139
446—HEALTH AND PERSONAL CARE STORES	3.7	1,008,900	37,329
Total		84,099,410	13,161,610
Total Percent of Full-Time Remote Employees			16

Based on the research above, studies show that the percentage of workers that work remotely is between 13 and 28 percent. Given this range of estimates, there is uncertainty regarding the precise number of E-Verify employees that will be remote workers. However, DHS uses the analysis shown in Table 2 to estimate that as of 2022, approximately 16 percent of new employee cases created by E-Verify enrolled employers (or 7,686,786) will be remote positions for which the employer would be motivated to use an alternative to in-person Form I-9 identification document inspection. This figure likely represents a lower bound estimate of the affected population due to the range for both full and part-time remote work estimates, as well as the various other compulsions for employers to desire flexibilities to in-person inspection, but DHS has selected it to avoid inflating the possible impact of the alternative procedure.

Baseline Analysis

All U.S. employers are required to properly complete Form I-9 for each individual they hire for employment in the United States. Prior to COVID-19 flexibilities, employees would attest to their employment authorization on the form and present (in-person) their employer with acceptable documents as evidence of identity and employment authorization. The employer would then physically examine these documents to determine whether they reasonably appear to be genuine and relate to the employee, then record the document information on the employee's Form I-9. Employers would also retain the Form I-9 for a designated period and make it available for inspection by authorized government officers. Employers conducting a physical examination of the documentation presented by employees may choose to keep a copy of documentation presented by employees when completing the

Form I-9, but they are not required to do so, with the exception of certain documents required by E-Verify, if the employer participates in E-Verify.⁷⁵ However, if copies of an employee's Form I-9 documents are retained for reasons unrelated to E-Verify requirements, they must be retained for all employees, regardless of actual or perceived national origin or citizenship, or immigration status.⁷⁶

E-Verify, authorized by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is a web-based system through which employers electronically confirm the employment eligibility of their employees. In the E-Verify process, employers create cases based on information taken from an employee's Form I-9. E-Verify then electronically compares that information to records available to DHS and the SSA. The employer then receives a response either confirming the employee's employment eligibility

⁷⁴ U.S. Bureau of Labor Statistics. (2022, March 31). May 2021 National Industry-Specific Occupational Employment and Wage Estimates. U.S. Bureau of Labor Statistics, available at <https://www.bls.gov/oes/2021/may/oessici.htm> (last visited May 24, 2023).

⁷⁵ E-Verify requirements regarding the copying of documentation only apply to initial completion of Form I-9 and not to reverification, since E-Verify cannot be used to complete the reverification process.

⁷⁶ See Handbook for Employers M-274, section 9.2 Retaining Copies of Form I-9 Documents, available at <https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/90-retaining-form-i-9/92-retaining-copies-of-form-i-9-documents> (last visited May 26, 2023).

or indicating that the employee needs to take further action to complete the case.

Since its inception, USCIS and the SSA have taken actions believed to have improved the accuracy of E-Verify and reduced opportunities for unauthorized workers to use fraudulent documents to gain employment. USCIS has added tools to help identify fraudulent documents, expanded the number of databases queried through E-Verify, and instituted quality control procedures to screen for data entry errors.⁷⁷ The benefits of using E-Verify have increased over time as the program has made advancements to improve user experience, reduce errors and increase the speed and accuracy of the employment eligibility verification process. This includes validating driver's license data for most states, providing source system photos for Passports, EADs, and PRCs, enhancing usability features that help users enter correct information, streamlining case creation and management to increase speed and accuracy, and improving overall data integrity and system compliance. Currently, 98.39 percent of employees are automatically confirmed as authorized to work ("work authorized") either instantly or within 24 hours, requiring no employee or employer action.⁷⁸

Alternative Procedure

Under the alternative procedure, only employers (or an authorized representative acting on the employer's behalf) enrolled in E-Verify, who completed all required E-Verify training, and who are in good standing in E-Verify, are qualified to apply alternative procedures. These "qualified employers" may opt to apply alternative procedures. To conduct alternative procedures, qualified employers will:

1. Examine copies (front and back, if the document is two-sided) of Form I-9 documents⁷⁹ or an acceptable receipt⁸⁰ to ensure that the

documentation presented reasonably appears to be genuine;

2. Conduct a live video interaction with the employee presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video interaction;

3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable;⁸¹

4. Retain, consistent with applicable regulations,⁸² a clear and legible copy of the documentation, (front and back, if the documentation is two-sided), of all documents examined in a paper or electronic formator in an acceptable combination of such formats, for as long as the employee works for the employer and for a specified period after employment has ended;⁸³ and

5. In the event of a Form I-9 audit or investigation by a relevant federal government official, make available copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the

damaged; the arrival portion of Form I-94 (Arrival/Departure Record) with a temporary Form I-551 stamp and a photograph of the individual; the departure portion of Form I-94 (Arrival/Departure Record) with an unexpired refugee admission stamp; or an admission code of "RE." See 8 CFR 274a.2(b)(1)(vi) and USCIS, Handbook for Employers, M-274, available at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/40-completing-section-2-of-form-i-9/43-acceptable-receipts> (last visited May 24, 2023).

⁸¹ The new edition of the Form I-9 is effective on August 1, 2023. Employers may continue to use the 10/21/2019 edition of the Form I-9 from August 1, 2023, *i.e.*, until the end of October 31, 2023. As described elsewhere in this rule and accompanying notice, if during this grace period an employer uses the 10/21/2019 edition of the Form I-9 for the alternative procedure, the employer must indicate its use of the alternative procedure by writing "alternative procedure" in the Additional Information field in Section 2. No later than November 1, 2023, employers must begin using the August 1, 2023 edition of the Form I-9. When using the August 1, 2023, edition of the Form I-9, an employer must indicate their use of the alternative procedure by completing the corresponding box in Section 2 or in the section corresponding to reverification (which is Supplement B in the August 1, 2023 edition of Form I-9), as appropriate.

⁸² See 8 CFR 274a.2(b)(3), (e), (f), (g).

⁸³ Employers must retain and store the Form I-9 for three years after the date of hire, or for one year after employment ends, whichever is later. See 8 U.S.C. 1324a(b)(3); 8 CFR 274a.2(b)(2). Additional information for employers and employees about the Form I-9 is available at <https://www.uscis.gov/i-9> (last visited May 24, 2023).

employment eligibility verification process.⁸⁴

Given the hard-to-quantify benefits of physical inspection and lack of data, DHS is proceeding with an alternative procedure that does not require the physical examination of acceptable documents, but instead includes additional requirements to offer an equivalent level of security, in exercise of the Secretary's authority at 8 CFR 274a.2(b)(1)(ix)(B). The notice describes the framework for an optional alternative procedure to physical examination of the Form I-9 documentation that offers an equivalent level of security.

3. Benefits of the Alternative Procedure

Use of the alternative procedure is expected to produce benefits for the public. Employers using the alternative procedure may realize administrative efficiencies relating to document examination through reduced travel on the part of HR specialists and employees and the ability to consolidate and specialize this HR function. This in turn may result in fewer mistakes in completing the Form I-9. Employees may also benefit in the form of expanded work opportunities, travel cost-savings, and supplemental benefits relating to avoided travel. Finally, employers who choose to enroll in E-Verify in order to exercise this option will help to ensure that documents presented by the employee are valid and unexpired by comparing to various government databases.

Operational Efficiency

Use of the alternative procedure may provide convenience to employers with operations in more than one location. For example, Human Resources staff who are responsible for verifying the employment eligibility and identity of all new employees could exercise the option to work remotely rather than staffing multiple locations or traveling between locations when new employees are on-boarded. This may enable employers to benefit from time and cost savings. Additionally, companies with multiple U.S. locations could consolidate Form I-9 inspection operations and document storage as they will no longer need to train and maintain in-person staff across multiple locations under the alternative procedure. Managers and supervisors, rather than an HR specialist, who may perform document verification simply because they are on-site would no longer need to spend time performing

⁸⁴ See 8 U.S.C. 1324a, 1324b; 8 CFR part 274a; 28 CFR part 44.

⁷⁷ See Gao-11-146 employment verification: Federal agencies have taken steps . . . (n.d.), available at <https://www.e-verify.gov/sites/default/files/everify/data/EVerifyGAOReport2010.pdf> (last visited May 24, 2023).

⁷⁸ See Verify performance. E. (n.d.), available at <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last visited May 24, 2023).

⁷⁹ The Lists of Acceptable Documents are included with the Form I-9.

⁸⁰ Occasionally, employees may present a "receipt" in place of a List A, B, or C document. An acceptable receipt is valid for a specified period of time so an employer may complete Section 2 of the Form I-9 or conduct reverification on the Form. Employers cannot accept receipts if employment will last less than three days. An acceptable receipt may be a receipt for the application to replace a List A, B, or C document that was lost, stolen, or

this collateral duty. The time and cost savings from providing an alternative to in-person verification (e.g., employee travel to a designated company location, efficiencies in processing documents, etc.) would be realized by all employers who utilize the alternative procedure. Because the beneficial outcomes of these new efficiencies would vary across industries, DHS is unable to quantify these benefits.

Fewer Mistakes

Remote examination will likely mean that employers will spend less time on corrections, have fewer mistakes, complete the form with greater efficiency, and ensure a more compliant process.

Equity

The alternative procedure provides qualified employers with the ability to remotely meet the examination requirements of 8 U.S.C. 1324a(b)(1). Use of the alternative procedure reduces “time taxes” and has the potential to promote equity. Such changes will advance equity in particular for employees for whom traveling to the workplace may be difficult or impossible. In addition, employers will more easily be able to provide an inclusive work environment for physically disabled employees. DHS recognizes the value of these benefits, which are consistent with the goals of Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*.

Secondary Benefits of the Alternative Procedure

To the extent that some employers may choose to enroll in E-Verify in order to use the alternative procedure, a secondary benefit of the alternative procedure is the additional security benefits to the public from increased use of the system. E-Verify ensures that documents presented by the employee are valid and unexpired because the system compares their documents against various government databases.

An additional secondary effect of the alternative procedure is that qualified employers will have more flexibility in hiring employees who work in remote settings, thereby increasing their access to quality applicants, regardless of their location. Furthermore, the greater flexibility that employers have in hiring could translate into greater employment prospects for individuals who cannot easily travel for in-person inspections of their Form I-9 documents. DHS does not attempt to quantify these impacts,

though it anticipates the impact will be real and positive.

Finally, a secondary effect of providing an alternative method to physical examination of identity and employment authorization documentation is that some qualified employers may expand their remote position offerings, leading to less demand for the office space required to house their workforce. According to research conducted by Global Workplace Analytics, the average business can save up to \$11,000 in office space costs per year for each halftime remote worker.⁸⁵ The reduced need to house staff means that companies can save on rent, utilities, insurance, and other expenses. These benefits are undefined and are expected to vary greatly across employers, so DHS does not attempt to quantify them.

4. Costs and Cost Savings of the Alternative Procedure

An employer’s voluntary decision to implement the alternative procedure may result in costs to participating employers and employees. These costs may include time for familiarization with the requirements of the alternative procedure; costs for employers to read the updated Form I-9 instructions about use of the checkbox; costs for employees to provide electronic copies of documents and to employers to store them; and costs to employers who choose to enroll in E-Verify to use the alternative procedure. Not all employers will incur all of these costs. In the discussion below, DHS quantifies these costs where feasible.

Quantified Costs of the Alternative Procedure

Familiarization—A likely impact of the final rule is that various individuals and entities will incur costs for familiarization with the provisions of the alternative procedure. Familiarization costs involve the time spent reviewing and learning the provisions of the notice and are a direct cost of the alternative procedure.

At approximately 3,900 words, DHS estimates the time that would be necessary to read the **Federal Register** notice would be approximately 13 to 16 minutes per person, resulting in opportunity costs of time. DHS uses the **Federal Register** notice word count instead of this final rule because the notice outlines the parameters of the alternative procedure and the

⁸⁵ Latest work-at-home/telecommuting/remotework statistics. Global Workplace Analytics, (2022, January 18), available at <https://globalworkplaceanalytics.com/telecommuting-statistics> (last visited May 24, 2023).

requirements for E-Verify employers to use the alternative procedure. Congruent with other DHS regulatory impact analyses, DHS assumes the average professional reads technical documents at a rate of about 250 to 300 words per minute.⁸⁶ Entities, such as private business and government organizations, may have more than one person who reads the notice. Using the average hourly rate of total compensation as \$39.75 for all occupations (both civilian and private),⁸⁷ DHS estimates that the opportunity cost of time will range from \$8.63 to \$10.34 (in 2022 dollars) per individual who must read and review the notice in the first year of its publishing.⁸⁸

In establishing a population estimate, DHS expects a minimum familiarization cost associated with employers who use E-Verify, as they are most affected by the optional alternative procedure established by the **Federal Register** notice issued concurrently with this final rule. To estimate this population, DHS utilized data from E-Verify and counted the total number of active E-Verify accounts, which was 292,195 as of December 2021. We assume that the same number of entities would incur the costs to familiarize themselves with the alternative procedure. Assuming, at a minimum, that one person from each entity would be responsible for reading the notice, the total familiarization cost would range from \$3,100,189 to \$3,716,720 (in 2022 dollars). The average of this estimated range for familiarization, \$3,408,455 will be used

⁸⁶ See 87 FR 10570, Feb. 24, 2022; See also, 87 FR 18078, Mar. 29, 2022.

The benchmark of 250 to 300 words per minute applies to most adults, according to several reports. See, e.g., HealthGuidance.org, What Is the Average Reading Speed and the Best Rate of Reading? (Jan. 3, 2020), available at <https://www.healthguidance.org/entry/13263/1/what-is-the-average-reading-speed-and-the-best-rate-of-reading.html> (last visited May 24, 2023); ExecuRead, Speed Reading Facts, available at <https://secure.execuread.com/facts/> (last visited May 24, 2023). It is noted that the reading of technical material can be slower than other types of documents. Because this document is technical in some ways, the actual review time might be higher, thus resulting in higher familiarization costs than reported herein. Calculation: 24,000 words/300 words per minute = 80 minutes; 24,000 words/250 words per minute = 96 minutes.

⁸⁷ Average Total Compensation (wages and benefits) for civilian workers and private industry workers, available at <https://www.bls.gov/news.release/archives/eccc06162022.pdf> (last visited May 24, 2023).

⁸⁸ Calculation: ((\$40.90 total compensation for civilian workers + \$38.61 total compensation for private industry workers)/2) * (Time (in minutes) to read notice—(lower or upper bound)) = (Opportunity cost of time [OCT] to read notice) = \$39.75 * 0.217 hours = \$8.63; = \$39.75 * 0.26 hours = \$10.34. Word count estimated as of May 31, 2023.

in the accounting of the first year of the cost of this rule (Table 3).

TABLE 3—SUMMARY OF FAMILIARIZATION COST

Cost to familiarize with alternative procedure notice	
Word Count	4,800
Words Per Minute High	300
Words Per Minute Low	250
Range to Read Rule (Minutes to Read):	
High	16.00
Low	19.20
Rate of Total Compensation (Per Hour):	
Civilian Workers	\$40.90
Private Industry Workers	\$38.61
Average	\$39.75
Familiarization Cost Per Person (Rate per Words per Minute):	
High	\$10.61
Low	\$12.72
Average per Entity Cost	\$11.67
Number of Entities	292,195
Total Familiarization Cost	\$3,408,455

Review Revised Form I-9 Instructions—As a part of this final rule DHS is adding a box to the Form I-9 that an employer (or an authorized representative acting on an employer’s behalf) must select if they elect to utilize the alternative procedure(s) and adding corresponding edits to the Form I-9 instructions. DHS estimates that it will take an employer one minute, or 0.02 hours (1 minute/60 minutes), to read the revised instructions about the box (indicating the employer used an alternative procedure) and mark the box, if needed. Employer population estimates for this cost are taken from the existing Collection of Information, titled “Employment Eligibility Verification,” OMB Control Number 1615-0047. DHS uses the same employer estimates to maintain consistency and to capture the changes as a result of this final rule. DHS estimates the total number of Forms I-9 completed by employers annually is 75,295,000. For the purposes of this analysis DHS assumes that in the future the number of Forms I-9 completed by employers would remain about the same. Assuming all employers read the revised instructions about the new box for each new employee every time they complete the form, the total annual increase in time burden for employers is 1,505,900 hours (0.02 hours × 75,295,000 forms). Using the average total rate of compensation of

\$39.75⁸⁹ per hour for all occupations, DHS estimates the total annual costs to employers for the additional box is \$59,859,525 (1,505,900 hours × \$39.75 per hour), or approximately \$0.80 per new employee (Table 4).

TABLE 4—SUMMARY OF REVISED I-9 INSTRUCTIONS/BOX COST

Cost to read form I-9 instructions/box	
Time Required to Read Instructions/Mark the Box (Hour):	0.02
Total Compensation (Per Hour):	
Civilian Workers	\$40.90
Private Industry Workers	\$38.61
Average total compensation	\$39.75
Annual Respondent Population	75,295,000
Time Burden Cost Per Box	\$0.80
Total Burden Hours	1,505,900
Total Annual Burden	59,859,525

E-Verify Account Creation, Training, and Use—In accounting for the costs of the Form I-9 alternative procedure, DHS considered that some employers will enroll in E-Verify in order to participate in the alternative procedure. Employers who enroll in E-Verify for this purpose, and who would not have otherwise enrolled in the program, would incur opportunity costs attributable to this policy. These costs include time to enroll in and utilize the E-Verify system.

In order to utilize the alternative procedure, employers not currently enrolled in E-Verify will need to create an account with E-Verify. DHS estimates the time required to create this new account averages 2.26 hours.⁹⁰ Using the average total rate of compensation as \$39.75⁹¹ per hour for all occupations, DHS estimates that the opportunity cost of time will be \$89.84 per employer who enrolls into E-Verify so that they may use the alternative procedure (Table 5). There has been an average of 70,565 new accounts per year since 2012. This baseline number is not expected to be reduced by the final rule or alternative procedure. It is uncertain how many additional new accounts will be created in response to the alternative procedure.

⁸⁹ Includes both civilian and private occupations, available at https://www.bls.gov/news.release/archives/eccec_06172021.pdf (last visited May 24, 2023).

⁹⁰ Enrollment time includes review and signing of the Memorandum of Understanding, registration, new user training, and review of the user guide.

⁹¹ Includes both civilian and private occupations, available at https://www.bls.gov/news.release/archives/eccec_06172021.pdf (last visited May 24, 2023).

As part of the E-Verify enrollment process, all new E-Verify enrollees are required to take training. USCIS has incorporated fraud awareness and anti-discrimination training into this existing training as an additional layer of security. As a result, new E-Verify employers will complete training that provides an overview of what to look for when examining employment eligibility documentation and examples of document anomalies. DHS has determined that this training requirement will not represent an additional training burden to employers. Feedback from subject matter experts at USCIS concluded that the additional fraud training will be incorporated into current training materials which are continually streamlined in order to maintain the lowest possible burden to E-Verify enrollees. USCIS is updating the tutorial to remove material that has become obsolete due to system enhancements while adding material about fraudulent document awareness, resulting in no net change to the estimated time to complete the tutorial. Qualified employers will have access to additional free resources through their participation in E-Verify that they may choose to partake in.

TABLE 5—SUMMARY OF ACCOUNT CREATION COST

Cost to create E-verify account	
Hours to Create New E-Verify Account	2.26
Total Compensation (Per Hour):	
Civilian Workers	\$40.90
Private Industry Workers	\$38.61
Average total compensation	\$39.75
Total Opportunity Cost per New Account	\$89.84

Finally, employers (or an authorized representative acting on the employer’s behalf) who enroll in E-Verify in order to use the alternative procedure will also face a time burden attributable to this policy to complete the verification of Form I-9 documents. DHS estimates that creating one new employee case in E-Verify takes, on average, seven minutes or 0.117 hours. Using the average total rate of compensation as \$39.75 per hour for all occupations, DHS estimates that the opportunity cost of time is \$4.64 per new employee case submitted through E-Verify (Table 6). There are no additional development or annual maintenance costs for operation of the E-Verify system because they are unchanged by this final rule and alternative procedure.

TABLE 6—SUMMARY OF E-VERIFY USE COST

Cost to submit new employee case	
Hours to Submit E-Verify Case	0.117
Total Compensation (Per Hour):	
Civilian Workers	\$40.90
Private Industry Workers	38.61
Average total compensation	39.75
Opportunity Cost per E-Verify Case	4.64

Summary of Estimated Quantified Costs of the Alternative Procedure

Table 7 summarizes the possible quantified cost impacts of the alternative procedure. DHS estimates a total annual impact for qualified employers to familiarize themselves with the alternative procedure and for all employers to read the instructions. However, this table presents only unit costs, not total monetized costs, resulting from a potential increase in new E-Verify users because DHS does not have sufficient data to project any

potential operational increases in demand for E-Verify enrollment and corresponding usage that may result from the availability of the alternative procedure. In addition, these costs are not additive because not every qualified employer using the alternative procedure would incur each of the below costs.

TABLE 7—ESTIMATED QUANTIFIED COSTS OF THE ALTERNATIVE PROCEDURE

Summary of quantified costs	Unit cost	Total annual impact
Familiarization (One-Time Cost for All Active E-Verify Users)	\$11.67 per qualified employer	\$3,408,455.*
Review Revised Form I-9 Instructions (Recurring Cost to Employers for All New Employees).	\$0.80 per new employee	\$59,859,525.
Increase in New E-Verify Users:		
Opportunity Cost per new account (One-Time Cost)	\$89.84 per new employer	Undetermined.
Opportunity Cost per new E-Verify Case (Recurring Cost)	\$4.64 per new employee	Undetermined.

* Impact in the first year only.

Unquantified Costs of the Alternative Procedure

DHS identified several unquantified costs that could impact the affected populations as a result of the alternative procedure, such as recordkeeping burdens, the loss of opportunity, data security impacts, and costs for employees to submit their documents electronically. The potential impacts are discussed below.

Recordkeeping Burden—DHS will require, as an additional layer of security, that a qualified employer who chooses to apply the alternative procedure retain a copy of all the documents presented to establish identity and employment authorization on the Form I-9. Documents must be retained for three years after the date of hire, or one year after the date employment ends, whichever is later.

DHS recognizes that the retention of identity and employment eligibility documentation may add administrative and operational burdens to the employer, since the intake, storage, and handling of sensitive documents could require additional operational resources. However, the document retention requirements are only applicable to the optional alternative procedure; nothing in this final rule prevents qualified employers from continuing to physically examine Form I-9 documents in accordance with the baseline procedure. Furthermore, because some commenters stated that digital document retention is already embedded in company practices and

guidance—particularly among E-Verify users—a new requirement to retain more documentation is not expected to pose a significant burden to employers. For this reason, and because each business will face their own unique operational burdens in order to take, store, and handle documents, DHS does not quantify this impact.

Data Security Impacts to Employers—As a result of using the alternative procedure, some employers may experience additional regulatory burdens associated with submitting sensitive personal information, such as indirect burdens that arise by virtue of such submission and local and state laws or regulations that affect consumer privacy rights and personal data. For example, as discussed earlier in this preamble, some commenters noted that the required retention of documents would create additional risks and costs under their state’s data breach provision notification laws. These burdens include requiring that employers provide notice regarding the collection, deletion, correction, and other rights relating to employee personal data. Furthermore, commenters stated that the requirement to retain data (and particularly sensitive categories of data) could create additional burdens under data breach provisions of certain laws. The extent to which local and state provisions will affect employers is too variable and uncertain to quantify in this analysis, although DHS notes that states with the strongest privacy laws

are likely to have a greater impact to employers.⁹²

In addition, employers may elect to utilize measures which help ensure that the collection and submission of sensitive documents is protected from any potential leak or data breach. This may involve the use of email encryption services or other data protection measures, of which the cost to use vary depending on the type and quantity of service needed by employers. Some lower end encryption services can be used for free, or are built into existing email services, but may provide a limited range of use or lack technical support. Paid services can range from \$8 a month to upwards of \$104 a month depending on the level and quantity of service required.⁹³ Once again, the extent to which employers will utilize these services is too variable to quantify in this analysis, although DHS notes that businesses with more employees are more likely to utilize more expensive services.

Employee Burden to Send Documents Electronically—As a result of participating in the alternative

⁹² For example, one study evaluated privacy laws recently passed in California, Colorado, Connecticut, Virginia, and Utah. See Millar, S. (2022, May 24). The State of U.S. State Privacy Laws: A Comparison. The National Law Review, available at <https://www.natlawreview.com/article/state-us-state-privacy-laws-comparison> (last visited May 24, 2023).

⁹³ “Best Encryption Software & Tools for 2021”, Guercio, Kyle, ESecurityPlanet, 25 Nov. 2020, available at www.esecurityplanet.com/products/best-encryption-software/ (last visited June 1, 2023).

procedure, employees will experience a burden of time in order to make a copy of identification documents and send via email or other electronic means. DHS recognizes that each employee will experience a unique set of circumstances in order to organize, scan, and send their documents (whether via machine scanning, smartphone camera, or similar means) and that these methods each present unique burdens of time. That said, DHS found that the industry average price range for scanning paper documents is \$0.06–\$0.11 per page, and estimates that employees will face similar costs to perform this task when making copies of identification documents.⁹⁴ Employees may also face a potential burden in order to securely transmit their identification documents over the internet to employers conducting the alternative procedure. As mentioned above, this may involve the use of email encryption services or other data protection measures, of which the cost to use will vary depending on the type and quantity of service needed by employees. Given that employees face fewer needs to send such information, DHS will assume that most employees utilize free to low-cost services.

Cost Savings of the Alternative Procedure

A positive externality of the past several years of flexibilities offered for verifying Form I–9 employee identification documents due to the COVID–19 emergency, in addition to the public safety benefit, has been the cost savings experienced by employers and employees. Based on extensive feedback from public comments, the alternative procedure is expected to enable employers to avoid operational expenses that would otherwise be incurred in the baseline case. Accordingly, DHS assumes that the primary incentive for employers to use or adopt these new flexibilities stems from the desire for business cost-savings. Furthermore, DHS assumes that those businesses who stand to incur the most cost-savings from these new flexibilities are those employers who are hiring remote positions.

The alternative procedure has the potential to instill costs savings to the public in several areas. Qualified employers who exercise this option may save on third-party verification costs, employers and employees will avoid the burden of scheduling time for the

employer to obtain required documentation from the employee and the employee to present such documentation in person for review by the employer, and both employers and employees may experience travel cost savings.

Third-Party Verification Savings—This final rule will allow qualified employers who exercise the alternative procedure to save on the time and cost to locate and hire an authorized representative to inspect documents for new remote employees. To estimate the cost savings of this impact, DHS reviewed several comments from employers who stated the cost of a Form I–9 inspection conducted by an authorized representative ranged between \$40 and \$105 per Form I–9, with the average of \$75.⁹⁵ While it is unclear how often employers availed themselves of the use of authorized representatives before the COVID–19 emergency flexibilities, commenters explained that shift toward greater remote work has increased the frequency of these arrangements. In fact, multiple commenters referenced situations where under the baseline case of in-person Form I–9 verification requirements, they would be compelled to form new contracts with authorized representatives to verify the documents of workers living in other states. The alternative procedure would allow these employers to conduct their own Form I–9 identification document inspection via use of E-Verify and the alternative procedure and avoid the costs of using authorized representatives.

The extent of cost savings in this area is unknown due to the challenge of estimating the representative share of employees in remote relationships with a qualified employer that would otherwise prompt Form I–9 document verification by an authorized representative. It is possible the impact is quite large, accounting for 16 percent of the total new hire population, as explained in the Affected Population section above. However, countervailing forces bear on this estimate to an unknown degree, making specific point estimation challenging. Using the total number of remote positions in the United States may be an over-estimate of the population that would require verification by an authorized representative because there are many cases of remote work arrangements between employers and employees

located in close proximity. However, the population is perhaps under counted to some degree due to various employee preferences and situations. This would include employers whose employees responsible for conducting the Form I–9 identification document verification (e.g., Human Resource specialists) are remote workers themselves, a phenomenon cited by numerous commenters. If a company's HR representative is the only remote employee a company has, all of the Form I–9 submissions for all of its employees may nonetheless be submitted via E-Verify in accordance with the alternative procedure, even if they work at a company location.

Lastly, as a consequence of allowing qualified employers who exercise the alternative procedure to save on the time and cost to locate and hire authorized representatives to inspect documents for new remote employees, DHS acknowledges there could be a reduction in demand for these services from notaries (or other authorized representatives). While it is unclear how often employers availed themselves of the use of authorized representatives before the COVID–19 emergency flexibilities, several commenters explained that the alternative procedure would allow these employers to conduct their own Form I–9 identification document inspection via use of E-Verify and the alternative procedure and avoid the costs of using authorized representatives.

Travel Cost Savings—The alternative procedure will also alleviate the burden of two parties meeting in person to review documents, which will provide time and travel cost savings to employees. Employees, particularly those in rural areas, will not have to travel (whether to a company worksite or an authorized representative's location) to complete the examination of Form I–9 documents in person. Physically disabled employees and others for whom remote work is a priority will also no longer be disadvantaged by the hassle and expense to travel to complete the Form I–9 examination process. Some employers may also realize travel time and cost savings. For example, employers who have one or a handful of HR specialists that cover onboarding new employees at multiple locations may be able to eliminate trips.

In estimating these cost-savings, DHS recognizes that the cost savings realized by employers and employees will vary by individual circumstance. Some employees will continue to search for employment within their locality, and even prefer to have their documents

⁹⁴ "The Cost of Document Scanning." ILM Corporation, 4 Oct. 2021, available at www.ilmcorp.com/tools-and-resources/cost-of-document-scanning/ (last visited May 31, 2023).

⁹⁵ Three commenters provided quoted estimates for hiring a third-party Notary/Inspector for remote verification. These ranged from \$40–80, \$75, to \$105 per Form I–9. DHS averaged these figures to develop the estimate of \$75 ((40 + 80 + 75 + 105)/4 = 75).

examined in person. However, DHS also recognizes that qualified employers who exercise the alternative procedure will likely be those who are offering remote positions, or those who prefer to conduct the verification process remotely rather than in person.

To produce a lower bound estimate of these cost-savings, DHS estimated travel distance based on the average commute of the general population. DHS considers this a lower bound estimate since some evidence exists to suggest that this average would be higher for remote employees.⁹⁶ Census data for 2019 determined that the average duration of a one-way commute in the United States was 27.6 minutes (across all modes of transportation).⁹⁷ This figure was then multiplied by the average hourly rate of total compensation of \$39.75 for all occupations (both civilian and private)⁹⁸ to produce round trip opportunity cost to employees of \$36.57. For workers who drive, eliminating this travel would also save vehicle operation costs. Based on the General Services Administration (GSA) privately owned vehicle mileage reimbursement rate, DHS estimates an operation cost of approximately \$0.625 per mile.⁹⁹ If qualified employers were to use the alternative procedure for 16 percent of new employee cases created per year—the number of E-Verify employer positions estimated to be remote—DHS estimates a time savings of \$281.1 million ($\$36.57 \times 7,686,786$ employees), plus avoided vehicle operations costs for those who drive.

To produce an upper bound estimate of these cost-savings, DHS assumed that some portion of the trips made by the approximately 7.7 million new hires of qualified employees estimated to be in

⁹⁶ For example, one platform-specific study found that the percentage of full-time remote workers who live more than 100 miles away from their home office has increased across all business sizes since 2020, with the largest increases occurring in businesses with 10–24 employees. See Quantifying the rise of remote and hybrid work—gusto. (n.d.), available at <https://gusto.com/company-news/the-state-of-hybrid-and-remote-work> (last visited May 24, 2023).

⁹⁷ Travel time to work in the United States: 2019—Census.gov (n.d.), available at <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-47.pdf> (last visited May 24, 2023).

⁹⁸ Average Total Compensation (wages and benefits) for civilian workers and private industry workers, available at https://www.bls.gov/news.release/archives/ecec_06162022.pdf (last visited May 24, 2023).

⁹⁹ U.S. General Services Administration, Privately Owned Vehicle Mileage Reimbursement Rate, 2022, available at <https://www.gsa.gov/travel/plan-book/transportation-airfare-pov-etc/privately-owned-vehicle-mileage-rates/pov-mileage-rates-archived> (last visited June 1, 2023).

remote positions, involve a plane ride. It is unlikely that 100 percent of these remote workers are within practical driving distance of their workplace. It is possible that some employers may find it advantageous or necessary to fly remote employees to the worksite for onboarding activities, including Form I–9 document examination. If employers no longer need to complete the Form I–9 document examination in-person, they will have the flexibility to complete this and other onboarding activities remotely. For purposes of creating an upper bound scenario to estimate cost savings from avoided travel, DHS assumes that 95 percent of the estimated 7.7 million qualified employer new hires in remote positions drive or use some other means of local transportation and the remaining 5 percent fly. It could be higher than 5 percent, but DHS does not have data that provide such an estimate. Bureau of Transportation Statistics data show that the average 2022 national average domestic airline itinerary fare was \$393.85. It's possible that such a trip may include other expenses, such as lodging, meals, and incidentals as well. DHS estimates \$155 for one night of lodging, meals, and incidentals based on the GSA FY 2022 standard lodging and per diem rate, though it could be more for cities with lodging and per diem rates higher than the standard.¹⁰⁰ In addition, avoiding this trip would save employees the time of taking the flight, any time spent waiting at the airport for the flight, and traveling to and from the airport, but DHS does not have data to quantify time saved. DHS uses \$549 ($\$393.82 + \155) as its estimate of per trip savings for this 5 percent of the population. Using these assumptions, the upper bound weighted average per trip savings is \$62 (95 percent \times $\$36.57 + \549×5 percent). If qualified employers were to use the alternative procedure for 16 percent of new employee cases created by E-Verify enrolled employers per year—the number of E-Verify employer positions estimated to be remote—DHS estimates an upper bound savings of \$476.6 million ($\$62 \times 7,686,786$ employees).

DHS also considered that some employers, rather than employees, travel to various worksites in order to complete Form I–9 document examination for new employees. DHS uses a scenario, based on a public comment received on the NPRM, to illustrate possible cost savings to

¹⁰⁰ U.S. General Services Administration, “FY22 Per Diem Highlights,” available at https://www.gsa.gov/cdnstatic/FY_2022_Per_Diem_Rates_Highlights.docx (last visited June 1, 2023).

employers from avoided travel made possible by use of the alternative procedure. The public commenter indicated that one human resource professional is responsible for performing Form I–9 document examinations at three separate hospitals, two of which are distant. For this scenario, DHS assumes that the two distant hospitals require 42 miles of travel round-trip taking a total of 78 minutes, and that the third closer hospital requires 21 miles of travel round-trip taking a total of 34 minutes.¹⁰¹ DHS also assumes that the human resources professional makes 10 trips to each hospital per year that could be avoided through use of the alternative procedure.¹⁰²

DHS estimates the savings from avoided vehicle operations and work time spent driving between the hospital sites. Using the GSA privately owned vehicle reimbursement rate of \$0.625 per mile and a fully-loaded wage rate for a human resources specialist of \$50.94,¹⁰³ DHS estimates use of the alternative procedure could save \$84 per trip to the distant hospitals (\$26 in vehicle operations costs and \$58 in time) and \$42 per trip to the closer hospital (\$13 in vehicle operations costs and \$29 in time), for an average savings

¹⁰¹ Rural Americans live an average of 10.5 miles from the nearest hospital with an estimated travel time of about 17 minutes. Assuming the closer hospital is 10.5 miles and 17 minutes from the HR specialist and that the two distant hospitals are an additional 10.5 miles and 17 minutes from the closer hospital.

See Pew Research Center, How far Americans live from the closest hospital differs by community type, December 12, 2018, available at <https://www.pewresearch.org/short-reads/2018/12/12/how-far-americans-live-from-the-closest-hospital-differs-by-community-type/> (last visited June 1, 2023).

¹⁰² Average of 267 staff per small hospital = 926,809 total personnel at small hospitals/3,474 small hospitals. 10 staff turnovers per year = 267 staff \times 3.8% hire rate. See American Hospital Association (AHA) Hospital Statistics, 2021 U.S. Hospitals, Utilization and Personnel, Bed Count—small, available at <https://guide.prod.iam.aha.org/stats/us-hospitals> (last visited June 1, 2023). See also Bureau of Labor Statistics, Table A: Job openings, hires, and total separations by Industry, seasonally adjusted, Rates by Industry (percent), Health care and social assistance, April 2022 Hires, available at https://www.bls.gov/news.release/archives/jolts_05312023.htm (last visited June 1, 2023).

¹⁰³ $\$50.94 = \35.13 mean hourly wage \times ($\$42.48 / \29.32) ratio of total compensation to wages and salaries. See Bureau of Labor Statistics, Occupational Employment and Wages, May 2022, 13–1071 Human Resources Specialists, Mean Hourly Wage, available at <https://www.bls.gov/oes/current/oes131071.htm> (last visited June 1, 2023). See also Bureau of Labor Statistics, Employer Costs for Employee Compensation News Release, March 17, 2023, Table 1: Employer Costs for Employee Compensation by ownership, Civilian workers, available at https://www.bls.gov/news.release/archives/ecec_03172023.htm (last visited June 1, 2023).

per trip of \$70 ((\$84 + \$84 + \$42)/3).¹⁰⁴ savings for this one business of \$2,100
 Assuming 10 avoided trips per hospital in this scenario (10 × (\$84 + \$84 + \$42)).
 per year, DHS estimates a total annual

TABLE 8—SUMMARY OF TRAVEL COST SAVINGS

Scenario	Range of travel cost-savings	
	Per round trip	Annual total
Lower Bound savings	\$36.57	\$281.1 million.
Upper Bound savings	62.00	\$476.6 million.
Example Savings for One Business	70.00	\$2,100*.

* Per Business in this example scenario.

Total Estimated Quantified Savings of the Alternative Procedure

Table 9 summarizes the potential quantified unit cost savings of the alternative procedure. Specifically, they include the cost savings realized by employers who exercise the alternative procedure to prevent incurring costs for hiring authorized representatives to examine documents for new remote employees, and a lower bound estimate of the cost savings to employees who through participation in the alternative procedure will not have to travel to a company worksite or an authorized representative’s location in order to complete the examination of Form I–9 documents in person.

TABLE 9—ESTIMATED QUANTIFIED COST SAVINGS OF THE ALTERNATIVE PROCEDURE

Quantified Cost Savings Summary	
Cost Savings on Third-Party Verification:	
Avg Third-party Notary/Inspector Per Form I–9	\$75.00
Cost-Savings for Travel:	
Per Round-Trip Travel Cost-Savings (lower bound)	36.57
Per Round-Trip Travel Cost Savings (upper bound) ...	62.00

5. Total Benefits, Costs, and Cost Savings of the Alternative Procedure

Table 10 summarizes the potential quantified and unquantified benefits, costs, and cost savings of the alternative procedure. The primary quantified costs are attributed to one-time rule familiarization with the requirements of the alternative procedure for all E-Verify users, and review of the new Form I–9 instruction for all employers with new hires. Employers who enroll in E-Verify and wouldn’t have done so without the alternative procedure will incur costs for E-Verify account creation and processing each new employee in E-Verify.

In addition, employers and employees may incur additional costs that DHS was unable to quantify. These costs may include employees making a copy of all the documents presented to establish identity and employment authorization on the Form I–9 and sending them to the employer, employers retaining copies of those documents, and additional burdens stemming from ensuring privacy when collecting or storing sensitive personal information.

The main quantified cost savings for employers are due to avoiding the costs for hiring authorized representatives to examine documents for new remote employees. The main cost savings incurred by employees and/or employers are due to not having to travel to a company worksite or an authorized representative’s location in

order to complete the inspection of Form I–9 documents in person.

Use of the alternative procedure is expected to produce benefits for the public. Employers using the alternative procedure may realize administrative efficiencies relating to document examination through reduced travel on the part of HR specialists and employees and the ability to consolidate and specialize this HR function. This in turn may result in fewer mistakes in completing the Form I–9. Employees may also benefit from this final rule in the form of expanded work opportunities, travel cost-savings, and supplemental benefits relating to avoided travel. Finally, employers who choose to enroll in E-Verify in order to exercise this option will help to ensure that documents presented by the employee are valid and unexpired by comparing to various government databases.

Table 10 summarizes the potential quantified and unquantified benefits, costs, and cost savings of the alternative procedure. Not all employers and employees will incur all of these potential impacts. Because the alternative procedure is optional for qualifying employers, DHS anticipate that any employer will likely only make use of the alternative procedure when it is in their best interest to do so—that is, when the benefits and cost savings exceed the costs.

TABLE 10—SUMMARY OF POTENTIAL BENEFITS, COSTS AND COST SAVINGS

Unit costs	Summary of potential costs		
	One-time	Recurring	Total annual
Familiarization, Average cost per employer	\$11.67	.....	\$3.4 million.*
New E-Verify Enrollees:			
Account Creation	89.84	.....	Undetermined.
Process Each New Employee .....	.....	\$4.64	Undetermined.
Review Revised I–9 Instructions .....	.....	0.80	\$59.9 million.

Unquantified Costs: Employer document retention; compliance with privacy laws; employee time and cost to make copies of documents.

¹⁰⁴ Distant hospitals: 42 miles × \$0.625 per mile = \$26.25 in vehicle operations costs and 1.13 hours

× \$50.94 per hour = \$57.73 in opportunity costs; Closer hospital: 21 miles × \$0.625 per mile = \$13.13

in vehicle operations costs and 0.57 hours × \$50.94 per hour = \$28.87 in opportunity costs.

Summary of potential cost savings

Unit cost savings	One-time	Recurring	Total annual
Employers: Avoided Third-Party Inspection of Form I-9 Documents	\$75.00	Undetermined.
Employees: Avoided Round-Trip Travel for In-Person Inspection of Form I-9 Documents:			
Lower Bound	36.57	\$281.1 million.
Upper Bound	62.00	\$476.6 million.

Summary of potential benefits

Unquantified Benefits: Employer administrative efficiencies, fewer mistakes in completing the Form I-9, and helping ensure that documents presented by the employee are valid and unexpired by comparing to various government databases. Employee expanded work opportunities, travel cost-savings, and supplemental benefits relating to avoided travel.

* Impact in the first year only.

C. Regulatory Flexibility Act

DHS reviewed this final rule in accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, tit. II, 110 Stat. 847. This rule does not impose any requirements on employers. It allows the Secretary to authorize an optional alternative for document examination. The alternative procedure to the in-person physical examination of documentation for the Form I-9 is a voluntary option that employers are not required to use; employers still have the option to physically examine Form I-9 documents in person. Because participation in the alternative procedure is voluntary, DHS expects that employers who choose to use the alternative procedure will only do so if the benefits of using the procedure outweigh the costs. Accordingly, DHS certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (“UMRA”) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector (2 U.S.C. 1532(a)). The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This final rule will not result in such an expenditure and will not significantly or

uniquely affect small governments. Therefore, no actions were deemed necessary under UMRA.

E. Paperwork Reduction Act of 1995—Collection of Information

Under the PRA, 44 U.S.C. 3501 through 3512, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule (unless they are exempt). In this final rule, DHS invites written comments and recommendations for the proposed information collection outlined below within 30 days of publication of this notice to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

DHS invited the general public and other federal agencies to comment on the impact to the collection of information Form I-9, Employment Eligibility Verification (OMB Control No. 1615-0047). In accordance with the PRA, the information collection notice was published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. Comments were accepted for 60 days from the publication date of the proposed rule. See Section II.H.3 of this preamble for summaries of and responses to the comments received regarding the information collection.

In addition, this final rule will require non-substantive edits to the information collection OMB-18, E-Verify Program (OMB Control No. 1615-0092). These edits include updates to the fraudulent document awareness content and adding the newest Form I-9 images to the E-Verify tutorials. Accordingly, USCIS has submitted a Paperwork Reduction Act Change Worksheet, Form OMB 83-C, and amended information collection instruments to OMB for review and approval in accordance with the PRA.

1. USCIS Form I-9 (OMB Control Number 1615-0047)

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Employment Eligibility Verification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I-9; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households; Business and other employers. The Form I-9 was developed to facilitate compliance with Section 274A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, which made it unlawful for employers to knowingly hire individuals who were not eligible to work in the United States and established a process for verifying the identity and U.S. employment authorization of all employees hired after November 6, 1986. DHS is revising this form and its accompanying instructions to correspond with revisions related to any alternative procedure(s) that may be authorized by the Secretary for examining the documentation presented by individuals to establish identity and employment authorization for the Form I-9.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection associated with the Form I-9 for Employers is 75,295,000, and the estimated hour burden per response is 0.35 hours. The estimated total number of respondents for the information collection Form I-9 for Employees is 75,295,000, and the estimated hour burden per response is 0.15 hours. The estimated total number of respondents

for the information collection Record Keeping is 27,200,000, and the estimated hour burden per response is 0.08 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 39,823,500 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$0.

F. Executive Order 13132: Federalism

This final rule will not have substantial direct effects on the States, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988: Civil Justice Reform

This final rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

DHS reviewed this final rule and has determined that it is not a “significant energy action” and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Environmental Policy Act

DHS Management Directive (MD) 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 establish the policy and procedures that DHS and its Components use to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4375, and the Council on Environmental Quality regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations enable federal agencies to establish categories of actions that do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1508.4. The DHS Categorical Exclusions are listed in IM

023–01–001–01 Rev. 01, Appendix A, Table 1.

For an action to be categorically excluded, the action must satisfy each of the following three conditions:

1. The entire action clearly fits within one or more of the Categorical Exclusions;
2. The action is not a piece of a larger action; and
3. No extraordinary circumstances exist that create the potential for a significant environmental effect. IM 023–01–001–01 Rev. 01 section V(B)(2)(a)–(c).

If the action does not clearly meet all three conditions, DHS or the Component prepares an Environmental Assessment or Environmental Impact Statement, according to CEQ requirements, MD 023–01, and IM 023–01–001–01 Rev. 01.

DHS is amending its regulations to create a framework under which the Secretary could, as an optional alternative to the in-person physical document examination method most employers have followed as part of the Form I–9 process set forth in current regulations, authorize alternative documentation examination procedures with respect to some or all employers as part of a pilot program, or upon the Secretary’s determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to Section 319 of the Public Health Service Act, or a national emergency declared by the President pursuant to Sections 201 and 301 of the National Emergencies Act. DHS has analyzed this action under MD 023–01 Rev. 01 and IM 023–01–001–01 Rev. 01. DHS has made a determination that this rulemaking action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This final rule clearly fits within the Categorical Exclusions found in IM 023–01–001–01 Rev. 01, Appendix A, Table 1, numbers A3(a) and (d): “Promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, advisory circulars, and other guidance documents of the following nature: (a) Those of a strictly administrative or procedural nature [and] (d) Those that interpret or amend an existing regulation without changing its environmental effect.” This final rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects, so a more

detailed NEPA review is unnecessary. DHS seeks any comments or information that may lead to the discovery of any significant environmental effects from this final rule.

J. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

DHS reviewed this final rule and has determined that under Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

K. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

DHS reviewed this final rule and determined that it will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*.

L. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

DHS reviewed this final rule and determined that it does not create an environmental risk to health or risk to safety that might disproportionately affect children.

M. National Technology Transfer and Advancement Act

DHS reviewed this final rule and determined that it does not use technical standards.

N. Family Assessment

DHS reviewed this final rule and determined that this action will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

Regulatory Amendments

Accordingly, DHS amends part 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Title VII of Pub. L. 110–229, 122 Stat. 754; Pub. L. 115–218, 132 Stat. 1547; 8 CFR part 2.

■ 2. Section 274a.2 is amended by:

■ a. Revising paragraph (b)(1)(ii)(A) and the second sentence in paragraph (b)(1)(vii).

■ b. Adding paragraph (b)(1)(ix).

■ c. Revising paragraph (c)(1)(ii).

The addition and revisions read as follows:

§ 274a.2 Verification of identity and employment authorization.

* * * * *

- (b) * * *
- (1) * * *
- (ii) * * *

(A) Physically examine (or otherwise examine pursuant to an alternative procedure authorized by the Secretary under paragraph (b)(1)(ix) of this section) the documentation presented by the individual establishing identity and employment authorization as set forth in paragraph (b)(1)(v) of this

section and ensure that the documents presented appear to be genuine and to relate to the individual; and

* * * * *

(vii) * * * Reverification on the Form I–9 must occur not later than the date work authorization expires and must comply with the applicable document presentation and examination procedures in paragraphs (b)(1)(ii)(A) and (b)(1)(ix) of this section, and form instructions. * * *

* * * * *

(ix) As an optional alternative to the physical examination procedure described in paragraph (b)(1)(ii)(A) of this section, the Secretary may, consistent with applicable law and via notice published in the **Federal Register**, authorize alternative documentation examination procedures with respect to some or all employers. The Secretary may adopt such procedures:

(A) As part of a pilot program;

(B) Upon the Secretary’s determination that such procedures offer an equivalent level of security to that of physical examination as indicated by, for instance, observed measures of system integrity (such as error or fraud rates) or the procedure’s

capacity for confirming certain documents or information; or

(C) As a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to Section 319 of the Public Health Service Act, or a national emergency declared by the President pursuant to Sections 201 and 301 of the National Emergencies Act.

* * * * *

(c) * * *

(1) * * *

(ii) If upon inspection of the Form I–9, the employer determines that the individual’s employment authorization has expired, the employer must reverify such employment authorization on the Form I–9 in accordance with paragraph (b)(1)(vii) of this section, including complying with the applicable document presentation and examination procedures in paragraphs (b)(1)(ii)(A) and (b)(1)(ix) of this section, and form instructions; otherwise the individual may no longer be employed.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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