U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) PROPOSES TO RESCIND THE "NO-MATCH" SAFE-HARBOR RULE

On Wednesday, August 19, 2009, the U.S. Department of Homeland Security (DHS) published in the Federal Register a proposed rule rescinding the Social Security No-Match Safe Harbor Rule promulgated August 15, 2007.

The No-Match Safe Harbor Rule amended employment eligibility verification regulations to specifically allow an employer's receipt of a "no-match" letter to be used as evidence that the employer "knowingly" employed unauthorized workers, unless certain specific steps were taken by the employer to take advantage of a "safe harbor" defense. Specifically, the regulation listed steps that must be taken by employers upon receipt of a Social Security "no match" letter. Failure to take the required steps within 93 days following receipt of the "no match" letter could result in a finding that the employer knew or should have known that the employee was unauthorized to work. Essentially, if the employer failed to follow the prescribed steps, the employer could be found to have had *constructive knowledge* of the employee's unauthorized status, in violation of the Immigration & Nationality Act and regulations prohibiting the knowing hire or continued employment of persons not authorized for employment. The regulation was quickly subject to litigation and a Federal Court injunction.

In justifying the decision to rescind the rule, the DHS emphasized that the government's enforcement focus is now on increased worksite compliance "through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs." Employers have recently seen that the government's new focus also includes increased worksite investigations, following the well-publicized, single-day launch of more than 600 such investigations nationwide in July 2009. Additionally, beginning September 8, 2009, the new E-Verify requirement will go into effect for certain federal contractors. It is possible that future initiatives will include expansion of this requirement to additional employers, and eventually to all employers.

Recession of Rule May be More Dangerous For Employers than Helpful

The announcement of the rule in August of 2007 was introduced as a warning of stepped-up enforcement of existing immigration statutes and an opportunity for employers who were potentially violating the law to rest assured of non-prosecution if they followed enumerated steps.

With the rule's withdrawal the certainty of protective steps goes away.

Everything that could have been prosecuted before can be prosecuted now, and the government is saying *will* be prosecuted now. Employers should be aware that failure to take reasonable action in response to a "no-match" letter can be used by the government as evidence of an employer's constructive knowledge of unauthorized employment.

Because the employment eligibility verification process, and subsequent efforts to address "no-match" letters, should be handled consistently in accordance with established policies in order to avoid violations of certain anti-discrimination provisions of the Immigration & Nationality Act, employers must walk a fine line in addressing employment eligibility and "no-match" issues. What appears to be "reasonable" action might transgress certain other legal requirements. Because this is such a complex and evolving area of law, employers are strongly advised to consult qualified immigration counsel for advice and consultation regarding the development and implementation of appropriate policies and procedures that can reduce the employer's exposure to potential liability.

For more information on how Foster Quan can assist your company with the development and implementation of appropriate policies governing reasonable steps that should be taken to address "no-match" letters, please contact your Foster Quan immigration attorney, or visit our website at www.fosterquan.com. Foster Quan's Workforce Compliance practice group offers full-service legal representation for matters relating to Form I-9 Employment Eligibility Verification and related immigration compliance.