

Intel Corporation

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Via FedEx

Regulatory Secretariat (VPR)
General Services Administration
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Ms. Duarte and Regulatory Secretariat:

RE: FAR Case 2007-013: Comments on Proposed Employment Eligibility Regulations Implementing Executive Order 12989 (as amended), 73 Federal Register 33374 (June 12, 2008)

Dear Ms. Duarte and Regulatory Secretariat:

Intel Corporation welcomes this opportunity to comment on the proposed regulations published jointly by the General Services Administration, Department of Defense and NASA. Please note that Intel is a member of the American Council on International Personnel and joins in its comments to the proposed regulations, submitted under separate cover. In these additional, individual comments, Intel explains why the regulatory proposal to require verification of its current employees connected to government contracts or subcontracts is unworkable, unnecessary and costly. Intel respectfully requests that the government withdraw or substantially alter this requirement.

Intel, headquartered in Santa Clara, California, is one of the world's leading technology companies and among the nation's largest employers, with a domestic workforce exceeding 46,000. Intel designs, manufactures and markets microcomputer components and related products, including microprocessors, microcontrollers, memory chips, computer modules, motherboards, network and communication hardware and software products, personal conferencing software, and parallel supercomputers. Intel is the global leader in the semiconductor industry. Intel developed the semiconductor technology on which the entire personal computer industry has been built, and our products have continually revolutionized the industry and redefined the role of the computer in our everyday lives.

Intel has participated in the Government's E-Verify program since January 1, 2008. Our E-Verify participation was initially limited to our hiring sites in Arizona, in order to comply with an Arizona state law that mandates E-Verify participation. Over the last few months, we have expanded participation to all hiring sites nationwide in order to take advantage of the recently-promulgated regulations that allow for extension of Optional Practical Training work authorization for graduates in the Sciences, Technology, Engineering and Mathematics, to enable us to hire that talent throughout the country.

So far this year, Intel has initiated nearly 1400 new hire queries through E-Verify, and we anticipate that going forward, new hire queries will approximate 3000 a year. Intel's E-Verify "tentative non-confirmation rate" ("TNC") far exceeds the estimated rate of non-confirmations published by E-Verify and USCIS. Although USCIS claims that "[l]ess than one percent of all work-authorized employees receive a tentative non-confirmation through E-Verify" (statement of USCIS Acting Director Jonathan Scharfen, USCIS press release, May 5, 2008), Intel's actual experience is a TNC rate of a stunning 12.21% for the year to date (143 of 1363 inquiries). *All of Intel's TNC's have ultimately been cleared by E-Verify as work authorized, but only after significant investment of time and money, lost productivity and, for our affected foreign national staff, many hours of confusion, worry and upset.*

Intel currently manages its own payroll processes. Quarterly, under Intel's payroll protocol, it uploads data to the on-line Social Security Number Verification System ("SSNVS") to ensure proper wage reporting. In the rare instance when SSNVS reports a no-match, Intel finds the source of the error and immediately corrects it. This practice is so successful that since Intel adopted this protocol approximately four years ago, the Social Security Administration has not had to send any annual employer correction "no-match notices" to Intel.

I. Intel Has No Practical Means to Identify Current Employees with Government Contract or Sub-Contract Responsibilities and thus Will Be Forced to Run E-Verify Queries for Many of Its 46,000 U.S. Employees.

The proposed regulations expand E-Verify to include verification for all employees assigned to a covered contract, not just those newly hired. The definition of "assigned employee" is any employee "directly performing work, in the United States, under a [covered] contract." (Section 52.222-XX (a) (1).) This definition does not provide helpful guidance to Intel, whose tens of thousands of U.S. employees are engaged in various research and development work that support Intel's business, including a variety of government contracts and sub-contracts. The end product under its government contracts is often a new technology, developed through trial and error over a lengthy research, test and implementation cycle. Typically, Intel employees are working on technologies that have a number of applications, and are rarely solely devoted to a single project or contract. Thus, thousands of employees may "directly" touch upon the work that leads to a covered contract deliverable. Moreover, employees are regularly re-assigned based on business needs and competing priorities. Management of work assignments is delegated to technical managers who, as a practical matter, are not able to sort out which job or research assignments may have a direct impact on a covered contract. For an employer engaged in this type of work, the limitation that only "direct assignees" require verification is illusory. Intel is just too big and too dispersed to be able to manage this "in and out" requirement for current employees.

What then will Intel do in order to comply with the regulatory requirement as now drafted, requiring a contractor to run E-Verify for current employees engaged on the contract? It will construe the regulation broadly, to ensure government contract compliance, and will thus need to run a substantial number of its 46,000 U.S. employees through the system. It will also impose a similar broad reading on any covered subcontractor, for the same reasons. This result would impose a substantial expense on Intel as well as a corresponding surge of E-Verify activity, imposing a significant strain on the system.¹

Intel's E-Verify experience demonstrates that each TNC requires at least 30 minutes in direct consultation with the affected employee, as well as E-Verify or other government agents, to resolve. Were Intel's nearly 13% TNC rate for new hires extrapolated to its existing workforce, experience would predict a need for thousands of additional personnel-hours to manage the additional TNC's. Of course, the resource demand will be far greater on the government side, as Intel is but one of many government contractors with similarly complex work assignment issues.

Imposition of such a labor intensive exercise might be warranted if the results were predicted to identify undocumented aliens working on government projects. But that is not the case at Intel—where the Company has not had a sustained FNC and has not had a no-match notice from SSA in years. This rule will simply add costs to government contracts and sub-contracts, which will ultimately lead to increases in contract pricing—defeating the very efficiencies this rule purportedly advances.

¹ Note that Intel appreciates that the E-Verify system is robust with capacity, reportedly sufficient to handle millions of simultaneous queries. The robustness of the E-Verify technology, however, is beside the point. There are most assuredly capacity concerns with the E-Verify program, but they manifest only when the employer or employee must deal with a human being in the TNC or FNC context in order to rectify the situation. Intel's 2008 experience with hundreds of TNC's, requiring hours of phone consultation with E-Verify, Social Security Administration and USCIS personnel, is most sobering.

Intel respectfully submits that the cost of verifying current employees far outweighs any benefit to the procurement process. Accordingly, it suggests the following alternatives to the requirement that current employees be subject to E-Verify:

1. Eliminate the E-Verify mandate for current employees and impose a discretionary standard, whereby the contracting agency could require a contractor to run its existing employees through E-Verify if the contractor had been charged with I-9 violations or had a record of unresolved Social Security no-match notices. Intel recognizes that the Privacy Act prohibits the Social Security Administration from sharing no-match correspondence with contracting agencies, and further recognizes that a no-match notice alone is not evidence that the bearer of the mismatched Social Security Number lacks work authorization. But the Government could use its procurement authority to require contractors either to certify that their no match record was within acceptable bounds or to run specified current employees through E-Verify. Such a change would exempt Intel and likeminded compliant employers from the wholly futile, but inordinately expensive, exercise of running E-Verify queries for the majority of their workforces.
2. If the proposed current employee verification system is to remain a part of these regulations, provide an option for employers in the regulations so that they can adopt a compliance method that meets Government objectives with the least disruption or cost to contractor operations. Examples include allowing an employer to E-Verify all employees at all hiring sites, all employees at any hiring site that services a covered contract, or only those employees assigned to work on the government contract.
3. Modify the definition of “assigned employee” to make clear that the covered employees are only those assigned on a continuing basis to work predominately on that particular contract. Intel suggests a standard of 60% or more of such the employee’s working hours, calculated on an annual basis, with the obligation accruing only after the standard is achieved.

II. The Time to Conduct E-Verify Queries for Current Staff Must Be Extended

The proposed regulations require covered contractors, within the longer of 30 days after required enrollment in E-Verify (in turn required within 30 days of the effective date of a covered contract) or three days after the employee is assigned to “work directly on the contract” to verify all such assigned employees through the E-Verify system. See Section 52.222-XX (a)(1) definition of “assigned employee” and (d)(2). This requirement is problematic for at least two reasons. First, it fails to contemplate the timetable for an employer which, like Intel, is already enrolled in E-Verify. At a minimum, the regulation should be clarified so that for employers already enrolled, the time for verification of existing employees is at least 30 days (or longer, as suggested below) from the execution of a covered contract.

Second, and more problematic, the 30-day time period is not nearly enough time to accomplish the tasks necessary to conduct E-Verify queries of current staff. Intel thus requests that the Government consider enlarging the time to 90 days. Consider, as discussed in the preceding section, the complexity of government contract services at employers like Intel. These companies must either (a) scrub data about their workforces to identify those employees assigned to work on a covered agreement and implement a plan to run those employees through E-Verify, including managing the burdensome TNC process or (b) they must enlarge the pool of affected employees, eliminating the need to figure out who is in and who is out, but multiplying exponentially the time required to conduct the verification.

In this context, it is important to underscore that submission of an E-Verify query for an existing employee will not be a one-step data entry task as is the case for new employees under existing E-Verify rules. E-Verify rules for new employee queries track the I-9 process, but add obligations not historically part of that process. E-Verify requires the employee to provide a social security number, a picture identification document and limited number of current identity or work authorization documents. For employees whose I-9's were completed long ago, Intel accepted documents to demonstrate identity

(drivers' licenses) or work authorization (passports or green cards) that have now expired. In order to E-Verify these employees, Intel will first have to "re-verify" their identify and work authorization. The task will be lengthy and complex. For example, many Intel employees presented permanent residence cards, cards that have long since expired. In order to conduct E-Verify queries successfully for these employees, Intel will need to sort its I-9's, identify expired documents, meet with affected employees and obtain new documents (even if the documents they originally presented showed unconditional ongoing work authorization.) Similar steps will be required for certain naturalized citizens. Until 2007, it was permissible for naturalized U.S. citizens to present certificates of naturalization to prove work eligibility, and many Intel employees, proud of their new American citizenship, chose to use these forms in the I-9 process. Because those certificates are not now recognized as part of the E-Verify process, Intel will need to re-verify all such employees before submitting an E-Verify query. Additionally, the I-9 process does not require an employee to provide a social security number, but E-Verify requires the employee to provide his/her number, and Intel will have to devise a process to collect and authenticate social security numbers for many employees, especially those who started as foreign national legal immigrants, who were not required to have a number when they started work. Simply stated, it is inconceivable that a Company like Intel could undertake such an enormous effort in the 30 days' time allotted by the proposed rule to accomplish these tasks for tens of thousands (or even 1000) employees.²

It is noteworthy that the DHS social security no-match regulations adopted by DHS in August 2007 provide 30 days for the employer to provide notice of a no-match to an affected employee, and then provide the employee another 60 days thereafter to correct the Social Security records. These timelines more accurately reflect the minimum time

² There are also substantial legal concerns with a process that requires re-verification of valid I-9 documentation and E-Verify queries outside the scope of the IIRAIRA basic pilot authorization for new hires, as discussed in Section III below. It is far from certain that the broad civil and criminal immunity for participation in good faith in the programs specifically authorized by Congress, Public Law 104-108, Section 403(d), pertain to verification queries that are both impermissible under IRCA regulations and beyond the scope of permissible participation in E-Verify under IIRAIRA.

that is required to resolve TNC issues. At a minimum, the 90-day framework of the DHS no-match regulations should be adopted here.

III. Because It Is Not Clear that the Broad Legal Immunities Extended to Employers Participating in Basic Pilot Programs Extend to Verification of Existing Employees, the Government Should Not Impose this Obligation on Contractors

E-Verify is still a voluntary demonstration program, authorized by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996 as the “Basic Pilot Program (Public Law 104-208, 110 Stat.3009-655 through 665 (1996), extended through October 2008 by 2002 amendments (Public Law 107-128, 115 Stat.2407 (2002)), re-christened “E-Verify” in 2007. The specifications for the program are limited by statute to verification of new hires in connection with the I-9 process. (*See* Section 402 (c), scope of employer’s election to participate in the pilot limited to new hires and certain recruitments for a fee, *and* Section 403 (a)-- pilot process is directly linked to I-9 process for new employees, including recording verification transaction on the I-9 form, and establishes E-Verify timelines and processes based directly on I-9 new hire rules.)

The express limitation of the E-Verify program to the new hire process is of keen interest to Intel as it contemplates implementation of E-Verify for existing employees. In voluntarily agreeing to participate in E-Verify for new hires throughout its U.S. operations, Intel was encouraged by the broad immunity language that Congress included in the basic pilot authorization. As a result, it need not worry about litigation from employees whose employment might be severed because of a Final Non-Confirmation Notice, because “[n]o person or entity participating in a pilot program [authorized by IIRAIRA] shall be civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system [of the basic pilot program.]” (IIRAIRA Section 403(d)) Because IIRAIRA did not contemplate use of the pilot program for existing employees, however, this immunity language appears not to apply to adverse decisions employers make based on *post-hire* E-Verify queries. It is predictable that work-authorized, long-term employees with facially valid I-9 documents,

fired as a result of the E-Verify process, will claim that the immunity language does not bar their discrimination or wrongful discharge cases where the E-Verify process provided the wrong answer.

Intel emphasizes that E-Verify does in fact provide the wrong answer—not only in rendering countless unnecessary TNC's, but in issuing Final Non-Confirmation notices. As described above, through June 30, 2008, Intel's TNC rate is over 12%. The majority of these TNC's have come from Intel's work-authorized foreign national staff, many of whom hold work authorization provided by the State Department (DS 2019) or by their colleges or universities (CPT I-20 from SEVIS). E-Verify has yet to recognize these forms of work authorization automatically and the manual process for checking these individuals' work authorization is not seamless. But far more troubling from an employment law perspective are final non-confirmation notices issued to work authorized employees. For these employees, the E-Verify MOU contemplates that the employer will discharge the employee. In its short experience with E-Verify, Intel has had a TNC converted to Final Non-Confirmation notice for a U.S. citizen who held a U.S. passport and District of Columbia birth certificate, because her Social Security record erroneously reflected foreign birth. She visited her local Social Security office *three* times during the TNC process, and each time returned to work with an SSA notice confirming that her name and number matched, but this was to no avail in E-Verify, as SSA did not appreciate the need to correct its data error. It was only after the FNC was issued, and after hours of phone work by Intel representatives, that E-Verify staff identified the error and directed correction of the Social Security records, thereby reversing the FNC.

E-Verify also issued an FNC to a foreign student with Optional Practical Training employment authorization because USCIS put the wrong validity dates on the employee's Employment Authorization Document and confirmed an E-Verify FNC when the employee refused to pay an additional \$340 filing fee to have the government correct its own error. Despite USCIS records showing the employee had both a valid I-20 and an I-797 approval notice for the correct OPT dates, E-Verify said she was not work

authorized. Again, only because Intel representatives persisted was that situation reversed and the employee's employment continued.³

Some might look at these situations and conclude that two mistaken final non-confirmation notices out of Intel's nearly 1400 E-Verify inquiries is an acceptable error rate of "just" 1.4%. But how many mistakes does 1.4 % represent among the 3.8 million employees who will be vetted through the E-Verify system under the current estimates for the proposed rule? Assuming the number of employees estimated by the Government in connection with the proposed rule is correct (and the Intel experience suggests that it is low), the result would be 53,200 mistaken Final Non-Confirmations, and 53,200 possible legal claims by work-authorized employees who had fully and lawfully complied with the I-9 process.

The proposed regulations lead to the conclusion that unwarranted termination of thousands of work authorized Americans and legal immigrants is a worthy price to pay if undocumented aliens are washed out of the workforce at the same time. But this conclusion ignores that the expansion of E-Verify under this rule will catch employers and work-authorized employees in an awful dilemma. Employers will be forced to choose between continuing to employ suspect employees, risking an ICE referral and investigation for civil or criminal charges on the one hand, versus the risk of Office of Special Council investigations, employment law claims and loss of valuable trained personnel on the other. Intel thus recommends:

- (1) That the regulations be clarified explicitly to extend immunity for any contractor who takes adverse action against a current employee. If there is no statutory basis for such immunity, then it is premature to impose the E-verify burden on employers to query current employees. It makes no sense that employers would have complete statutory

³ In both cases, E-Verify representatives congratulated Intel for its persistence and acknowledged that many employers would have simply terminated the employee as contemplated by the E-Verify MOU.

immunity for actions taken against new hires as a result of E-Verify but would be fully at risk of liability for current employee claims.

- (2) That the requirement to query current employees be delayed until E-Verify adopts processes for a post-FNC process, initiated by either the employee or the employer, so that performance of government contracts is not hampered by the unnecessary termination of work authorized employees.

Thank you for your consideration. Intel would be happy to discuss these points in further detail or address your questions about its submission. Please direct inquiries to the undersigned.

Sincerely,

Margie Jones
U.S. Immigration Operations Manager