



**September 15, 2009**

**Special Alert:**

**U.S. Court of Appeals Refuses To Block  
Federal Contractor E-Verify Rule**

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On September 9, 2009, the U.S. Court of Appeals for the Fourth Circuit denied a motion by the U.S. Chamber of Commerce (“the Chamber”) for an injunction to halt implementation of a rule requiring federal contractors to use E-Verify. This follows the August 26, 2009 decision by the U.S. District Court for the District of Maryland upholding implementation of this rule against various legal challenges by the Chamber. As a result, the E-Verify rule became effective on September 8, 2009.

The E-Verify rule does not cover all federal contracts. Following the decision, the Department of Homeland Security (“DHS”) issued supplemental guidance advising which contracts were subject to the E-Verify provision. According to the DHS, the E-Verify rule applies only to solicitations issued and contracts awarded on or after September 8, 2009 that include a Federal Acquisition Regulations (“FAR”) clause in accordance with FAR 1.108(d). This means that if the solicitation was issued or contract awarded prior to September 8, 2009, or if it was issued on or after that date and does not include an E-Verify clause, then the contractor is not required to implement E-Verify now. Irrespective of this effective date, however, all federal contracting officials have been instructed to review current and pending contracts for modification to include the E-Verify clause. Therefore, a contractor who is currently exempt from the E-Verify rule may be required to implement it in the near future.

Secondly, the E-Verify rule specifically exempts federal contracts that apply to commercially available, off-the-shelf (“COTS”) products. COTS products are those that are available in the general marketplace with little or no modification. In this regard, the rule notes that nearly all food and agricultural products fall within the COTS definition—including food and agricultural products shipped as bulk cargo.

Thirdly, the E-Verify rule makes clear that agreements or activities performed by financial

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institutions not subject to the FAR procurement process are not subject to the E-Verify requirement.

Finally, nothing in the E-Verify rule affects the applicability of state laws or regulations that may require state contractors to utilize E-Verify.

The complete text of the new E-Verify rule for federal contractors, along with FAQs about its implementation, may be found on the USCIS website: [www.uscis.gov](http://www.uscis.gov)

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