



June 9, 2008

Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
425 I Street, NW, Room 7257
Washington, D.C. 20536

Submitted Electronically Via Federal eRulemaking Portal: www.regulations.gov

**Re: Docket # ICEB-2008-0002
Comments on Interim Final Rule Entitled “Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions,” 73 Fed. Reg. 18944**

Dear Sir or Madam:

The Securities Industry and Financial Markets Association (SIFMA¹) is pleased to submit these comments in response to the Department of Homeland Security’s interim final rule on “Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions.” While we welcome the expansion of H-1B cap gap relief for F-1 nonimmigrants, we are concerned about the limitations placed on eligibility for a 17-month extension of OPT which substantially reduce the benefits that the DHS rule seeks to provide.

The securities industry employs nearly 830,000 workers in the United States alone. SIFMA member companies are among the leading recruiters and employers of highly skilled workers, including thousands of F-1 graduates of U.S. educational institutions during their periods of Optional Practical Training (OPT). Competition from both developed and developing countries for these talented foreign students, however, is becoming fierce. Our members thus are keenly interested in this interim final rule. We applaud DHS’s effort to extend the OPT period for many students. As DHS recognizes, there is a great need for the period of OPT to reflect the restricted time frame in which H-

¹ SIFMA represents more than 650 securities firms, asset managers and banks in all financial markets in the United States and around the world. SIFMA works with Congress and the Executive Branch to promote effective and efficient policies and regulations that expand and improve the financial markets, foster development of financial products and services, and create efficiencies for member firms while enhancing the public’s trust in the markets and the securities industry.

1B petitions may be filed and the difficulty that results from the high demand for and limited availability of H-1B visas.²

While we welcome the expansion of H-1B cap gap relief for F-1 nonimmigrants, we are concerned about the significant limitations placed on eligibility for a 17-month extension of OPT. The 17-month extension of OPT in the interim final rule contains substantial limitations that result from two requirements: the student must be in an initial period of OPT based on the completion of a degree program that is on the STEM Designated Degree Program List; and the student's employer must be registered in and in good standing with the E-Verify employment authorization verification program. We comment below on both of these requirements.

I. STEM Degree Requirement

- ***The OPT Program and U.S. Competitiveness***

SIFMA member companies are among the leading recruiters and employers of highly skilled graduates regardless of their citizenship status. Hiring and retaining the best qualified individuals is an important way for SIFMA members to differentiate themselves from competitors.

The optional practical training program for F-1 students fills an important need in SIFMA members' human resources programs, allowing members to recruit, train and develop highly skilled and educated professionals at the early stages of their careers and fill highly specialized needs for language, quantitative, and business skills that promote competitiveness in highly complex business and product lines. But the time limitations of the OPT program and the significant competition among U.S. employers for the very limited number of H-1B visas available each year mean that SIFMA members are hampered in their ability to retain these highly sought after professionals and capitalize on their investment in the development of these workers. Highly skilled foreign graduates of U.S. universities, unable to remain and work in the United States, are increasingly turning to other countries, taking the skills, education and training they obtained in the United States to other countries. The "brain drain" has not gone unnoticed by competing economies in the European Union and other regions, which recognize that enhanced migration opportunities for highly skilled foreign nationals are a way to increase their own competitiveness.³

² While the extension of the OPT period for some F-1 students will alleviate problems caused by the limited availability of H-1B visas, the underlying shortage of H-1B visas will remain a significant obstacle to employers' efforts to retain temporary workers. SIFMA continues to support an increase in H-1B visas sufficient to respond to the high demand for such visas.

³ See, e.g., the European Commission's 2007 report, *Europe in the Global Research Landscape*, at ftp://ftp.cordis.europa.eu/pub/foresight/docs/prospective-report2007_en_12_web.pdf.

- ***Broadening the 17-Month OPT Extension to Include Other Fields of Study Critical to U.S. Competitiveness***

The Department of Homeland Security's new regulation is an important recognition that the United States must be able to retain highly skilled and educated foreign nationals in order to maintain and enhance its global competitiveness. However, limiting the 17-month extension of optional practical training to graduates in science, technology, engineering and mathematics (STEM) fields ignores other fields of study that contribute significantly to U.S. economic competitiveness. Chief among these are business and social science fields. Foreign nationals constitute an increasing percentage of students enrolled in degree programs in these fields. One eminent business administration program, the Amos Tuck School of Business at Dartmouth, has estimated that 37% of its graduate candidates are foreign nationals.⁴ According to the Council of Graduate Schools, the leading organization representing U.S. graduate educational institutions, foreign nationals also make up a growing percentage of graduate programs in economics and other social sciences.⁵ If the US is to retain its position of leadership, it must remain open and welcoming to talented individuals in *all fields of study*.

Business-related fields encompass mathematical and technological skills that enhance the competitiveness of U.S. companies. Business skills also support the financing, development and marketing of technological advances. While technological innovations play a significant role in enhancing U.S. competitiveness, it is the ability of U.S. companies to commercialize these innovations that results in economic development.

Through their sophisticated understanding of the global marketplace, highly skilled businesspersons identify areas of market demand for scientific and technological research and development (R&D), drive financing for R&D efforts, plan and implement marketing and sales strategies for new technologies, and guide continued development of existing technologies, to ensure that U.S. businesses maintain competitive advantage. Indeed, business methods themselves have been recognized as patentable innovations by the U.S. Court of Appeals for the Federal Circuit, our country's highest judicial body devoted to adjudicating intellectual property matters.⁶ To omit business fields from the 17-month OPT extension is to limit U.S. companies' access to highly educated individuals who possess the fundamental skills that drive and support technological innovation in the marketplace. These students can easily seek opportunities in the European Union, Australia, Canada, and South Korea, all of which have been actively recruiting foreign talent and attempting to lure foreign students away from the United States.

⁴ "Top U.S. Business Schools Draw More International Students," Voice of America News, November 17, 2007, at <http://voanews.com/english/archive/2007-11/2007-11-10-voa8.cfm>.

⁵ Council of Graduate Schools, *Findings from the 2007 Council of Graduate Schools International Graduate Admissions Survey Phase III: Final Offers of Admission and Enrollment*, November 2007, at http://www.cgsnet.org/portals/0/pdf/R_intltenr107_III.pdf.

⁶ *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

- ***Expanding the Designated STEM Degree List to Include Other Critical Scientific Fields***

The list of STEM degrees designated for the 17-month OPT extension should also be expanded to include other science and technology fields that have been identified – along with the physical sciences, engineering, mathematics and technology – as crucial to U.S. competitiveness. Principal among these are social science degrees, including economics. These fields are omitted from DHS’s list, even though they are among the critical science degrees identified in the National Science Foundation survey that is the basis for the regulation’s focus on STEM fields.⁷

Finally, while SIFMA applauds the decision to include actuarial sciences on the list of designated STEM degrees, related management sciences in the same and similar degree classifications should also be designated as STEM fields. In particular, the list should be expanded to include Management Sciences and Quantitative Methods (Category 52.13) and Management Information Systems and Services (Category 52.12), which involve similar advanced levels of mathematical and statistical analysis.

II. E-Verify Requirement

The interim final rule contains specific eligibility requirements for the 17-month extension of OPT for STEM graduates, including the requirement that the student’s employer be enrolled in the E-Verify program. USCIS recently issued a revised Form I-765 that includes a field in which to enter the employer’s name and E-Verify registration number. The Form I-765 must be submitted to USCIS, along with a Form I-20 recommending the 17-month extension of OPT, in order for the OPT extension to be granted.

While some SIFMA members are enrolled in the E-Verify program, we believe the OPT extension rule is not the appropriate vehicle to encourage greater use of the program.

- ***Employers Need Time and Resources to Implement Proper Use of E-Verify***

Less than one percent of U.S. employers are currently enrolled in E-Verify, so the vast majority of employers wishing to retain or hire an OPT STEM graduate will not already be enrolled in the program.⁸ As a result, the employers will need to enroll in E-Verify prior to the submission of the OPT extension application by the STEM graduate.

There has been substantial debate about the amount of time and resources needed to properly implement the use of E-Verify within a company.⁹ Despite these varying

⁷ See National Science Foundation, *Science and Engineering Indicators 2008*, at <http://www.nsf.gov/statistics/seind08>.

⁸ See 73 Fed. Reg. 18952 (April 8, 2008).

⁹ See *Arizona Contractors Ass’n, Inc. v. Candelaria*, 534 F.Supp.2d 1036, 1043 (D.Ariz. Feb 07, 2008)(“The average cost to set-up E-Verify is \$125, with 85% of employers spending \$100 or less. The average annual operation cost is \$728, with 75% of employers spending \$100 or less annually. Though this

estimates, proper implementation and use of E-Verify unquestionably requires the devotion of time and resources at each hiring location within a company. E-Verify is currently a voluntary program and, as a result, employers are able to carefully consider whether enrollment in E-Verify is economically and logistically feasible for the company as a whole and for each hiring site prior to enrollment. Including a mandatory E-Verify enrollment requirement in the interim final rule is contrary to this process of careful consideration and implementation.

The E-Verify registration requirement in the interim final rule will often require employers to make the decision to enroll in E-Verify and develop the required compliance procedures within a very short time frame. For example, an employer may wish to hire a STEM graduate whose current period of OPT expires in two weeks. Since the graduate's work authorization is automatically extended while the employment authorization extension application is pending, the employer would be able to hire the graduate and ensure continuity of work authorization. If the employer is not currently enrolled in E-Verify, it must then enroll in E-Verify quickly in order to support the 17-month extension of work authorization for the prospective employee.

Although initial enrollment in E-Verify is a simple process, effective implementation of the E-Verify program requires far more than simply signing up online. The employer must also have procedures to verify the employment authorization of all future hires once enrolled. Human resources professionals need to be trained in the use of E-Verify and existing I-9 verification protocol must be altered to incorporate the E-Verify component. For large companies, these changes could involve a large number of human resources employees. For smaller companies, the burden of learning and using E-Verify is likely to fall upon one or two individuals. In all cases, however, proper implementation of E-Verify will require carefully considered changes to existing procedures. The attachment of the E-Verify requirement to the OPT extension rule may encourage enrollment while not allowing sufficient time to ensure that the enrollment is effectively implemented.

- ***E-Verify Requires Further Development in Order to Handle a Large Volume of Registered Employers***

According to the most recent estimates, about 61,000 employers have enrolled in E-Verify and about half of those employers are active users.¹⁰ A substantial number of

is considerably less than the modest expenses the court found in *Arizona Contractors I*, such costs of compliance are still sufficient to provide Plaintiffs with standing.”)(internal citations omitted); Westat, “Findings of the Web Basic Pilot Evaluation,” at page 104 (September 2007), available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf> (last accessed June 5, 2008). (“The average costs to set up and maintain the Web Basic Pilot vary considerably depending on employer characteristics. The average set-up costs for employers in different industries ranged from \$61 (accommodation/food services industries) to \$405 (mining, utilities, or construction) Average maintenance costs ranged from \$144 for employers in “other industries” to \$1,795 for those in public administration/social services. Not surprisingly, maintenance costs were higher for employers that verified employees at multiple locations than for those that verified at only one location (\$1,653 versus \$490).”).

¹⁰ See General Accounting Office, “Challenges Exist in Implementing a Mandatory Electronic Employment Verification System,” Testimony Before the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives, at p. 3 (May 6, 2008).

employers may decide to enroll in E-Verify as a result of this interim final rule. In fact, DHS estimates that 5,300 employers could be required to enroll in E-Verify as a result of the interim final rule.¹¹ It is not clear, however, whether E-Verify currently has the capacity to handle a large surge in the number of work authorization verification queries submitted.

If enrollment increases as a result of this interim final rule, SSA and DHS will also experience an increase in inquiries from individuals seeking to resolve erroneous tentative nonconfirmations. The interim final rule does not discuss whether SSA and DHS have the resources to handle a sudden surge in inquiries or if any additional resources will be allocated in the future.

In addition, recent estimates indicate that about 92 percent of E-Verify queries are confirmed within seconds of submission.¹² The majority of the remaining “tentative nonconfirmations” result from information in the Social Security Administration (SSA) database that is incorrect or out of date.¹³ USCIS has recently begun to implement enhancements to E-Verify that should decrease the error rate for naturalized citizens.¹⁴ Despite the initiation of these enhancements, the error rate in the E-Verify databases remains significant.

This error rate needs to be reduced before E-Verify will be ready for widespread use. Tentative nonconfirmations, and subsequent efforts to resolve them, place an additional burden on employers and employees alike. Employers must continue to employ an individual who is subject to a tentative nonconfirmation and allow the employee time to resolve the matter. If the employee is not able to resolve the tentative nonconfirmation, but the employer believes that the work authorization documents are entirely genuine, the employer is placed in a very difficult position. It must decide whether to terminate the employment of an individual who appears to be authorized to work or continue to employ the individual and risk applicable penalties.¹⁵

Given the serious consequences of tentative nonconfirmations, the percentage of tentative nonconfirmations resulting from database errors should be very small before employers are required to enroll in E-Verify. SIFMA supports DHS and SSA efforts to reduce errors and believes the database enhancements initiated this month to decrease the mismatch rate for naturalized citizens are a step in the right direction. USCIS and SSA plan to introduce additional enhancements aimed at reducing E-Verify errors relating to U.S. citizens. All scheduled enhancements should be complete before E-Verify enrollment is required in regulations such as this interim final rule.

¹¹ See 73 Fed. Reg. 18952 (April 8, 2008).

¹² See *supra*, note 7 at p. 12.

¹³ See *Id.*

¹⁴ See USCIS News Release, “USCIS Announces Enhancements to E-Verify Program,” (May 5, 2008).

¹⁵ See 8 CFR §274a.10.

- ***An OPT Extension Rule is Not the Appropriate Mechanism to Encourage Employers to Enroll in E-Verify***

This interim final rule allowing for extension of OPT for certain F-1 nonimmigrants is not the appropriate mechanism for encouraging employers to enroll in E-Verify. As explained above, SIFMA member companies are among the leading recruiters and employers of highly skilled graduates regardless of their citizenship status. Because our industry is highly regulated, our members typically conduct extensive pre-hire background checks on potential employees. As such, SIFMA member companies do not frequently encounter problems with document fraud or new hires lacking proper work authorization documentation. Accordingly, the effect of the E-Verify enrollment requirement in the interim final rule is to impose an additional burden on employers who are already conducting effective work authorization verification through the I-9 process and other procedures. Although SIFMA supports DHS' effort to increase participation in the E-Verify program, more effective tools could be used to encourage companies to enroll.

The interim final rule also raises concerns about confidentiality of E-Verify enrollment numbers and possible inappropriate use of a company's proprietary information. The rule requires F-1 nonimmigrants to include an employer's E-Verify enrollment number on the I-765 Application for Employment Authorization requesting a 17-month extension of OPT. As a result of this requirement, employers will need to provide employees, or even prospective employees, with the E-Verify enrollment number. Our members are concerned that providing this information to F-1 nonimmigrants could lead to inadvertent distribution of the information or purposeful misuse of the enrollment number on unrelated applications. SIFMA suggests that if the E-Verify requirement is maintained in a final rule, an alternative system be developed for submission of the E-Verify enrollment number directly from the employer to USCIS.

We thank the Department of Homeland Security for this opportunity to submit comments on the interim final rule and would be happy to provide additional information necessary to facilitate a workable final rule.

Sincerely,

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David G. Strongin
Managing Director