



OREGON  
ASSOCIATION OF  
NURSERIES

29751  
SW Town Center  
Loop W

Wilsonville, OR  
97070

Phone  
503.682.5089

Toll-Free  
1.800.342.6401

Fax  
503.682.5099

Web  
[www.oan.org](http://www.oan.org)

August 8, 2008

General Services Administration  
Regulatory Secretariat (VPR)  
Attn: Laurieann Duarte  
1800 F Street, NW, Room 4035  
Washington, D.C. 20405

Re: FAR Case 2007-013  
Federal Acquisition Regulation, Employment Eligibility Verification

Dear Ms. Duarte:

The Department of Defense, the General Services Administration and the National Aeronautics and Space Administration published a proposed rule in the *Federal Register* on June 11, 2008, entitled "Federal Acquisition Regulation, FAR Case 2007-013, Employment Eligibility Verification." The notice of rulemaking stated that comments must be submitted on or before August 11, 2008. The Oregon Association of Nurseries respectfully submits its comments in response to the notice of rulemaking.

The Oregon Association of Nurseries is based in Wilsonville, Oregon with a membership of more than 1,500 wholesale growers, retailers, landscapers and suppliers. Oregon's nursery and greenhouse industry is the state's largest agricultural sector. Oregon trails only California in nursery production and accounts for 18 percent of all U.S. nursery crops.

Oregon's nursery and greenhouse industry continues its record of strong growth. On September 13, 2007, the Oregon field office of the National Agricultural Statistics Service reported the state's nursery and greenhouse growers set another sales record with wholesale sales of \$966 million in 2006, ten percent greater than the \$877 million set in 2005.

The OAN has experience in dealing with the adverse impact of United States laws, policies, rules and procedures on immigrant communities in the United States. The OAN believes that the proposed rule amending the Federal Acquisition Regulations should not be implemented. We are opposed to the proposed rule mandating use of the Basic Pilot/E-Verify program for federal contractors because: 1) it violates existing laws; 2) the databases upon which the program relies are error-prone and have unacceptably high error rates which misidentify workers as not being authorized to work; 3) there is substantial employer abuse of the program which results in discrimination, racial profiling, and illegal employment practices by employers; 4) the

privacy and security concerns of the technology have not been addressed; and 5) it jeopardizes the livelihoods of work-authorized immigrant and U.S. citizen workers.

Although the proposed rule only applies to federal contractors, making this program mandatory for anyone is dangerous because of the severe flaws and problems with the program which have not been fixed. This change, for starters, would immediately apply to at least 200,000 employers and approximately 4 million employees. Mandating the use of a system that doesn't work will be disastrous for everyone in the U.S., not just federal contractors and their workers.

The OAN believes that implementation of the proposed rule may have similar impacts to the Oregon economy as would the implementation of the DHS/SSA No-Match letter regulation. A recent study commissioned by the Coalition for a Working Oregon, and released July 2008, found that the implementation of the No Match regulation would, in the short term, result in an immediate job loss of 173,500 jobs, or 7.7% of Oregon's workforce. This includes the estimated 93,500 undocumented workers and 76,000 legal documented workers that would see their jobs end. The overall estimated economic effect would be a reduction in statewide output of \$17.7 billion dollars, or over 6% of the states output. Oregon would lose as much as \$650 million in state and local tax revenues.

We imagine that other states would experience similar economic impacts in proportion to the size their own state gross domestic product (GDP). By way of comparison, California's state GDP is more than ten times the size of Oregon's state GDP. In total, 25 states have state GDP's in excess of Oregon's, which ranked 26<sup>th</sup> in the country in the United States Census Bureau's *Statistical Abstract of the United States* 2005 State GDP Ranking. Regardless of relative magnitude, the economic damage will be inflicted on almost every state in equal measure, due to our country's overall dependence on these undocumented workers—a dependence that has grown out of years of failed immigration policy and enforcement.

### **COMMENTS TO THE PROPOSED RULE:**

**The proposed rule violates current federal statutory law that the program be voluntary.** The amendments to the FAR, if implemented would violate existing law because the statute that created the Basic Pilot/E-Verify explicitly requires that participation in the program be voluntary for employers, with a few very limited exceptions. Pub. L. 104-208 §402(a).

**The proposed rule violates current federal statutory law that prohibits the re-verification of existing employees.** The proposed rule's requirement that employers re-verify their current employees is illegal because by law the program can only be used to verify newly-hired employees within the first 3 days of hire. Pub. L. 104-208 §402(a); 8CFR §1274a.2.

**The proposed rule requiring mandatory participation in the program by federal contractors violates the law.** The statute authorizing the Basic Pilot/E-Verify explicitly states that the program is voluntary. Pub. L. 104-208 §402(a). Agencies which mandate federal contractors to use the program will be violating the law. The proposed rule is also unreasonable and an improper interpretation of the law. The implementation of this rule is outside the scope of agency authority; as only Congress has the authority to amend statutes.

**The proposed rule mandates federal contractors to use a program which is still in a pilot stage, is largely untested and has serious flaws.** Approximately 1 percent of all employers in the United States are enrolled in the Basic Pilot/E-Verify program, but only about half of those enrolled employers are active users of the program. *See*, Richard M. Stanna, Testimony Before the Sub-Committee on Social Security, Committee on Ways and Means, House of Representatives: *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System* (Government Accountability Office, June 2007, GAO-07-924T). The active use of the program by less than 1 percent of employers has already uncovered the program's severe flaws, inaccurate databases, misidentification of workers, and vulnerability to employer abuse and privacy and security weaknesses. These flaws have not been properly addressed or corrected. Mandating a program for hundreds of thousands of federal contractors and the millions of workers they employ, based on a program which has not moved out of the pilot stage, has only a miniscule test rate and a poor success rate is dangerous for employers, employees and the economy.

**The proposed rule could deprive federal contractor employees of their livelihoods due to the inaccuracies and database flaws which misidentify workers.** The Basic Pilot/E-Verify program relies on Social Security Administration (SSA) and Department of Homeland Security (DHS) databases, which are inaccurate and outdated. SSA estimates that at least 17.8 million of its records contain discrepancies related to name, date of birth and citizenship status. The DHS databases also have inaccuracies and are not updated in real-time. The U.S. Citizenship and Immigration Service (USCIS), the agency responsible for managing the program remains a largely paper-based system and has a history of mishandling huge amounts of data. Due to these database inaccuracies, foreign-born individuals who are authorized to work are 30 times more likely to be incorrectly identified as not authorized to work by the program than native-born U.S. citizens.

**The proposed rule mandates federal contractors to use a program that has substantial rates of employer abuse.** Specifically, some employers who use the voluntary program engaged in illegal employment practices, including: pre-employment screening (47 percent); failure to give employees notice of a tentative non-confirmation notice (TNC) (9.4 percent); encouraging employees not to contest TNCs (7 percent); adverse employment action based on issuance of TNC notices such as restricting work assignments (22 percent), delaying job training (16 percent), reducing pay (2 percent), re-verification of existing employees (30 percent); increasing work hours; ignoring poor working conditions; and failure to inform workers of their rights under the program. *See*, Findings on the Web Basic Pilot Evaluation, Westat Report, September 2007, p. 71.

**The proposed rule mandates federal contractors to use a program that is vulnerable to security threats and could compromise worker privacy.** Although USCIS has invested in internal security improvements, it continues to be open to significant security vulnerabilities or compromise by outsiders seeking to manipulate the immigration system. DHS has failed to detect cyber break-ins to its system, has failed to comply with Federal Information Security and Management Act (FISMA) standards since its inception, does not screen entities enrolling in the Basic Pilot/E-Verify program to verify that they are bona fide employers, and has other

unresolved technological flaws which invite identity theft and could lead to other misuses of workers' and employers' private information.

**The proposed rule mandates federal contractors to use a program whose infrastructure cannot support the anticipated increase in use by them.** The scalability of Basic Pilot/E-Verify to a mandatory program, even if just for federal contractors, raises serious architectural issues because it will have to handle a vast increase in users, queries, transactions, and communications volumes. Each time a system grows larger, serious new technical issues arise that were not previously significant.

**The proposed rule has a serious impact on all federal agencies but is especially detrimental to DHS and SSA.** SSA estimates that making the program mandatory will result in 3.6 million extra visits or calls to SSA field offices per year, which would result in 2,000 to 3,000 more work years, the necessity of hiring more staff, and hundreds of millions of dollars more in expenses each year. As of January 2008, over 750,000 Social Security cases were awaiting decisions on disability claims, with an average wait time per case of 512 days. *See*, Walth, B. and Denson, B, "Getting Disability Payments Can Be A Fight to the Death." The Oregonian, 3 Aug. 2008, A1+. In Oregon, the average wait time per case is 669 days. *Id.* Over 50 percent of people who call a local SSA field office with inquiries receive a busy signal. *Id.* Since Basic Pilot/E-Verify relies on sometimes outdated or erroneous information in SSA databases, requiring federal contractors to use it could result in a massive overload to SSA systems as workers try to correct their records. DHS is notorious for its inability to resolve existing backlogs in processing applications submitted by immigrants and would-be immigrants to USCIS, an agency within DHS. Any attempts to make Basic Pilot/E-Verify mandatory, even if only for federal contractors, would spiral the agency further into bureaucratic gridlock.

**The proposed rule would have a devastating effect on the economy.** Many businesses rely on federal contracts for a substantial portion of their income. Mandating them to use the Basic Pilot/E-Verify program is a lose-lose situation for America and our economy. Mandating use of an inaccurate system means that 8 percent of all federal contractor employees could potentially be misidentified as not eligible to work. A June 10, 2008, report from the Government Accountability Office (GAO) confirms that only 92 percent of employees are immediately confirmed as eligible to work. This inaccuracy rate means that by implementing the rule, hundreds of thousands of federal contractor employees could be issued a tentative non-confirmation (TNC). The idea that any electronic employment eligibility verification system could eliminate our economy's demand for workers is naïve; contractors that need workers will continue to hire them "off the books," if forced to do so. The Congressional Budget Office (CBO) recently estimated that mandatory use of Basic Pilot/E-Verify by all U.S. employers would lead to an increase in undocumented workers being paid outside the tax system, which over a 10-year period would result in a loss of \$17.3 billion in federal revenue. Federal contractors comprise a significant percentage of U.S. employers and generate billions of dollars, mandating them to use the Basic Pilot/E-Verify will create a serious loss in revenue. In addition, making Basic Pilot/E-Verify mandatory without providing a path to authorized status for the existing unauthorized work force will force more workers into the underground economy and divert billions of dollars.

**The proposed rule's requirement that existing federal contractor employees, must be reverified through Basic Pilot/E-Verify, and must present photo identification to establish identity, may result in lawfully present immigrants and U.S. citizens being terminated from work.** It has been estimated that approximately 11 percent of U.S. citizens do not have government-issued photo identification. That translates into roughly 21 million citizens if compared to the most recent population estimates by the U.S. Census Bureau. Some studies also indicate that members of minority populations such as African-Americans, Latinos, Women and Senior Citizens are less likely to have photo identification. In addition, many lawfully present immigrants such as recent refugees and asylees do not always have photo identification. There are also many situations where individuals may have the right to work but have not yet received a physical Employment Authorization Document such as persons with pending adjustment of status applications. The proposed rule also fails to make exceptions for cases where photo identification has been lost or destroyed due to crime, accidents, natural disasters or other causes.

**The proposed rule will lead to increased discrimination and an unwillingness to hire workers who look or sound "foreign."** Government-commissioned reports have already shown that some employers who use Basic Pilot/E-Verify engage in illegal employment practices, and evidence suggests that such employers, when hiring, may discriminate against workers who look, sound or dress "foreign," or who have "foreign-sounding" names. Mandating use of the program will pressure federal contractors to give preference in hiring to applicants they believe "look like" U.S. citizens. In addition, mandating federal contractors to use Basic Pilot/E-Verify without addressing the problem of discriminatory practices by employers will have an even greater impact on the number of employees who experience discrimination at the hands of unscrupulous employers.

**The proposed rule contradicts many of the guiding principles that informed the creation of the Federal Acquisition Regulations for contractors including minimizing administrative operating costs, conducting business with integrity, fairness and openness and promoting competition.** Administrative operating costs can include start-up, implementation, training and maintenance costs. But there are also other direct and indirect costs to employers who use the Basic Pilot/E-Verify program; employers may perceive foreign-born workers as more expensive to employ than native-born workers due to the database inaccuracies which create a large disparity between initial verification results for native-born employees and work-authorized foreign-born employees. Resolving tentative non-confirmations (TNC) and correcting employee records cost time, money and affect other resources. The proposed rule also fails to advance integrity, fairness and openness in the way business is conducted. Government-commissioned reports have found that employer abuse of the program is substantial and that many employers who use the program engage in prohibited employment practices and discriminatory behavior. Finally, the proposed rule does not encourage competition because the harmful impact on small businesses (many of which are minority-, immigrant- or family-owned) is disproportionate and makes the playing field for small businesses more uneven.

## CONCLUSION

In sum, the OAN strongly opposes the proposed rule amending the Federal Acquisition Regulations which makes the Basic Pilot/E-Verify program mandatory for federal contractors. We request that the proposed rule not be implemented, in whole or in part.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeff Stone", with a long horizontal flourish extending to the right.

Jeff Stone, Director of Government Relations  
Oregon Association of Nurseries