Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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 (ICE), Department of Homeland Security (DHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: DHS is proposing to allow for alternative procedures for documents required by the Form I–9, *Employment Eligibility Verification*. This proposed rule would create a framework under which the Secretary of Homeland Security (the Secretary) could authorize alternative options for document examination procedures with respect to some or all employers. Such procedures could be implemented 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. This proposed rule would allow employers (or agents acting on an employer's behalf) optional alternatives for examining the documentation presented by individuals seeking to establish identity and employment authorization for purposes of completing the Form I–9, *Employment Eligibility Verification*.

DATES: Electronic comments must be submitted on or before October 17, 2022.

ADDRESSES: You may submit comments on the entirety of this proposed rule, identified by Docket No. ICEB–2021–0010, through the following method:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the website instructions to submit comments.

Comments submitted in a manner other than the Federal eRulemaking Portal, including emails or letters sent to DHS, will not be considered comments, and will not receive a response from DHS. Please note that DHS cannot accept any hand delivered or couriered comments, nor any comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. If you cannot submit your material using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Public Participation

DHS encourages all interested parties to participate in this rulemaking by submitting data, views, comments, and arguments on all aspects of this proposed rule. Comments providing the most assistance to DHS will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include the data, information, or authority that supports the recommended change. See the **ADDRESSES** section above for information on where to submit comments.

A. Submitting Comments

To submit your comments online, go to *https://www.regulations.gov* and insert ''ICEB 2021–0010'' in the ''Search'' box. Click on the ''Comment'' box and type your comments in the text box provided. When you are satisfied with your comments, follow the prompts, and then click ''Submit Comment.''

DHS will post comments to the federal e-Rulemaking portal at *https://www.regulations.gov* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines is offensive. For more information, please read the ''Privacy & Security Notice,'' via the link in the footer of *https://www.regulations.gov*. DHS will consider all comments and materials received during the comment period and may change this rule based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov* and insert ''ICEB 2021–0010'' in the ''Search'' box. Next, click on ''Dockets,'' then on the name of the rule, and finally on ''Browse All Comments.'' Individuals without internet access can request alternate arrangements for viewing comments and documents related to this rulemaking (see the **FOR FURTHER INFORMATION CONTACT** section of this document). You may also sign-up on the online docket for email alerts whenever comments are posted, or a final rule is published.

II. Abbreviations

Abbreviation	Amplification
CFR	Code of Federal Regulations
COVID 19	Coronavirus disease 2019
DHS	Department of Homeland Security
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
IRCA	Immigration Reform and Control Act of 1986
NEPA	National Environmental Policy Act
OMB	Office of Management and Budget
OPM	Office of Personnel Management
PRA	Paperwork Reduction Act
U.S.	United States
U.S.C.	United States Code
USCIS	U.S. Citizenship and Immigration Services

III. Background and Purpose

A. 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, to amend the Immigration and Nationality Act (INA), which appears in Title 8 of the U.S. Code. Among other reforms, the

IRCA amendments made it unlawful for employers to knowingly hire individuals who were not eligible 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. IRCA imposed employer sanctions, codified in section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a, including financial, criminal, and other penalties for those who failed to verify the identity and the employment eligibility 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. Among other goals, IRCA sought to ensure that only eligible 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.[1]

IRCA prompted the creation of the Form I–9, *Employment Eligibility Verification,* which was designated as the 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, 1986 to work in the United States.[2] If an employee's employment authorization expires, the employer must reverify the employee's employment authorization to ensure the employee continues to be employment-authorized in the United States.[3] If an employee is rehired, the employer must also ensure that the employee is still authorized to work in the United States.[4] The employer must retain the Form I–9 in a paper, electronic, or microfilm or microfiche 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.[5]

The Homeland Security Act of 2002, Public Law 107–296 moved the responsibility for overseeing the examination of documentation evidencing identity and employment authorization from the former U.S. Immigration and Naturalization Service, which was a component of the U.S. Department of Justice, to the newly formed DHS, specifically to U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). USCIS issues most employment authorization documentation to noncitizens and administers an electronic employment eligibility verification program called E-Verify,[6] while ICE monitors and enforces compliance with the requirements of the Form I–9. The Immigrant and Employee Rights Section of the U.S. Department of Justice's Civil Rights Division enforces the investigates and prosecutes employment anti-discrimination provision of the INA, 8 U.S.C. 1324b.

B. Background

Within three business days after the first day of employment (*i.e.,* the first day of work in exchange for wages or other remuneration), employers must physically examine the documentation presented by new employees from the Lists of Acceptable Documents (*i.e.,* ''Form I–9 documents''),[7] or an acceptable receipt,[8] to ensure that the presented documentation appears to be genuine and to relate to the individual who presents them. *See* 8 CFR 274a.2(b)(1)(ii)(A), (b)(1)(vi). Employers must then complete Section 2, ''Employer Review and Verification,'' of the Form I–9. *See* 8 CFR 274a.2(b)(1)(ii)(B). If reverification is required, the employee or referred individual must present a document that shows continued employment authorization or a new grant of employment authorization. *See* 8 CFR 274a.2(b)(1)(vii). If the employer rehires an individual for whom it had previously completed the Form I–9 and complied with the document verification requirements, the employer may inspect the original Form I–9. *See* 8 CFR 274a.2(c). If the rehired employee's employment authorization on the original Form I–9 had expired when the individual was rehired, the employer must conduct reverification. *See* 8 CFR 274a.2(c).

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[1] *See* 8 U.S.C. 1324a and 8 U.S.C. 1324b.

[2] 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.*

[3] 8 CFR 274a.2(b)(1)(vii).

[4] 8 CFR 274a.2(c).

[5] 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.*

[6] *See* Learn More About E-Verify, E-Verify, *https://www.e-verify.gov/* (last visited May 6, 2022).

[7] The Lists of Acceptable Documents are included with the Form I–9.

[8] Occasionally, employees may present a ''receipt'' in place of a List A, B, or C document. An acceptable receipt is valid for a short period of time so an employer can complete Section 2 or Section 3 (reverification) of Form I–9, Employment Eligibility Verification. Employers cannot accept receipts if employment will last less than 3 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* USCIS, Handbook for Employers, M–274, *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 June 21, 2022).

Table 1: Lists of Acceptable Form I-9 Documents

Employees may present one selection from List A or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		6. Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI				

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Due to the physical proximity precautions implemented by employers related to combating the coronavirus disease 2019 (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.[9] 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 emergency [10] 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

[9] 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 updated Mar. 31, 2021).

[10] *See* 85 FR 15337 (Mar. 18, 2020).

predictable basis needed to undergo an in-person examination of their Form I–9 identity and employment eligibility documentation.[11] 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.[12] Subsequently, due to the continuation of the COVID–19 pandemic, ICE extended these flexibilities several times: the latest announcement, issued on April 25, 2022, extended the temporary flexibilities until October 31, 2022.[13]

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.[14] 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. DHS thanks the public for its comments and encourages commenters to participate in this rulemaking by submitting comments in response to the specific proposal contained in this proposed rule, as well as the alternatives presented. As noted below, this proposed rule would not directly authorize remote document examination, but it would create a framework under which DHS could pilot various options, respond to emergencies similar to the COVID–19 pandemic, or implement permanent flexibilities upon a specific determination as to level of security, including, but not limited to, fraud risk.

C. Need for the Proposed Change

DHS recognizes that more employers may have adopted telework and remote work arrangements because of the COVID–19 pandemic. For instance, the Pew Research Center conducted a study to better understand how the work experiences of employed adults had changed during the pandemic. That survey found that, among workers who said their job responsibilities could mainly be done from home, most said that they rarely or never teleworked before the pandemic. However, in October 2020, 71 percent of those workers were working from home all or most of the time.[15] In addition, on March 11, 2021, the U.S. Bureau of Labor Statistics reported that nearly 1 in 4 people (22.7 percent) employed in February 2021 teleworked or worked at home for pay because of the COVID–19 pandemic.[16] This rapid shift to telework and remote work was possible because of advances in technology and workplace modernization, such as cloud-based solutions that allowed employees to work despite not physically reporting to a company location on a regular basis. For instance, the study conducted by the Pew Research Center found that, of those workers doing their jobs from home all or most of the time, about three-quarters or more said it was easy to have the technology and equipment they needed to do their job and more than half said they wanted to keep working from home after the pandemic subsided, if given a choice to do so.[17] Another study by the Pew Research Center found that the impetus for working from home has shifted considerably since 2020, with more workers saying they are working from home today by choice rather than necessity. For instance, among workers with a workplace outside of their home, 61 percent now say they are choosing not to go into their physical workplace, while only 38 percent say they are working from home because their physical workplace is closed. Earlier in the pandemic, 64 percent said they were working from home because their office was closed.[18] For these reasons, DHS anticipates that work patterns for many employees may be permanently affected.

In light of these advances in technology and new work arrangements, DHS is exploring alternative options, including making permanent some of the current COVID–19 pandemic-related flexibilities to examine employees' identity and employment authorization documents for the Form I–9. This rule would not create such alternatives but would instead formalize the authority for the Secretary to extend flexibilities, provide alternative options, or conduct a pilot program to further evaluate an alternative procedure option (in addition to the procedures set forth in regulations) for some or all employers, regardless of whether their employees physically report to work at a company location. DHS would introduce any such alternative procedure in a future **Federal Register** notice that would include the parameters for the alternative procedures, any applicable conditions for participation, and for how long the alternative procedures would be available.

D. Proposed Changes

To allow DHS to evaluate and implement options that provide employers with more flexibilities, and in recognition of many employees' changing work environments and advances in technology, DHS proposes to revise the language currently in 8 CFR 274a.2(b) and (c). This proposed revision includes additional language in paragraphs (b)(1)(ii)(A), (b)(1)(vii), and (c)(1)(ii) stating that an alternative procedure may be authorized by the Secretary for examining the documentation presented by individuals to establish identity [19] and/or employment authorization when completing Form I–9 when they are

[11] *See* ''ICE announces extension, new employee guidance to I–9 compliance flexibility,'' U.S. Immigration and Customs Enforcement (Effective Apr. 1, 2021), *https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility*.

[12] *See* USCIS, DHS Extends Form I–9 Flexibility (Effective Mar. 31, 2021), *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 updated Mar. 31, 2021); ICE announces extension, new employee guidance to I–9 compliance flexibility, *https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility* (last updated Apr. 1, 2021).

[13] *See* DHS Extends Form I–9 Requirement Flexibility (Effective May 1, 2022), *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 Apr. 25, 2022); ICE announces extension to I–9 compliance flexibility, *https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3* (last updated Apr. 25, 2022).

[14] 86 FR 59183.

[15] *See* Pew Research Center, How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work (Dec. 9, 2020), *https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/* (last visited Feb. 14, 2022).

[16] *See* U.S. Bureau of labor Statistics, Mar. 11, 2021, The Economics Daily, *https://www.bls.gov/opub/ted/2021/workers-ages-25-to-54-more-likely-to-telework-due-to-covid-19-in-february-2021.htm* (last visited Oct. 20, 2021).

[17] *See* Pew Research Center, How the Coronavirus Outbreak Has—and Hasn't—Changed the Way Americans Work (Dec. 9, 2020), *https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/* (last visited Apr. 1, 2022).

[18] *See* Pew Research Center, COVID–19 Pandemic Continues To Reshape Work in America, (Feb. 16, 2022), *https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/* (last visited Apr. 6, 2022).

[19] This proposed rule relates to the physical presentation or inspection of documents for the Form I–9 only, and not to other regulatory programs or requirements that may require physical presentation or inspection of documents.

hired, reverified, or rehired. Moreover, a new paragraph (b)(1)(ix) would be added to state that, in lieu of the physical examination procedure described in paragraphs (b)(1)(ii)(A), (b)(1)(vii), and (c)(1)(ii), the Secretary may authorize optional alternative documentation examination procedures with respect to some or all employers, and that such procedures may be adopted 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 or a national emergency declared by the President. DHS plans to introduce any such alternative procedure in a future **Federal Register** notice.

E. Proposed Form I–9 Changes and Potential Conditions for Alternative Procedures

DHS expects that any future alternative procedures that may be authorized by the Secretary for examining the documentation presented by individuals to establish identity and/or employment authorization for the Form I–9 when they are hired, have their employment authorization reverified, or rehired, may require the employer (or agents acting on the employer's behalf) to indicate on the Form I–9 whether documentation was examined consistent with such alternative procedure(s). Therefore, DHS is proposing changes to the Form I–9 and its accompanying instructions that would allow employers to indicate that alternative procedures were used (should such alternative procedures be authorized in the future). Specifically, DHS is proposing adding a box to the Form I–9 that, if an alternative procedure were used for either Section 2 or Section 3, an employer (or an agent 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 proposing to update the instructions to the Form I–9 to explain the new box. These Form I–9 changes would allow ICE, when conducting an audit, to know that the employer (or an agent acting on an employer's behalf) has represented that the employer examined (and, if required by the procedure, retained) documentation consistent with the alternative procedure(s). These changes would help ICE enforce and monitor compliance with the provisions of the alternative procedure(s) referenced above. DHS has provided estimates of the resulting potential paperwork burden changes related to the Form I–9 in Section F, Paperwork Reduction Act—Collection of Information.

DHS is considering other requirements that may impact this collection of information for any alternative procedure 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. DHS invites comment on a range of potential changes to the collection of information.

Specifically, DHS welcomes comments on the effects of the below 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:

1. DHS is considering various document retention requirements. For instance, DHS could impose some or all of the document retention requirements applicable to the remote examination process during the flexibilities period discussed above, which required employers to retain copies of the documentation employees chose to present. DHS is also considering requiring employers to retain copies of any documents presented remotely via video, fax, or email. DHS requests comments on any cost(s) or increased burden(s) for employers to retain such documentation, as well as comments on the benefits, costs, or any burdens for employees related to such document retention.

2. DHS is considering adding a fraudulent document detection and/or an anti-discrimination training requirement for employers. For example, the employer or authorized representative who uses the alternative procedure may be required to take a 30–60-minute online training on detecting fraudulent documents remotely and avoiding discrimination in the process. DHS requests comments on any cost(s) or increased burden(s) for employers to complete such training, as well as comments on the benefits, costs, or any burdens for employees related to such training.

3. DHS is considering a variety of options with respect to the population that will be eligible to utilize the alternative procedure(s), and requests comments on such options and on how they may affect the collection of information. (For example, one potential option for consideration might be to limit the eligible population to those employers who have enrolled, and are participants in good standing, in E-Verify; another potential option for consideration might be to place some limits on employers who have been the subject of a fine, settlement, or conviction related to employment eligibility verification practices.) DHS requests comments on all relevant options with respect to the population that will be eligible to use the alternative procedure(s).

IV. Statutory and Regulatory Requirements

DHS developed this proposed 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. Executive Orders 12866 and 13563: Regulatory Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is 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, although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by OMB.

This proposed rule would allow the Secretary to authorize alternative options for document examination procedures with respect to some or all employers when they are hired, have their employment authorization reverified, or rehired, 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 or a national emergency declared by the President. The proposed rule would not itself implement an alternative procedure to physical examination. If an alternative procedure is authorized, this would provide employers (or agents acting on an employer's behalf) an alternative option for examining the Form I–9 documentation presented by individuals seeking to establish identity

and/or employment authorization. This proposed rule would also allow the Secretary the option of conducting a pilot program before deciding whether to use the option provided in this rule. If DHS introduces an alternative procedure, employers would still have the option to physically examine documents for the Form I–9 and would not be required to use the alternative method.

DHS has examined the potential impacts of an alternative procedure to physical examination. However, DHS is currently unable to fully quantify these potential impacts due to a lack of information about the specifics of a possible future alternative procedure. DHS discusses some of the potential impacts below. DHS also includes an estimate of the cost to employers for the Form I–9 revisions proposed in this rule.

Impacts of Form I–9 Revisions

As discussed in Section III, DHS is proposing to add boxes to Sections 2 and 3 of the Form I–9 that an employer (or an agent acting on an employer's behalf) must select if using any available alternative procedure(s) and to make corresponding edits to the form's instructions. DHS estimates that it would take an employer one minute to read the revised instructions about the box indicating if an employer used the alternative procedure(s) and mark the box, if needed, or 0.02 hours (1 minute/60 minutes). Employer estimates and wage rates are taken from the existing Collection of Information, titled ''Employment Eligibility Verification'', OMB Control Number 1615–0047. DHS uses the same wage rates and employer estimates to maintain consistency and to capture the changes due to this proposed rule. DHS estimates the total number of employers who complete the Form I–9 annually is 55,400,000.[20] Assuming all employers would read the revised instructions about the new boxes, the total annual increase in time burden for employers would be 1,108,000 hours (0.02 hours × 55,400,000 employers). Using a fully loaded wage rate of $35.78 per hour, DHS estimates the total annual costs to employers for the additional box would be $39,644,240 (1,108,000 hours × $35.78 per hour).

Potential Impacts of an Alternative Procedure

If the alternative procedure option (not requiring the physical examination of Form I–9 documentation) becomes available to some or all employers, the employers who decide to exercise this option may face new costs. If, for example, the alternative procedures were to make permanent the COVID–19 flexibilities for remote examination (*e.g.,* examination done over video, fax, or email) or other similar remote examination procedures, the new costs could include the acquisition and set-up costs for any new information technology that may be needed for this purpose. Employers may also incur the related costs of training personnel to operate any new equipment or to apply the alternative procedures. If employers choose to delegate this work to contractors, they would also face additional contracting costs. Furthermore, if DHS authorizes alternative procedures on the condition that participating employers engage in particular activities, such as enrolling in E-Verify, collecting and retaining images of Form I–9 documents presented by employees, or completing related fraudulent document detection and/or anti-discrimination training, these conditions may entail costs and benefits as well. For example, if the alternative procedure(s) require(s) E-Verify enrollment, any unenrolled employers who choose to enroll in E-Verify to use the alternative procedure may incur costs associated with enrollment (such as the time it takes to enroll, complete any required training, and remain participants in good standing). DHS expects employers will only opt to use the alternative procedure(s) if they believe it is in their best interests to do so. Therefore, DHS expects that the benefits to employers using the alternative procedures option would outweigh the costs. DHS requests comments on the types of costs that employers may face if the Secretary were to authorize an alternative procedure to the physical examination of documentation presented by individuals to establish identity and/or employment authorization for the Form I–9. DHS specifically calls commenters' attention to the types of conditions identified above.

As an example of potential benefits to employers who exercise the alternative procedure(s) option, we can consider those employers who operate in more than one location. These employers may be able to allow their human resources staff to perform the examination and verification procedure for Form I–9 documents from a single location or remotely, rather than having the verification performed at each location or be required to use an authorized representative to perform physical document examination on the employers' behalf. By centralizing their Form I–9 processing in this manner, these employers may streamline the completion of the Form I–9 and also be able to reap the savings that would result from these economies of scale. In addition, contractors that perform the same operations may be able to benefit in the same way from such economies of scale. With the existence of competition among those contractors, the costs to firms that hire these contractors may be reduced as well if those contractors can perform the work at a lower cost.

The alternative procedures would potentially offer benefits to new and rehired employees as well as those whose employment authorization needs to be reverified, especially in cases where they may not need to make an extra trip to a company location to allow for the physical examination of their Form I–9 documentation. Recent statistics on commuting times have indicated that most workers (who do not work from home) travel, on average, about one hour, roundtrip, to commute to work each day.[21] By potentially minimizing travel, the alternative procedures would save time spent commuting to a physical location and other travel expenses (such as road tolls and gasoline), as well as save employers the expenses they incur receiving employees at a company location, such as preparing visitors badges.

Additional potential benefits to employees and employers may arise from the alternative procedures in the area of remote work. Employers who are seeking to hire new remote workers or rehire former employees will have greater flexibility to hire a new employee who would otherwise have difficulty making the trip to a company location to physically present his or her identity and employment authorization documentation. Thus, in some cases, the alternative procedures may enable some employers to benefit from a larger pool of candidates competing for the employer's available positions. By the same token, individuals seeking employment may be able to seek positions from a larger field of potential employers.

DHS requests comments about the costs and benefits from the physical examination of Form I–9 documentation with respect to: (1) employers hiring employees, or (2) employees seeking,

[20] Estimates can be found in the document titled ''I–9 Supporting Statement'' available at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201906-1615-001.*

[21] Average One-Way Commuting Time by Metropolitan Area, U.S. Census Bureau, *https://www.census.gov/library/visualizations/interactive/travel-time.html* (last visited Oct. 20, 2021).

obtaining, or re-obtaining employment. DHS also requests comments on any cost savings that employers or employees may incur if the Secretary were to authorize an alternative procedure to the physical examination of documentation presented by individuals to establish identity and employment authorization for the Form I–9.

B. Regulatory Flexibility Act

DHS has reviewed this proposed 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 would allow the Secretary to authorize alternative options for document examination 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 or a national emergency declared by the President. The proposed rule would not itself implement an alternative procedure to physical inspection. If DHS introduces an alternative procedure, employers would still have the option to physically examine documents for the Form I–9 and would not be required to use the alternative method(s). Accordingly, DHS certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

C. Small Business Regulatory Enforcement Fairness Act of 1996

Pursuant to Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 858–59, DHS wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please use the contact information provided in the **FOR FURTHER INFORMATION CONTACT** section of this document.

D. Unfunded Mandates Reforms Act of 1995

The Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1531–1538) requires federal agencies to assess the effects of their discretionary regulatory actions. In particular, the UMRA addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any year. This proposed rule would not result in such an expenditure, and for this reason, no additional actions were deemed necessary under the provisions of the UMRA.

E. Paperwork Reduction Act—Collection of Information

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt.

DHS invites the general public and other Federal agencies to comment on the impact of the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument. DHS calls 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. If you have questions concerning this proposal, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document. DHS also welcomes comments on the burden(s) associated with the potential conditions for using alternative procedures, as described earlier in this preamble. Following this period of public comment, DHS may seek OMB approval to further revise the collection of information to accommodate such potential conditions following publication of the final rule, pilot program, or alternative procedures, if and when appropriate.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule.

Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

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:* 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 or other for-profit. 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, making employment of unauthorized aliens unlawful and diminishing the flow of illegal workers in the United States. 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 I–9 for Employers is 55,400,000 and the estimated hour burden per response is 0.35 hours. The estimated total number of respondents for the information collection I–9 for Employees is 55,400,000 and the estimated hour burden per response is 0.17 hours. The estimated total number of respondents for the information collection Record Keeping is 20,000,000 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 30,408,000 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

A rule has implications for federalism under section 6 of Executive Order

13132, Federalism, if it has substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS has analyzed this proposed rule under that Order and has determined that it does not have implications for federalism.

G. Executive Order 12988: Civil Justice Reform

This proposed 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 has analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. DHS has determined that it is not a ''significant energy action'' under that order because it is a ''significant regulatory action'' under Executive Order 12866 but 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 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 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 action 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 rule is not part of a larger action. This rule presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, more detailed NEPA review is not necessary. DHS seeks any comments or information that may lead to the discovery of any significant environmental effects from this rule.

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

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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

This proposed rule would 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

Executive Order 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. DHS has reviewed this proposed rule and determined that this proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children. Therefore, DHS has not prepared a statement under this executive order.

M. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation, test methods, sampling procedures, and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not use technical standards. Therefore, DHS did not consider the use of voluntary consensus standards.

N. Family Assessment

DHS has determined that this action would 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).

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students, Verification of identity and employment.

Regulatory Amendments

Accordingly, DHS proposes to amend 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; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 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 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; 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.

[FR Doc. 2022–17737 Filed 8–17–22; 8:45 am]

BILLING CODE 9111–28–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590–AB21

2023–2024 Multifamily Enterprise Housing Goals

AGENCY: Federal Housing Finance Agency.

ACTION: Proposed rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or the Agency) is issuing a proposed rule with request for comments on the multifamily housing goals for Fannie Mae and Freddie Mac (the Enterprises) for 2023 and 2024. The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (the Safety and Soundness Act) requires FHFA to establish annual housing goals for mortgages purchased by the Enterprises. Under FHFA's existing housing goals regulation, the multifamily housing goals for the Enterprises include benchmark levels through the end of 2022 based on the total number of affordable units in multifamily properties financed by mortgage loans purchased by the Enterprise each year. This proposed rule would amend the regulation to establish benchmark levels for the multifamily housing goals for 2023 and 2024 based on a new methodology—the percentage of affordable units in multifamily properties financed by mortgages purchased by the Enterprise each year.

DATES: FHFA will accept written comments on the proposed rule on or before October 17, 2022.

ADDRESSES: You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590–AB21, by any one of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AB21.
- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590–AB21, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590–AB21, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

FOR FURTHER INFORMATION CONTACT: Ted Wartell, Associate Director, Housing and Community Investment, Division of Housing Mission and Goals, (202) 649–3157, *Ted.Wartell@fhfa.gov;* Padmasini Raman, Supervisory Policy Analyst, Housing and Community Investment, Division of Housing Mission and Goals, (202) 649–3633, *Padmasini.Raman@fhfa.gov;* Kevin Sheehan, Associate General Counsel, Office of General Counsel, (202) 649–3086, *Kevin.Sheehan@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments germane to the proposed rule into consideration before issuing a final rule. Copies of all such comments will be posted without change, including any personal information you provide such as your name, address, email address, and telephone number, on