

October 17, 2022

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

Dear Ms. Hageman:

**Business Roundtable Comments on
"Optional Alternatives to the Physical Document Examination Associated With
Employment Eligibility Verification (Form I-9)"
Department of Homeland Security Docket No. ICEB 2021-0010**

INTRODUCTION

Business Roundtable appreciates the opportunity to respond to the Notice of Proposed Rulemaking (NPRM) that U.S. Immigration and Customs Enforcement (ICE) published on August 18, 2022, "Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9)."

The CEO members of Business Roundtable lead America's largest companies, which account for half of the value of all publicly-traded companies in the United States. They support public policies that enable U.S. economic growth and job creation and that expand economic opportunity for all Americans. This includes efforts to continue to strengthen the pipeline of American workers as well as to ensure lawmakers enact sound immigration policies that support our economy.

Business Roundtable has conducted extensive research and released in-depth reports that examine immigrants' contributions to the American economy;ⁱ compare U.S. immigration policies to those of other countries;ⁱⁱ and propose practical solutions for fixing the country's immigration system.ⁱⁱⁱ Business Roundtable continues to encourage Congress to fix our country's broken immigration system on a bipartisan basis.

Specifically, we encourage the Department of Homeland Security (DHS) to:

- Finalize this regulation to formalize the agency's authority to allow alternative document review procedures;
- Make remote verification a permanent option, without a subsequent in-person review requirement; and
- Continue to extend the temporary policy and provide proactive guidance to employers.

Business Roundtable appreciates the Department's efforts to reduce burdens on employers, better utilize resources and improve government efficiency. We stand ready to assist in efforts to modernize immigration processes.

SUPPORT FOR THIS AGENCY ACTION AND RECOMMENDATIONS

DHS should finalize this regulation to formalize its authority to allow alternative review processes.

Business Roundtable welcomed ICE's decision to provide the needed flexibility to employers completing Form I-9 during the COVID-19 pandemic. We have long advocated for policies that improve efficiency and reduce paperwork burdens on employers, and that can be done in an equally secure manner. In December 2021, Business Roundtable submitted a detailed response to the U.S. Citizenship and Immigration Services (USCIS) Request for Public Input, "Remote Document Examination for Form I-9, Employment Eligibility Verification" in which we encouraged the agency to make remote verification permanent; eliminate the subsequent in-person review requirement; and increase flexibility around acceptable documents to prevent disruptions in employment.^{iv} We also recommended that DHS modernize employment eligibility verification processes in our response to the agency's April 2021 Request for Input, "Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services."

Our members' companies and their employees have benefited significantly from the temporary "virtual" policy. We encourage DHS to finalize this regulation without delay to formalize its authority to allow alternatives to in-person document review. Once the final regulation is in place, we urge the agency to move quickly to make fully remote verification a permanent option for employers.

A permanent remote inspection process will benefit both employers and employees.

Remote inspection has made Form I-9 processes more efficient for both the onboarding of new hires and the reverification of current employees. Business Roundtable requests that DHS make remote inspection a permanent option for employers, without a subsequent in-person review requirement. We submit that allowing this option as a time-limited pilot program would be detrimental to employers and employees, given significant costs and compliance risks associated with abrupt changes in I-9 processes. Many companies would decline to pursue alternative review methods if they know they will have to adapt their I-9 procedures soon thereafter. Given the positive feedback USCIS received from the business community in 2021 regarding the temporary ICE policy, DHS should be prepared to move forward and allow remote document inspection on a permanent basis. Our members have seen significant benefits and improved compliance as a result of remote review, and we encourage the agency to implement new processes in a way that enables as many employers as possible to utilize them.

In transitioning to the "virtual" policy, Business Roundtable members' companies reported they were able to adapt to and create new processes to comply with their I-9 obligations with no insurmountable difficulties. Employers experienced greater challenges completing physical document reviews using authorized agents, which we describe in more detail below. Remote verification reduced administrative burdens and costs associated with the I-9 process and helped employers navigate the rise in remote work across the United States. The remote process eliminated travel and lodging costs many companies historically covered to enable remote hires to complete onboarding at company offices. It also reduced expenses and administrative overhead associated with large in-person onboarding events. The temporary policy has enabled human resources (HR) teams to manage their I-9 programs centrally, even with large workforces spread throughout the country.

For employees, remote verification improved the onboarding process by streamlining it and eliminating the need to travel to a company location. It has also expanded their access to employment opportunities. Business Roundtable members' companies found that this process especially benefited employees with limited mobility or disabilities by enabling them to complete Form I-9 in a safe and secure setting.

Notably, the temporary policy has strengthened employers' compliance with regulatory requirements. Enabling companies to centralize their Form I-9 programs in-house minimized errors, since experienced HR and immigration teams understand how to identify acceptable documents and complete the form correctly. Both employees and employers were better able to complete verification within the regulatory timelines, dramatically improving timely completion. Since employees no longer had to travel to an office to meet with the employer in person, remote review eliminated many instances of late completion due to circumstances outside the parties' control (e.g., severe weather events).

DHS should eliminate the subsequent in-person review requirement.

The only drawbacks Business Roundtable members' companies reported under the temporary ICE policy resulted from the subsequent in-person review requirement. We respectfully request that the government eliminate that requirement—as it relates to the temporary ICE policy that is currently in place, as well as any future remote review option—and allow employers to complete the entire Form I-9 process remotely.

In-person review is impractical because U.S. employers have completed a large volume of initial Forms I-9 and reverifications under the temporary policy. Requiring completion of in-person review within three business days of the policy's termination would place an unreasonable burden on employers and employees. Thousands of employees reporting to their employers for in-person review in a short window of time would create an operational bottleneck and overwhelm business operations. Furthermore, the in-person review is duplicative and unnecessary. We urge the agency to establish a one-step remote verification process. We offer specific feedback below regarding the measures suggested in the NPRM to reduce risks to the integrity of any alternative procedure.

Business Roundtable members' companies that completed "virtual" verifications (e.g., via video conferencing, e-mail, fax, etc.) reported that they were able to meet the legal standard for document review. Companies found that using video conferencing technology to examine documents in the hands of employees enabled them to determine whether the documentation appeared to be genuine and reasonably related to the employee, just as they would in the employee's physical presence. The follow-up physical review is particularly duplicative for E-Verify employers who have already received confirmation from the government that their employees are work-authorized. It also creates unnecessary hardship for employees who must travel to meet with their employer.

Additionally, the in-person review requirement has created challenges around the use of authorized representatives. Many companies chose not to transition fully to a centralized remote inspection regime, even though they were eligible to, because they would be required to subsequently complete an in-person review. Instead, they opted to rely on the "authorized representative" process—which predated the temporary ICE guidance—to complete the Form I-9. Others completed remote verification initially but then used an authorized representative for the subsequent in-person review.

Employers reported multiple challenges in utilizing third-party authorized representatives, including:

- Costs and administrative burdens to create training materials, develop processes to provide guidance to authorized representatives and leverage third-party vendors.
- Risk of a higher rate of errors in completing Form I-9, requiring employers to assist authorized representatives through review, corrections and follow-up correspondence. In many cases, this additional time spent on each verification delayed completion, resulting in timeliness violations or delayed start dates.
- Employee concerns about presenting their documents to an authorized representative, as it did not seem “official” and raised privacy concerns given the highly sensitive nature of I-9 documentation.
- Difficulty managing a decentralized process on a large scale, with employees and authorized representatives throughout the United States.

The agency should maintain the integrity of the employment eligibility verification process, while modernizing it to reduce burdens on employers and employees.

Business Roundtable acknowledges that DHS must preserve the integrity of the employee eligibility verification process to ensure employers continue to comply with their legal obligations under an alternative procedure. We submit that allowing fully remote verification will increase overall employer compliance with verification obligations, as it will lower costs and streamline company practices. A virtual Form I-9 process will also allow more companies to centralize management and storage of records, making it easier and less costly for the government to determine compliance during routine Form I-9 audits. We encourage the agency to consider these benefits and make remote document review available to as many employers as possible.

The NPRM outlines several measures the agency is considering:

1. *Document retention requirements, including retaining copies of documentation employees present remotely.* Business Roundtable supports this suggestion as a condition of allowing fully remote document inspection, so long as employers have discretion regarding the format and can retain documents electronically. ICE already requires companies to retain copies of any documents they review virtually under the temporary policy, and our members’ companies have not reported any difficulty complying with that requirement. Additionally, companies enrolled in E-Verify have a legal obligation under that program to retain copies of certain documents.
2. *Training requirements on detecting fraudulent documents remotely and avoiding discrimination in the I-9 process.* Business Roundtable shares the government’s goal of ensuring employees who complete the Form I-9 have sufficient training to detect fraudulent documents and avoid discrimination in the employment eligibility verification process. We offer the following recommendations in connection with this potential requirement.
 - DHS should make clear that the legal standard for document review under immigration law and regulations will remain the same. The regulations require employers to “ensure that the documents presented appear to be genuine and to relate to the individual.”^{vi} USCIS guidance states that “[y]ou are not required to be a document expert. You must accept documents that reasonably appear to be genuine and relate to the person presenting them.”^{vi} Without clear guidance that the training obligation will not alter the existing legal standard, we have concerns that employers

could inadvertently run afoul of their antidiscrimination obligations enforced by the U.S. Department of Justice Immigrant and Employee Rights Section. Any implication of a higher review standard could also create employment law discrimination risks.

- Training should be available on-demand on the internet in an accessible location, and it should be a one-time requirement for verifiers. The agency should allow employers flexibility in how they retain documentation of attendance.
- DHS should only require training for personnel employed by the company who will be completing the Form I-9 in a fully remote environment. The agency should not impose any training requirements on authorized representatives not employed by the company whom the company designates to complete in-person document review.
- As an alternative to a formal training, DHS could consider publishing a "job aide" that verifiers could reference during the I-9 process, to assist them in spotting fraudulent documents.

3. *Limits on employers who will be able to participate (e.g., E-Verify enrollment, limitations on employers who have been the subject of a fine, settlement, or conviction related to the employment eligibility verification process).* Business Roundtable encourages the government to make any alternative review procedure available to as many employers as possible. For the reasons discussed above, we believe additional flexibility will help employers strengthen their I-9 programs. However, we do recognize that as part of its efforts to maintain the integrity of the process, DHS should evaluate whether to narrow the population of employers that may use an alternative review method.

- Access to virtual verification could be limited to those employers enrolled in E-Verify who do not have a history of willful I-9 violations or a pattern of practice of violations. As E-Verify employers will have already received confirmation from the government that their employees are work-authorized, a one-step, remote process should be available to them.
- Regarding past violations, we urge the agency to only consider limitations on employers that have a history of serious violations, and not penalize employers for minor and unintentional violations. If DHS pursues such limitations, the agency must ensure that there is a clear, appropriate structure in place to determine which employers should be subject to them and for how long.

DHS should continue to extend the temporary "virtual" policy until it makes remote verification a permanent option and provide clear guidance to employers.

On October 11, 2022, ICE announced an extension of the temporary I-9 policy until July 31, 2023. Business Roundtable welcomes this extension, which will benefit both employers and employees. We ask that the agency continue to provide proactive guidance and keep the flexibilities in place until a permanent remote option is available. Our members' companies must be able to plan and maintain compliant Form I-9 and E-Verify programs. As explained above, we also encourage ICE to eliminate the subsequent in-person review requirement under the temporary policy.

CONCLUSION

Business Roundtable supports this NPRM and encourages the agency to finalize it without delay. With the regulation in place, we urge DHS to move quickly to make fully remote employment eligibility verification available to employers on a permanent basis. We have welcomed the agency's approach to obtaining input from employers about their experiences with the remote Form I-9 process as well as their suggestions for moving forward.

The pandemic has demanded flexibility, and governments, financial institutions and other entities have pivoted to an electronic environment in highly sensitive settings. The Form I-9 process should similarly reflect the realities of today's workforce and the future of work. Business Roundtable encourages DHS to consider the comments to this NPRM and the 2021 USCIS RFI and find solutions that reduce paperwork burdens while protecting the integrity of the process and ensuring all employers comply with their legal obligation to verify the identity and work authorization of employees in the United States.

Business Roundtable appreciates the opportunity to respond to this Notice of Proposed Rulemaking and looks forward to continued communication with the agency on these and other issues surrounding the United States immigration system. Please contact Dane Linn, Senior Vice President, Business Roundtable, at dlinn@brt.org if you have any questions.

ⁱ Business Roundtable. (2017, September). *Economic effects of immigration policies: a 50-state analysis*. Retrieved from

<https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Economic%20Effects%20Immigration.pdf>.

Business Roundtable. (2014, June). *Contributing to American growth: the economic case for immigration reform*. Retrieved from

https://s3.amazonaws.com/brt.org/archive/0_immigration_report/2014.06.06%20BRT%20Immigration%20Report.Contributing%20to%20American%20Growth.pdf.

ⁱⁱ Business Roundtable. (2015, March). *State of immigration: how the United States stacks up in the global talent competition*. Retrieved from <https://s3.amazonaws.com/brt.org/BRT-immigrationreport-2.pdf>.

ⁱⁱⁱ Business Roundtable. (2013, April). *Taking action on immigration: realistic solutions for fixing a broken system*. Retrieved from

https://s3.amazonaws.com/brt.org/archive/reports/20130405_Taking_Action_on_Immigration.pdf.

^{iv} Docket No., USCIS-2021-0022, Comment ID USCIS-2021-0022-0299. We request that Business Roundtable's prior comment be considered part of the rulemaking record for the present Notice of Proposed Rulemaking.

^v 8 CFR § 274(b)(1)(ii)(A); Immigration and Nationality Act § 274(b)(1)(A).

^{vi} *Examining Documents*, U.S. Citizenship and Immigration Services (last updated July 10, 2020), <https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents/examining-documents>.