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By electronic submission: www.regulations.gov

RE: Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students
80 Fed. Reg. 63376 (October 19, 2015)
RIN Number 1653-AA72

Dear Ms. Westerlund:

The U.S. Chamber of Commerce writes in response to the request for comments by the Department of Homeland Security (hereinafter referred to "DHS" or "Department") to the Notice of Proposed Rulemaking entitled *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 80 Fed. Reg. 63376 (October 19, 2015) (hereinafter referred to as "NPRM," or "proposal").

The Chamber and its members are pleased to see the agency act in an expeditious manner to issue this NPRM in order to prevent the STEM Optional Practical Training (OPT) Extension from expiring due to the ruling issued in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security* (hereinafter "*WashTech*").[1] Moreover, it is also reassuring to see the agency take concrete steps to improve upon the terms set forth in the 2008 Interim Final Rule that established the STEM OPT Extension and the Cap-Gap Relief provisions.[2]

[1] *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, Civil Action No. 14-529 (D.D.C. Aug. 12, 2015).
[2] 73 Fed. Reg. 18944 (Apr. 8, 2008).

At the same time, there are some provisions in the NPRM that are of concern to Chamber members. The impetus for our members' concerns is generally due to a lack of certainty with regard to an employer's obligations under the proposed rule. Be that as it may, the Chamber and its members are nevertheless confident that these concerns can be addressed through the notice-and-comment process.

The Chamber believes that the OPT Program, properly structured, helps employers address certain workforce needs at their companies. At the same time, the Chamber believes that the United States must work to expand domestic sources of talent in the STEM fields, as well as provide adequate protections to American STEM workers; our member companies share this commitment.[3] Companies need to innovate and develop cutting-edge technology in order to remain competitive in the global economy. The OPT Program and the STEM OPT Extension help companies achieve these goals, and they do so without undermining the domestic labor force.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

CURRENT LAW PROVIDES DHS WITH AUTHORITY TO ISSUE THIS RULE

Given that the Optional Practical Training (OPT) Program for F-1 students is still embroiled in ongoing litigation, the Chamber feels compelled to comment on the question of DHS's regulatory authority over the OPT program generally, as well as the agency's authority to promulgate a rule that allows certain F-1 students with STEM Degrees from U.S. universities the ability to extend their OPT status for an additional 24 months. Congress delegated broad authority to DHS to govern the admission of nonimmigrants into the U.S. The OPT program has been around for almost 70 years and Congress has never sought to limit or undermine the many rules governing the OPT program that have been implemented by both Republican and Democrat administrations. Therefore, in light of the broad authority granted by Congress to the executive branch over F-1 admissions into the U.S. and Congress' historical acquiescence to the executive branch's governance of the OPT program, the Chamber is of the opinion that the agency possesses the authority to issue this rule.

Congress delegated broad authority to the Department of Homeland Security when it was created in 2002 to issue regulations addressing the immigration laws of the U.S. This delegation included, among other things, broad powers to enforce the Immigration and

[3] For a full discussion of the Chamber's efforts in promoting STEM education and training in the United States, please reference the U.S. Chamber of Commerce's Statement for the Record on the Hearing before the United States Senate Committee on Judiciary for "Immigration Reforms Needed to Protect Skilled American Workers," hearing held March 17, 2015.
https://www.uschamber.com/sites/default/files/150316_statement_uscc_highskilledhearing_senatejudiciary.pdf

Nationality Act (hereinafter referred to as "INA"),[4] as well as specific instructions as to how executive branch agencies may issue regulations controlling how nonimmigrants would be allowed to enter and remain in the U.S.[5] This NPRM, like its predecessor rule from 2008, was promulgated by DHS pursuant to the authority vested in them by Congress in the INA. The basic subject matter contained in both the 2008 IFR and the current NPRM is concerned with the admission of F-1 students into the U.S., the duration of their status in the U.S., and the conditions under which they may maintain lawful status on their F-1 visa. All of these topics clearly fall under the purview of § 1184(a) of the INA, which allows DHS to issue regulations that govern the "admission of nonimmigrants into the U.S."[6]

The F-1 visa classification allows the entry of a "bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study…"[7] This visa classification is defined in the section of the INA that provides the definitions for all sorts of key terms of the Act. Congress defined many different terms in the Act, but Congress chose not to define the term "student," nor did it define "course of study." Under a typical *Chevron* analysis, the lack of statutory definitions provides one of many indications that these terms are ambiguous.

Further proof of the statute's ambiguity can be seen when one compares Congress' silence in defining these terms with several Congressional actions that specifically authorized employment for F-1 students[8] and exempted F-1 students from several wage taxes,[9] it becomes clear that even though these individuals are "students" coming to the U.S. "solely for the purpose of pursuing a course of study…," that language has not been interpreted to foreclose F-1 students from being employed in the U.S. At the same time, this language does not clearly state when employment is permitted either. Given this lack of clarity, one cannot help but conclude that this statutory text is ambiguous as to whether F-1 students can receive an extension on their OPT status to receive practical training with a U.S. employer after they

[4] See 8 U.S.C. § 1103(a)(1), which provides that the "Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens…". See also 8 USC §1103(a)(3), which states that the Secretary "shall establish such regulations…as he deems necessary for carrying out his authority under the provisions of this chapter." Both of these provisions provide broad authority to DHS to regulate this area of the law.
[5] 8 USC § 1184(a)(1) states that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General **may by regulations prescribe**…" (Emphasis added). While this section still refers to the Attorney General, this section of the INA has been administered by the DHS Secretary since DHS was created pursuant to its authority under 8 USC § 1103(a)(3).
[6] Id.
[7] 8 U.S.C. § 1101(a)(15)(F)(i).
[8] See Immigration Act of 1990 § 221, which created a pilot program that allowed F-1 students to be employed in a job unrelated to their course of study.
[9] See 26 U.S.C. § 3121(b)(19), which refers to exemption from the Federal Insurance Contributions Act; 26 U.S.C. § 3306(c)(19), which refers to the exemption under the Federal Unemployment Tax Act; and 42 U.S.C. §410(a)(19), which refers to exemption under the Federal Old-Age, Survivors, and Disability Insurance Benefit Program administered by the Social Security Administration.

graduate. As such, a reviewing court would likely then examine whether the provisions in the NPRM constitute a reasonable interpretation of the statute.

The second step in a likely *Chevron* analysis would be to examine the proposed regulatory text and determine whether the provisions in the NPRM are "arbitrary, capricious, or manifestly contrary to the statute."[10] There are many factors that strongly favor this rule qualifying as a reasonable construction of the relevant sections of the INA.

Since 1947, legacy INS and DHS have interpreted U.S. immigration law to allow foreign students to engage in employment for practical training purposes.[11] As early as 1983, legacy INS explicitly allowed foreign students to engage in post completion practical training.[12] There have been multiple occasions where Congress has amended the statutory provisions governing the admission of F-1 visa holders, none of which ever sought to overrule or significantly curtail the executive branch's authority to administer the OPT Program.[13] Of particular interest are the changes that were made by Congress in 1996 with regard to restricting the means in which F-1 student visa holders could enter the country when it passed the Illegal Immigration Reform and Immigrant Responsibility Act. Examining Section 214 of the INA, IRRIRA only sought to implement restrictions on the executive authority to regulate the treatment of certain F-1 students who enrolled in elementary or secondary schools. Congress could have implemented restrictions on how the executive branch could regulate F-1 students who wished to receive practical training after they graduated from a U.S. college or university, but they never did, which supports the argument that the NPRM is a reasonable interpretation of the INA.

In the Immigration Act of 1990, Congress authorized the creation of a pilot program which allowed F-1 student employment in positions that were "unrelated to the alien's field of study."[14] The creation of this program bolsters the argument that DHS's interpretation is reasonable in many ways, but the fact that Congress authorized this pilot program is illuminating because it raises the question – why would Congress authorize F-1 students to seek employment in fields unrelated to their studies and not similarly authorize employment

[10] Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 844 (1984).
[11] See Programmers Guild, Inc. v Chertoff, 338 Fed. Appx. 239, 244 (3d Cir.2009), citing 12 Fed. Reg. 5355, 5357 (INS) (Aug, 7, 1947).
[12] See 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983), which specifically allowed students to engage in practical training "after completion of the course of study."
[13] See Pub. L. No. 87-256. § 109(a), 75 Stat. 527, 534 (Sept. 21, 1961) , which allowed F-1 nonimmigrants to have their spouses and minor children accompany them; Immigration Act of 1990 § 221(a), which permitted F-1 nonimmigrants to engage in limited employment unrelated to their field of study; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 § 625, 110 Stat. 3009-546, 3009-699,which added limitations related to F-1 nonimmigrants at public schools; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 §§501-502, 116 Stat. 543, 560-63, which implemented various monitoring requirements for F-1 students; and Pub. L. No 111-306, §1, 124 Stat. 3280, 3280, which amended the F-1 visa category with respect to language training programs.
[14] See Immigration Act of 1990 § 221(a).

that was related to their studies? The answer to this question is that INS had issued a rule in 1989 that authorized students to be employed in a field related to their studies and that same rule permitted those F-1 students to be employed following their graduation.[15] The logical conclusion to draw here is that Congress only acted explicitly to authorize F-1 students to receive post-completion training in fields unrelated to their studies because the law already allowed post-completion training in fields related to the student's studies.

This history of the OPT program, which stretches back to 1947 and has explicitly allowed employment and training after graduation since 1983, has never been undone by any act of Congress. Effectively, Congress has accepted the rulemaking process that has allowed certain F-1 students to be employed after graduation under the OPT program, which also includes a select groups of F-1 graduates who can have their OPT status extended beyond the initial 12 month period if they received a STEM degree from a U.S. university. In sum, it is clear that DHS is acting well within its regulatory authority in promulgating this NPRM.

OPT EXTENSION IMPROVEMENTS WHEN COMPARED TO THE 2008 RULE

Lengthened STEM OPT Extension Period

The Chamber supports DHS's proposal to lengthen the extension period of OPT from 17 months to 24 months in the NPRM. DHS appropriately notes, and our members agree, that "the length of any extension should aim to produce an optimal educational experience in the relevant field of study..."[16] The NPRM notes that many research grants awarded through the National Science Foundation (NSF) are for a time period of up to three years, which fits perfectly with the proposals' 24 month extension for STEM graduates. This two year period, combined with the initial 12-month OPT period, provides a total duration of OPT that would provide the individual OPT recipients and their employers with more certainty that there will not be a disruption throughout the length of the project.

This proposed change is also beneficial outside of the grant research context. Chamber members that are in various types of businesses, from information technology to manufacturing, will have more certainty with respect to their labor needs because their employees are given seven additional months of valid work status in the U.S. Anecdotes from our members informed us that in order for them to get new hires up to speed and familiarized with company processes, it generally requires approximately 2-3 years' time, which fits in line with DHS's proposed extension. In addition, this increased extension period offers all employers of OPT recipients more opportunities to petition for those workers to obtain other employment-based visas, which will provide further certainty to businesses with regard to their labor needs. Giving employers more opportunities to seek longer term status for these

[15] See 8 C.F.R. §214.2(f)(10) (1989), which authorized F-1 students to engage in practical training "after the completion of studies" upon the certification that "the proposed employment…is related to the student's course of study."
[16] 80 Fed. Reg. 63376, 63385 (Oct. 19, 2015).

types of individuals decreases the possibility of future workplace disruptions brought about by the need for these individuals to leave the country once their OPT status is exhausted.

Utilizing Prior STEM Degrees to Qualify for the STEM OPT Extension

The Chamber was pleased to see that NPRM proposes to allow individuals to use prior STEM degrees as the basis for a STEM OPT Extension.[17] This will provide greater access for more talented individuals to avail themselves of the increased educational and training opportunities with U.S. employers through the program. The Chambers finds that DHS's restriction on the need for this prior degree to have been earned by the individual within 10 years of the individual's application for the STEM OPT Extension is a reasonable requirement, given that innovations in technology occur so rapidly such that 10 year-old technology is oftentimes obsolete by today's standards.

One unfortunate limitation placed upon the use of the STEM OPT Extension in the NPRM is the outright ban on the use of degrees obtained from foreign institutions of higher education.[18] The Chamber understands and fully appreciates the desire of DHS to "further one's course of study in the United States."[19] However, in the case of an individual who earned the equivalent of a bachelor's degree in a STEM field outside of the U.S. and an advanced degree in a non-STEM field from a U.S. university, it stands to reason that such an individual should be entitled to avail themselves of the extension provided they meet all of the other criteria set forth in the NPRM since these individuals did go to school in the U.S. and earned graduate degrees from U.S. universities. Unfortunately, the agency states in the NPRM that STEM degrees earned outside of the U.S. will not be permitted to qualify under the program "due to the difficulty in determining the equivalency of a degree obtained at a foreign institution…"[20] This justification offered by DHS is unpersuasive because foreign degree equivalency is a widely-accepted practice in many different employment-based immigration contexts.[21]

Similar foreign-degree equivalency procedures that are afforded to H-1B petitioners could easily be utilized in these situations, and it would still be in line with DHS's goal of furthering one's course of study in the U.S. because these individuals would still be required to have earned a degree in the U.S. to qualify for the extension. We hope that DHS considers incorporating this type of change into its final rule, as it would allow U.S. employers to have more access to the top academic talent that American colleges and universities have to offer.

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[17] See 80 Fed. Reg. at 63388, 63041 (Oct. 19, 2015).
[18] Id, at 63388.
[19] Id.
[20] Id.
[21] See 8 C.F.R 204.5(k)(2), which allows for foreign equivalency of degree levels above the baccalaureate level. See also 8 C.F.R 204.5(l)(2), which recognizes the foreign degree equivalent for baccalaureate degrees, and see 8 C.F.R. 214.2(h)(4)(iii)(C)(2), which recognizes the foreign degree equivalent of U.S. baccalaureate or higher degree.

School Accreditation

As stated above, the Chamber believes that DHS could allow degrees earned outside of the U.S. to qualify for the extension. A similar issue concerns the language regarding school accreditation, in particular the need for the qualifying degree to be earned at an accredited U.S. education institution.[22] As DHS is aware, many U.S. schools now have satellite locations, some of which are located outside of the U.S. The language of the regulation is unclear about whether foreign nationals can use degrees from accredited U.S. universities operating abroad for this purpose. As such, the Chamber would appreciate DHS clarifying the term "accredited U.S. educational institution" such that an F-1 student would be able to avail themselves of the STEM OPT Extension based upon a prior STEM degree earned at a U.S. accredited institution abroad.

Individuals are Eligible to Receive Two STEM OPT Extensions in Their Lifetime

Chamber members agree that DHS's proposal to allow individuals to receive two STEM OPT extensions for two separate STEM degrees is an improvement to this program.[23] The Chamber believes allowing an individual to take advantage of two lifetime STEM OPT extensions is a worthwhile change to the program, as it provides an individual the ability to receive more practical training for different degrees. This would enhance the educational experience of these students and the economic benefits to our economy by allowing talented individuals more opportunities to receive further training in the U.S.

Cap-Gap Relief

The Chamber is pleased with the Department's inclusion of the Cap-Gap provisions that were first proposed in the 2008 rule. The automatic extension of an individual's valid work status if they are the beneficiary of an approved H-1B petition under the Cap-Gap provisions of the prior rule has been useful for many Chamber members since 2008. It has helped employers and their OPT employees avoid unnecessary costs and significant workplace disruptions which would have resulted if the employees were forced to leave the U.S. during this gap in status.

NPRM PROVISIONS THAT CAN BE IMPROVED

Definition of STEM

The Chamber appreciates DHS's efforts to propose a general definition of STEM fields in the NPRM and to provide stakeholders with a process whereby DHS may update the Designated Degree Program list through a notification process using the Federal Register.

[22] See proposed 8 C.F.R. 214.2(f)(10)(ii)(C)(3), 80 Fed. Reg. 63376, 63401 (Oct. 19, 2015).
[23] See proposed 8 C.F.R. 214.2(f)(10)(ii)(C), 80 Fed. Reg. 63376, 63401 (Oct. 19, 2015).

Our members appreciate the Department's goal to provide transparency and predictability to stakeholders, as well as providing a means for the Designated Degree Program list to be updated such that the list can adapt to ever-changing technology and innovation.

However, the Chamber and its members are concerned that certain career fields that should be classified as STEM will be foreclosed under the rubric set forth in the NPRM. While the Chamber supports using the Department of Education Classification of Instructional Program (CIP) taxonomy to serve as the basis for degrees that qualify for the STEM OPT Extension, there is a concern among our members that the proposed STEM categorization is too rigid and needs to incorporate more flexibility to meet the dynamic needs of innovation in the STEM fields. The NPRM's discussion section defines the term "STEM field" by referencing those fields included in the Department of Education's Classification of Instructional Programs (CIP) taxonomy within the **summary groups** containing: mathematics, natural sciences (including physical sciences and biological/agricultural sciences), engineering/engineering technologies, and computer/information sciences, and related fields.[24] The same section of the NPRM includes a footnote that claims that future revisions might include additional degrees, including degrees listed under different summary groups than those highlighted in the 2009 report.[25]

Unfortunately, in the proposed regulatory text in the NPRM, it is not at all clear that the Department will consider adding different summary groups into this STEM definition. Alternatively, the way that the words "related fields" are used in the NPRM suggests that any new degree that would be added to the STEM Designated Degree list must be included within one of the enumerated summary groups from the 2009 Stats in Brief report relied upon by the agency.[26] This language is, in the Chamber's opinion, a suboptimal solution because it creates a static definition of STEM fields that fails to provide the flexibility to adapt to the latest innovations and discoveries in STEM.

Fixing this problem would not be difficult; all it would require is a change in the regulatory text that states that in maintaining the STEM Designated Degree Program list, the Department may add new summary groups under the Department of Education's Classification of Instructional Program (CIP) taxonomy other than those specifically enumerated in 8 C.F.R. 214(2(f)(10)(ii)(C)(2)(i). Neither the Chamber nor DHS has the foresight to know what types of innovations will occur in the next few decades, and because of our collective inability to look into the future, the way in which "STEM fields" are defined should be flexible enough to incorporate new fields of study and employment in the future.

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[24] 80 Fed. Reg. 63376, 63386 (Oct. 19, 2015)
[25] Id., citing the inclusion of degrees under the following summary groups: Agriculture, Agriculture Operations, and Related Sciences; Computer and Information Sciences and Support Services; Engineering; Engineering Technologies and Engineering-Related Fields; Biological and Biomedical Sciences; Mathematics and Statistics; and Physical Sciences.
[26] Proposed 8 C.F.R. 214.2(f)(10)(ii)(C)(2)(i); 80 Fed. Reg. at 63401 (Oct. 19, 2015).

For example, one such field of employment that should be included as a STEM field is accounting. This is a field wherein the field of study at the college level requires knowledge of both mathematics and statistics. Clearly, the progression of an accountant's career will be directly linked to that accounting degree earned, and the accountant's progression, over time, will be linked directly to his or her ability to apply knowledge of mathematics and statistics.

Mentoring and Training Plan

We appreciate the concerns expressed by the Department in the NPRM's preamble to ensure that employers do not abuse this program. The Chamber supports the efforts of DHS to curb potential employer abuses and we believe that reasonable measures can effectively do so. However, some of the requirements that are imposed upon the schools, STEM graduates, and the employers who use the program may be unnecessarily burdensome or simply need further clarification from the Department to properly apprise stakeholders of what their requirements are moving forward. Most of these issues are centered on the new Mentoring and Training Plan (MTP) provisions included in the NPRM.

The establishment of an MTP program is concerning to Chamber members of all sizes. There are many small to medium-sized businesses that utilize the OPT program, and those who run these businesses wear many hats at the worksite. A CEO at a small software engineering firm cannot always delegate responsibilities to those underneath him or her. In many cases, this individual is responsible for payroll, managing the Human Resources department, and writing code on client deliverables, among other responsibilities that he or she has to the firm. Smaller employers like this do not have formalized mentoring programs at the workplace. The increased administrative burdens associated with creating an MTP program and ensuring that OPT employees are evaluated in a timely fashion every six months will not only take away valuable time away from the business's core competencies, but it is also likely that the administrative burden will be more time-intensive than the estimates made by the Department would lead one to believe.

In addition, our members will be responsible for informing the Designated School Official (DSO) if any of their OPT employees have been terminated or no longer work at the company. Given the many duties the operators of our small businesses members have, it will be difficult to comply with the very short 48-hour requirement to inform the DSO of an OPT employee's termination. Similar concerns have been brought to our attention by our large multinational corporations because their termination procedures are oftentimes very extensive and cumbersome whereby news of an employee's termination usually does not occur rapidly within the company.

While our members of all sizes understand ICE's desire to have this information in real time, the Chamber suggests that expanding the proposed 48 hour deadline to notification within 10 business days would be a reasonable requirement on employers. SEVIS would still be updated in a reasonable amount of time and it would allow employers of STEM OPT

recipients more leeway to report these terminations to the DSO without violating the terms of the program. When one compares this 48 hour requirement to notify the DSO with the reporting requirements imposed upon schools to report changes in student and school information, schools are given 21 days to report changes to SEVIS to ensure that foreign student activities are properly being tracked by the federal government.[27] If a three week period is sufficient to apprise the federal government of the whereabouts and information of F-1 students, including those subject to a STEM OPT Extension,[28] then allowing businesses at least 10 business days to report employment terminations is a reasonable compromise.

Another concern expressed by larger Chamber member companies that have at least one hundred OPT employees is the individualized MTP plan that must be tracked by a supervisor at the firm for each worker. Many of these firms already have workable mentoring and training programs in place, some of which involve multiple employees to perform some of the mentoring and training tasks for the new workers. The STEM OPT Extension requirement, in many cases, will force companies to make drastic changes to their current mentoring programs. Forcing companies to comply with these new requirements is unnecessary to ensure that DHS's main goals are achieved through this program.

Some of these employers have informed us that they do perform reviews of their employees every six months, similar to the proposed requirement in the NPRM. However, given the time at which students graduate and start their employment, the time of the year in which these reviews occur might not coincide precisely with the schedules that would be mandated by the Department. As such, the Chamber suggests that DHS consider only requiring employers to provide one final evaluation at the end of the STEM OPT Extension period or perhaps have some process where they would allow companies to show DHS that they have a current MTP that meets certain standards that DHS would allow the presence of that MTP to meet the requirement.. Both of these solutions would diminish the paperwork and resource burdens associated with program compliance. Alternatively, if DHS insists upon having evaluations occur every six months, our members would appreciate having 180 days to allow companies to adjust their processes without significant disruption in their business practices.

Another concern our members have with regard to the ongoing student evaluation process is the difficulty that may occur when supervisors are not available to sign the evaluation form when it needs to be completed. Employees in supervisory roles have multiple responsibilities and sometimes they divide their time between several work locations or they are on work-related travel. This burden is complicated by the fact that the process is currently paper-based and does not take advantage of available technology that will substantially cut

[27] See 8 CFR § 214.3(g)(2)(ii), which requires the Designated School Official to report any changes in the student records if the student fails to maintain status, changes their name, changes their address, graduates early, is subject to disciplinary action, or has any changes in their address or employer name when they are the recipient of STEM OPT Extension.
[28] 8 C.F.R § 214.3 (g)(2)(ii)(F)(1).

down on the time necessary to fulfill the program's requirements. We suggest that the Department explore the use of new technologies to help truncate this process and alleviate the administrative burden placed on our members.

Other employers have informed us that even with their current mentoring programs, they still need flexibility in determining the MTP because there are many variables that can change for an employer over a two-year period. Companies can gain and lose clients, or their focus as a company can change from one product line to another. As such, the initial plans relied upon by DHS to verify that companies are not undermining American workers should not be so prescriptive from the outset such that a company risks noncompliance because an OPT employee is now working on a different project because the prior project was for a former client.

Lastly, there is a general concern among our members that coming into compliance with the MTP requirements for all of their current STEM OPT Extension recipients will be difficult for businesses to accomplish. The focus of these concerns is with regard to the crafting of the MTP plans and completing all of the accompanying paperwork and evaluations associated with them. It is not clear whether this new rule would require employers to go back and provide evaluations of the prior work history of individuals who are currently employed pursuant to the current 17 month extension pursuant the 2008 rule. This is particularly important to employers that are interested in extending the status of their workers who are currently recipients of a 17 month extension because this could be an extremely heavy paperwork burden. The Chamber urges the Department to clarify that this new requirement shall only be effective moving forward after the date this rule goes into effect. Furthermore, to the extent that our companies will have to make major adjustments to their business practices in order to comply with the increased paperwork requirements for their new OPT hires and for extending the status of their current STEM OPT Extension recipients, the Chamber reiterates its aforementioned request that DHS provide employers with a grace period of 180 days after the final rule's effective date to come into compliance with these increased paperwork requirements.

U.S. Worker Safeguards

Chamber members are very concerned about the scope of some of the worker protection requirements included in the NPRM. The Chamber agrees with the DHS that efforts should be made to prevent employer abuses of the program. However, some of the attestation language is very broad in its application, and many of our members have very strong reservations about the impact of these rules.

The language that is of great concern to our members is the proposed regulatory text for 8 C.F.R. § 214.2(f)(10)(C)(10)(ii), which states that the employer must attest that "the employer will not terminate, lay off, or furlough any full- or part-time, temporary or

permanent U.S. workers as a result of the practical training opportunity."[29] DHS refers to this requirement in the discussion section of the NPRM as the "nondisplacement assurance."[30] The Chamber believes that DHS is trying to address a legitimate concern and prevent the use of the OPT program as a way to **replace American workers** with foreign nationals under the assumption that the individuals receiving the STEM OPT Extension will be paid less than the American workers. That is a legitimate goal, but the language proposed is so broad that it would impose liability in other situations where companies are making strategic decisions for their businesses.

For example, assume there is a company that uses the STEM OPT Extension and they have two product lines, one which is very successful and the other which is not. The team working on the first product line includes students working on OPT extended by virtue of their STEM degrees, and those students have contributed to the success of the first product line. The second product line has become obsolete, and no longer has a market. In this situation, the company makes the decision that it must close down the obsolete product line and administer layoffs and furloughs for at least some of the workers engaged in that division. The proposed language creates the potential for liability if the company lays off or furloughs the workers in the division involved in the obsolete product line, even though under this hypothetical situation, the correlation between providing the STEM OPT opportunity to those student workers in the successful department of the business and the lay-off or furlough of the U.S. workers in the obsolete product line was attenuated. The problem is there are no reasonable limitations to determine whether a layoff, furlough, or termination was the "result of the practical training opportunity" in the NPRM.

The Chamber proposes a compromise to the proposed language that will foreclose potential liability in situations where companies are making legitimate business decisions, but will still find liability against employers who purposefully try to use the OPT program to replace American workers. As such, we request that DHS make the following changes:

- The language proposed for 8 CFR § 214.2 (f)(10)(C)(10)(ii) in the NPRM should read as "The employer is not providing the STEM OPT opportunity for the purpose of, and with the intent to, directly lay off, or furlough any full- or part-time U.S. worker and replace that worker with the STEM OPT recipient; and," and;
- The language used in Question 4d in the proposed Form I-910 should read as "The employer is not providing the practical training opportunity for the purpose of, and with the intent to, directly lay off, or furlough, any full- or part-time, U.S. worker and replace that worker with the STEM OPT recipient."

Furthermore, it seems redundant and potentially confusing to use both "termination" and "layoff," which presumably are synonymous, and the Chamber suggests simply using

[29] 80 Fed. Reg. 63376, 63402 (Oct. 19, 2015).
[30] 80 Fed. Reg. 63376, 63390 (Oct. 19, 2015).

"layoff." In addition, the Chamber proposes to eliminate the reference to "temporary or permanent" workers. This seems to open questions of the terms of employment and other employment law concepts that DHS is not equipped to analyze, and that need not be analyzed in any case for this provision to serve its purpose. A general reference to "any … U.S. workers" and a prohibition against providing the STEM OPT opportunity for the purpose of laying off or furloughing such a worker, would fully serve DHS's intended purpose.

Site Visits

The discussion section of the NPRM states that Immigration and Customs Enforcement (ICE) will have discretion to conduct "on-site reviews" to ensure employers are complying with assurances in the MTP.[31] At the same time, the proposed regulatory language is not as prescriptive as the discussion text, where it just says that DHS, not necessarily ICE, may conduct these sites visits.[32] While the Chamber understands that DHS views the audit as a necessary mechanism to ensure compliance, the broad and inconsistent language in the NPRM is problematic because it provides very little guidance as to what employers can expect.

Many Chamber members are concerned about the prospect of multiple agencies performing these site visits. Given the Department's stated intention to "clarify that ICE, at its discretion, may conduct 'on-site reviews,'"[33] DHS should be consistent in its intentions and specify in the regulatory text and in the language used in the proposed Form I-910 that ICE is the agency that has the discretion to conduct these site visits. As such, we request that DHS replace any references to DHS in the proposed regulatory text for 8 C.F.R. § 214.2(f)(10)(C)(11) and in note in Section 4 of the proposed Form I-910 to provide the clarity that ICE is the agency within DHS that will be responsible for conducting these site visits.

Another concern is that the lack of procedural and privacy protections contained in the NPRM's site visit provisions. The NPRM does not enumerate any procedures that ICE is required to notify companies it will conduct a site visit. Chamber members are in agreement that this process should be complaint driven; ICE should not have broad discretion to conduct unannounced site visits without the presence of specific, credible evidence of employer wrongdoing. In the absence of any evidence of misconduct, ICE should provide employers with at least 72 hours' notice, which is similar to the notice that is provided to employers for the I-9 audit process.

The Chamber also recommends that ICE provide clear guidance on the scope and process for such investigations. Site visits should be limited to ensuring that the F-1 student is employed by the sponsoring employer noted in SEVIS and that the job duties of the individual are related to the STEM degree they possess; these investigations should be used as

[31] 80 Fed. Reg. 63376, 63390 (Oct. 19, 2015).
[32] 80 Fed. Reg. 63376, 63402 (Oct. 19, 2015).
[33] 80 Fed. Reg. 63376, 63390 (Oct. 19, 2015).

a way for ICE to conduct a different on-site investigation without notice. Moreover, to the extent that ICE can verify specific pieces of information by email or phone, the agency should utilize these tools to conduct their investigations. This will save resources and time for both ICE and the employer.

CONCLUSION

The NPRM will enhance the STEM OPT extension for many Chamber members across the economic spectrum. By providing our members with more certainty and increased opportunities to attract top talent, the Chamber is grateful to DHS for including those provisions that will be extremely helpful to our members. At the same time, no rule is perfect, and we hope that the Department carefully considers our feedback and suggestions to improve upon the proposed rule.

The Chamber appreciates the opportunity to comment on the NPRM's provisions with the Department. We urge the Department to act expeditiously in finalizing this rule so as to prevent the disruption that will undoubtedly occur if the 2008 rule is vacated without a replacement. We thank you for your consideration of the views of our members and we look forward to working with you.

Sincerely,

Randel K. Johnson
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