[9111-28-P]

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

8 CFR Part 103

[DHS Docket No. ICEB-2017-0001]

RIN 1653-AA67

Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The U.S. Department of Homeland Security (DHS) proposes two changes that would apply to surety companies certified by the Department of the Treasury (Treasury) to underwrite bonds on behalf of the Federal Government. First, the proposed rule would require Treasury-certified sureties seeking to overturn a surety immigration bond breach determination to exhaust administrative remedies by filing an administrative appeal raising all legal and factual defenses. This requirement to exhaust administrative remedies and present all issues to the administrative tribunal would allow Federal district courts to review a written decision addressing all of the surety's defenses, thereby streamlining litigation over the breach determination's validity. Second, this proposed rule would set forth "for cause" standards and due process protections so that U.S. Immigration and Customs Enforcement (ICE), a component of DHS, may decline bonds from companies that do not cure their deficient performance. Treasury administers the

Federal corporate surety program and, in its current regulations, allows agencies to prescribe in their regulations for cause standards and procedures for declining to accept bonds from a Treasury-certified surety company. DHS proposes the for cause standards contained in this rule because certain surety companies have failed to pay amounts due on administratively final bond breach determinations or have had in the past unacceptably high breach rates.

DATES: Comments must be submitted electronically or postmarked no later than [Insert date 60 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments, identified by the DHS docket number to this rulemaking, Docket No. ICEB-2017-0001, to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, by one of the following methods:

- Electronically: Submit comments to the Federal eRulemaking Portal at http://www.regulations.gov. Follow the instructions for submitting comments.
- Mail: Address your written comments to the individual in the **FOR FURTHER INFORMATION CONTACT** section below. DHS docket staff, which maintains and processes ICE's official regulatory dockets, will scan the submission and post it to FDMS.

See the **Public Participation** portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Melinda A. Jones, Management and Program Analyst, MS 5207, Enforcement and Removal Operations, U.S. Immigration

and Customs Enforcement, 500 12th Street SW, Washington, DC 20536; telephone (202) 732-5919; e-mail BLM-Treas@ice.dhs.gov.

SUPPLEMENTARY INFORMATION:

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I. Public Participation.

We encourage you to participate in this rulemaking by submitting comments and related materials. Comments received will be posted, without change, to http://www.regulations.gov as part of the public record and will include any personal

information you have provided. Should you wish your personally identifiable information redacted prior to filing in the docket, please so state. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES**, above, for methods to submit comments. Mailed submissions may be paper or CD-ROM.

A. Submitting Comments

If you submit comments, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and materials online or by mail, but please use only one of these means. ICE will file all comments sent to our docket address, as well as items sent to the address or email under **FOR FURTHER INFORMATION CONTACT**, in the public docket, except for comments containing confidential information. If you submit a comment, it will be considered received by ICE when it is received at the Docket Management Facility.

To submit your comments online, go to http://www.regulations.gov, and insert the complete Docket number starting with "ICEB" in the "Search" box. Click on the "Comment Now!" box and input your comment in the text box provided. Click the "Continue" box, and if you are satisfied with your comment, follow the prompts to submit it. If you submit your comments by mail, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you would like us to acknowledge receipt of comments submitted by mail, include with your comments a

self-addressed, stamped postcard or envelope on which the docket number appears. We will stamp the date on the postcard and mail it to you.

We will consider all comments and materials submitted during the comment period and may change this rule based on your comments. The docket is available for public inspection before and after the comment closing date.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to http://www.regulations.gov and insert the complete Docket number starting with "ICEB" in the "Search" box. Click on the "Open Docket Folder," and you can click on "View Comment" or "View All" under the "Comments" section of the page. Individuals without internet access can make alternate arrangements for viewing comments and documents related to this rulemaking by contacting ICE through the **FOR FURTHER INFORMATION CONTACT** section above.

C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Commenters may wish to read the Privacy and Security Notice that is available via a link on the homepage of http://www.regulations.gov.

D. Public Meeting

We do not now plan to hold a public meeting, but you may submit a request for one using one of the methods specified under **ADDRESSES** above. In your request, explain why you believe a public meeting would be beneficial. If we determine that one

would aid this rulemaking, we will hold one at a time and place announced by a later notice in the Federal Register.

II. Abbreviations

AAO	Administrative Appeals Office
APA	Administrative Procedure Act
BFS	Bureau of the Fiscal Service, Department of the Treasury
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
DOJ	Department of Justice
FY	Fiscal Year
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
OMB	Office of Management and Budget
USCIS	U.S. Citizenship and Immigration Services

III. Background

A. Immigration Bonds Generally

ICE may release certain aliens from detention during removal proceedings after a custody determination has been made pursuant to 8 CFR 236.1(c). ICE may require an alien to post an immigration bond as a condition of his or her release from custody. See Immigration and Nationality Act (INA) sec. 236(a)(2)(A), 8 U.S.C. 1226(a)(2)(A); 8 CFR 236.1(c)(10). A delivery bond is posted to guarantee the appearance of the bonded alien for removal, an interview, or at immigration court hearings. Immigration bonds

also may be posted to, for instance, secure the timely voluntary departure of an alien from the United States, 8 CFR 1240.26(b)(3)(i), (c)(3)(1), or to secure compliance with an order of supervision, 8 CFR 241.5(b). See also INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (authorizing Secretary of Homeland Security to "prescribe such forms of bond" as the Secretary deems necessary to carry out his immigration authorities).

Immigration bonds may be secured by a cash deposit ("cash bonds") or may be underwritten by a surety company certified by Treasury pursuant to 31 U.S.C. 9304-9308 to issue bonds on behalf of the Federal government ("surety bonds"). 8 CFR 103.6(b). Treasury publishes the list of certified sureties in Department Circular 570, available at http//:www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm. For cash bonds, ICE requires a deposit for the face amount of the bond and, if the bond is breached, ICE transfers that deposit into the Breached Bond/Detention Fund as compensation for the breach of the bond agreement. 8 U.S.C. 1356(r); 8 CFR 103.6(b), (e). In contrast, when a surety bond is breached, ICE must issue an invoice to collect the amount due from the surety company or its agent. ICE Form I-352 (Rev. 03/08). This proposed rule would apply only to surety bonds.

Pursuant to the terms of the bond, surety companies and their agents serve as co-obligors on the bond and are jointly and severally liable for payment of the face amount of the bond when ICE issues an administratively final breach determination. In this proposed rule, the singular term "bond obligor" refers to either the surety company or the bonding agent. The plural term "bond obligors" refers to both entities.

ICE officials may declare a bond breached when there has been a "substantial violation of the stipulated conditions." 8 CFR 103.6(e). Bond breach determinations are

issued on ICE Form I-323, Notice - Immigration Bond Breached. ICE makes such a determination when a bond obligor fails to deliver the alien into ICE custody when requested, when an obligor fails to ensure that the alien timely voluntarily departs the United States, or when an obligor fails to ensure that the alien complies with an order of supervision, as required by the terms of the bond.

Bond obligors have a right to appeal the breach determination by completing Form I-290B, Notice of Appeal or Motion, and submitting the form together with the appropriate filing fee and a brief written statement setting forth the reasons and evidence supporting the appeal within 30 days of the date of the determination. 8 CFR 103.3. If a bond obligor does not timely appeal the breach determination to the U.S. Citizenship and Immigration Services (USCIS) Administrative Appeals Office (AAO), or if the appeal is denied, the breach determination becomes an administratively final agency action. See 8 CFR 103.6(e); see generally United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc., 728 F. Supp. 2d 1077, 1086-91 (N.D. Cal. 2010); Safety Nat'l Cas. Corp. v. DHS, 711 F. Supp. 2d 697, 703-04 (S.D. Tex. 2008).[1]

For surety bonds, if a bond obligor does not timely appeal to the AAO or if the appeal is dismissed, ICE will issue a demand for payment on an administratively final breach determination in the form of an invoice to the bond obligors. 31 CFR 901.2(a). The bond obligors have 30 days to pay the invoice or submit a written dispute; otherwise, the debt is past due. 31 CFR 901.2(b)(3). During this 30-day period, the bond obligors may seek agency review of the debt. See 6 CFR 11.1(a); 31 CFR 901.2. If the bond

[1] Courts have also held that certain AAO decisions are final agency actions when the AAO issues opinions on non-bond appeals within its jurisdiction in other contexts. See, e.g., Herrera v. U.S. Citizenship & Imm. Servs., 571 F.3d 881, 885 (9th Cir. 2009).

obligors ask to review documents related to the debt, ICE will provide documents supporting the existence of the debt. If the bond obligors dispute the debt, ICE will review the breach determination and issue a written response to any issues raised by the bond obligors. Under the terms set forth in ICE's invoice, if a debtor, such as a bond obligor, does not pay the invoice within 30 days of issuance of the written response to the dispute, the invoice is past due. See 31 CFR 901.2(b)(3).

B. Need for Exhaustion Requirement

Treasury-certified surety companies that receive a breach determination need to know when that decision is final to plan their next steps. When a decision is final, the bond obligor can seek further review of the decision in the Federal courts. 5 U.S.C. 704. An initial agency action, such as a bond breach determination is considered final and subject to judicial review unless exhaustion of administrative remedies is required, i.e., unless (1) a statute expressly requires an appeal to a higher agency authority, or (2) the agency's regulations require (a) an appeal to a higher agency authority as a prerequisite to judicial review, and (b) the administrative action is made inoperative during such appeal. Darby v. Cisneros, 509 U.S. 137, 154 (1993).[2] An agency may also by regulation require issue exhaustion. Sims v. Apfel, 530 U.S. 103, 108 (2000). Issue exhaustion means that a litigant cannot raise an issue in federal court without first raising the issue in the litigant's administrative appeal.

In this rule, DHS proposes to require Darby exhaustion by revising DHS regulations such that before a surety can sue on DHS's bond breach determination in

[2] See also Air Espana v. Brien, 165 F.3d 148, 151 (2d Cir. 1999) (noting that the Immigration and Nationality Act does not impose an exhaustion requirement); DSE, Inc. v. United States, 169 F.3d 21, 26-27 (D.C. Cir. 1999) (filing of appeal did not make agency decision inoperative); Young v. Reno, 114 F.3d 879, 881-82 (9th Cir. 1997) (by regulation, appeal was not required).

federal court, the surety must appeal such determination to the AAO. Consistent with Darby, the rule would also provide that the agency's breach determination remains inoperative during the pendency of such appeal. In addition, DHS proposes to require issue exhaustion by requiring sureties to raise all factual and legal issues in an administrative appeal or waive those issues in federal court.

The need for exhaustion of administrative remedies and issue exhaustion requirements for bond breach determinations is evidenced by two cases where district court judges required ICE to issue written decisions addressing defenses raised by surety companies and their agents for the first time in federal district court litigation. In these cases filed by the United States in federal district court to collect amounts due from surety companies and their agents for breached bonds, the courts issued remand orders requiring ICE to prepare written decisions addressing whether over 100 breach determinations were valid after evaluating the defenses raised by the bond obligors. United States v. Int'l Fidelity Ins. Co., No. 2:11-cv-396-FSH-PS, ECF No. 86 at 8 (D.N.J. July 30, 2012); United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc., 2012 WL 4462915, at *9 (N.D. Cal. Sept. 25, 2012).

Requiring exhaustion of administrative remedies and issue exhaustion would streamline this type of litigation and conserve judicial resources because the bond obligors would be required to raise all factual and legal issues in an administrative appeal, and the AAO would issue a written decision addressing all defenses. The administrative appeal process would allow errors to be corrected without resort to federal court litigation and would avoid the delay associated with remanding breach determinations to the agency to issue written administrative decisions addressing

defenses. As noted by a district court judge, appropriate review of an agency determination under the APA would be simplified if DHS amended its current regulations to require exhaustion of administrative remedies. See Int'l Fidelity Ins. Co., ECF No. 86, at 9. This proposed regulation would promote judicial economy by allowing federal courts to review breach determinations under the APA's arbitrary and capricious standard of review since remanding breach determinations to ICE would no longer be necessary.

C. Need for Ability to Decline Bonds from Non-Performing Surety Companies

For decades, certain surety companies and their agents have failed to pay invoices for breached bonds timely (within 30 days) or to present specific reasons to the agency why, in their view, the breach determinations are invalid. This non-performance has compelled litigation in federal court to resolve thousands of unpaid breached-bond debts valued in the millions of dollars and has also resulted in ICE filing claims in state receivership proceedings when sureties cannot pay past-due invoices. ICE needs to be able to decline new bonds from non-performing surety companies, after providing the due process specified in the proposed rule, to give them an incentive to take appropriate action when a bond is breached.

The need for the ability to decline bonds derives from the lack of an effective existing mechanism to address non-performing surety companies. Specifically, certain surety companies' failure to pay amounts due on breached bonds has been ongoing for years, and the agency has considered different approaches to recovering payments. In 1982, Regional Counsel for the former Immigration and Naturalization Service (INS) recommended that the INS amend 8 CFR 103.6 to implement a procedure, similar to that

established by the U.S. Customs Service in July 1981, to stop accepting bonds from surety companies with poor payment records until their payment performance improved, but this proposal was never implemented.

In 2005, ICE notified a surety with substantial delinquent debt that it would no longer accept immigration bonds underwritten by that company and separately asked Treasury to revoke the surety's certification to post bonds on behalf of the United States. A district court enjoined ICE's action not to accept additional bonds, ruling that ICE could not decline immigration bonds from this surety without first affording the company procedural due process rights. Safety Nat'l Cas. Corp. v. DHS, No. 4:05-cv-2159, slip op. at 8 (S.D. Tex. Dec. 9, 2005).

Treasury, after conducting an informal hearing, issued a determination concluding that the surety company exhibited a course and pattern of doing business that was incompatible with its authority to underwrite bonds on behalf of the United States and directed the surety to make full payment of all amounts due and owing on over 900 breached bonds (over $7 million at the time). See "Notice to Safety National Casualty Corp. from FMS Commissioner" (Jan. 23, 2007) (withdrawn and vacated, with prejudice, on July 19, 2013). The surety then filed suit in Federal district court on February 21, 2007, seeking to enjoin Treasury from enforcing its final decision and to vacate Treasury's ruling that the surety should be decertified. Safety Nat'l Cas. Corp. v. U.S. Dep't of the Treasury, No. 4:07-cv-00643 (S.D. Tex. Feb. 21, 2007), ECF No. 1. On August 27, 2008, the court stayed the case pending the resolution of 1,421 bond disputes, id. (Minute Entry), raised in an earlier case filed by Safety National Casualty Corp. and its agent against DHS, Safety Nat'l Cas. Corp. v. DHS, No. 4:05-cv-2159 (S.D. Tex. filed

June 23, 2005), ECF No. 1. On July 30, 2013, the Treasury case was dismissed based on a settlement agreement reached by the parties in the earlier case involving the 1,421 bond disputes. No. 4:07-cv-00643, ECF. No. 67. This example illustrates the difficulty ICE has encountered in precluding surety companies that have not paid invoices issued on administratively final breach determinations from issuing new immigration bonds.

The repeated failures of certain surety companies to respond appropriately to breached-bond invoices, either by disputing the validity of the breach determination or paying the invoice, shows the need for this proposed rule that would allow ICE to decline bonds from non-performing surety companies.

D. Treasury Regulation Allows Federal Agencies to Decline Bonds from Certified Sureties for Cause

Treasury's Bureau of the Fiscal Service (BFS) is responsible for administering the corporate Federal surety bond program pursuant to 31 U.S.C. 9304-9308 and 31 CFR part 223. Treasury evaluates the qualifications of sureties to underwrite Federal bonds and issues certificates of authority to those sureties that meet the specified corporate and financial standards. Under 31 U.S.C. 9305(b)(3), a surety must "carry out its contracts" to comply with statutory requirements. To "carry out its contracts" and be in compliance with section 9305, a surety must, on a continuing basis, make prompt payment on invoices issued to collect amounts arising from administratively final determinations.

On October 16, 2014, Treasury published a final rule entitled, "Surety Companies Doing Business with the United States." 79 FR 61992. The rule became effective on December 15, 2014. This Treasury regulation clarifies that: (1) Treasury certification does not insulate a surety from the requirement to satisfy administratively final bond

obligations; and (2) an agency bond-approving official has the discretion to decline to accept additional bonds on behalf of his or her agency that would be underwritten by a Treasury-certified surety for cause provided that certain due process standards are satisfied.

Through this proposed rule, DHS proposes to specify the circumstances under which ICE would decline to accept new immigration bonds from Treasury-certified sureties. This proposed rule would also set forth the procedures that ICE would follow before it declines bonds from a surety. This proposed rule would facilitate the prompt resolution of bond obligation disputes between ICE and sureties and would minimize the number of situations where the surety routinely fails to pay administratively final bond obligations or fails to promptly seek administrative review of bond breach determinations.

IV. Discussion of Proposed Rule

A. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies serves many purposes. Bastek v. Fed. Crop Ins. Corp., 145 F.3d 90, 93 (2d Cir. 1998). First, exhausting administrative remedies ensures that persons do not flout established administrative processes by ignoring agency procedures. See McKart v. United States, 395 U.S. 185, 195 (1969); Pub. Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21, 29 (D.C. Cir. 1984). Second, it protects the autonomy of agency decision making by allowing the agency the opportunity to apply its expertise in the first instance, exercise discretion it may have been granted, and correct its own errors. Woodford v. Ngo, 548 U.S. 81, 89 (2006). Third, the doctrine aids judicial review by permitting the full factual

development of issues relevant to the dispute. James v. HHS, 824 F.2d 1132, 1137-38 (D.C. Cir. 1987). Finally, the doctrine of exhaustion promotes judicial and administrative economy by resolving some claims without judicial intervention. Woodford, 548 U.S. at 89. For all of these reasons, DHS considers it to be both necessary and appropriate to mandate the exhaustion of administrative remedies for bond breach determinations on bonds issued by Treasury-certified surety companies.

DHS proposes, therefore, that a Treasury-certified surety or its agent that receives a breach notification from ICE must seek administrative review of that breach determination by filing an appeal with the AAO before the agency's action becomes final and subject to judicial review. The initial breach determination would not be enforced while any administrative appeal is pending. ICE would not issue an invoice to collect the amount due from the bond obligors on a breached bond until the agency action becomes final. If the bond obligor failed to file an administrative appeal during the filing period (currently 30 days) or filed an appeal that is summarily dismissed or rejected due to failure to comply with the agency's deadlines or other procedural rules, then the bond obligor would have waived all issues and would not be able to seek review of the breach determination in Federal court.[3] ICE would then issue an invoice to collect the amount due.[4]

[3] See, e.g., Woodford, 548 U.S. at 90 ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules"); Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 787 (10th Cir. 2006) (upholding district court's dismissal of complaint due to failure to exhaust administrative remedies); Galvez Pineda v. Gonzales, 427 F.3d 833, 838 (10th Cir. 2005) ("[U]ntimely filings with administrative agencies do not constitute exhaustion of administrative remedies."); Glisson v. U.S. Forest Serv., 55 F.3d 1325 (7th Cir. 1995) (suit barred for failure to appeal from the decision of the supervisor of a national forest to authorize the sale of timber).

[4] Because a motion to reconsider or reopen a bond breach determination does not stay the final decision, a bond obligor's failure to file such a motion would not constitute failure to exhaust administrative remedies.

B. Issue Exhaustion

The proposed regulation would also require Treasury-certified surety companies and their agents to raise all defenses or other objections to a bond breach determination in their appeal to the AAO; otherwise, these defenses and objections would be deemed waived. The Supreme Court has observed that administrative issue exhaustion requirements may be created by agency regulations:

> [I]t is common for an agency's regulations to require issue exhaustion in administrative appeals. See, e.g., 20 CFR 802.211(a) (1999) (petition for review to Benefits Review Board must "lis[t] the specific issues to be considered on appeal"). And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.

Sims v. Apfel, 530 U.S. 103, 107-08 (2000).

DHS believes that issue exhaustion is appropriate and necessary when a Treasury-certified surety company or its agent appeals a breach determination to the AAO. Some of these companies have engaged in protracted litigation over the validity of bond breach determinations; some of this litigation could have been streamlined if the bond obligors had been required to present all of their issues and disputes to the agency for adjudication on appeal before suit was filed in Federal court instead of raising new issues for the first time in federal court. Under this proposed rule, DHS would consider issue exhaustion to be mandatory in that a commercial surety or its agent would be required to raise all issues before the AAO and would waive and forfeit any issues not presented.

C. Standards and Process for Declining Bonds from a Treasury-Certified Surety

As required by the Treasury regulation, DHS, through this proposed rule, would establish the standards ICE would use to decline surety immigration bonds for cause (the

"for cause" standards) and the procedures that ICE would follow before declining bonds from a Treasury-certified surety. The standards proposed by ICE are informed by the important function that surety immigration bonds serve in the orderly administration of the immigration laws. Because insufficient resources exist to hold in custody all of the individuals whose statuses are being determined through removal proceedings, delivery bonds perform the vital function of allowing eligible individuals to be released from custody while the bond obligors accept the responsibility for ensuring their future appearance when required. If the bond obligor fails to satisfy its obligations under the terms of the bond, a claim is created in favor of the United States for the face amount of the bond. 8 CFR 103.6(e); Immigration Bond, ICE Form I-352, G.1 (Rev. 03/08). Enforcing collection of a breached immigration bond is important to motivate bond obligors to comply with the obligations they agreed to when they executed the bond and upon which ICE relied in permitting the alien to remain at liberty while removal proceedings are pending. When an alien does not appear as required, agency resources must be expended to locate the alien and take him or her back into custody.

In short, the standards DHS proposes for ICE to exercise its discretion to decline bonds from sureties arise from the need to maintain the integrity of the bond program. The bond program does not operate as intended when sureties (1) fail to timely pay invoices based on administratively final breach determinations, or (2) have unacceptably high breach rates. The incentive to deliver aliens in response to demand notices is reduced when sureties do not timely forfeit the amount of the bond as a consequence of their failure to perform. Moreover, if sureties do not submit payment for the Government's claim created as a result of the breach, they may receive an undeserved

windfall if they retain any premiums or collateral paid by the person who contracted with them to obtain the bond on behalf of the alien (the indemnitor).

1. For Cause Standards

The rule proposes three circumstances, or for cause standards, when ICE may notify a surety of its intention to decline any new bonds underwritten by the surety.[5] ICE's decision about whether to decline new bonds would be discretionary; ICE would not be required to stop accepting new bonds every time one of the for cause standards has been violated, and ICE would retain discretion to work with surety companies on an individual basis to ensure compliance.

First For Cause Standard: Ten or More Past Due Invoices

Under the first for cause standard, ICE would be authorized to issue a notice of its intention to decline new bonds when the surety has ten or more past due invoices issued after the final rule's effective date. The terms "invoice," "administratively final," and "past due" are each terms of art which require further explanation.

In this context, an "invoice" is a demand notice that ICE sends to a surety company seeking payment on an administratively final breach determination. A breach determination is "administratively final" either when the time to file an appeal with the AAO has expired without an appeal having been filed or when the appeal is denied. See 8 CFR 103.6(e); see also Gonzales & Gonzales Bonds, 728 F. Supp. 2d at 1086, 1091; Safety Nat'l Cas. Corp., 711 F. Supp. 2d at 703-04.

[5] Treasury's regulation permitting agencies to promulgate "for cause" standards to decline administratively bond obligations is "prospective and is not intended to require a principal to obtain replacement bonds that have already been accepted." 79 FR 61992, 61995. Accordingly, DHS does not anticipate that ICE's notification would have any effect on a surety's open bonds.

Finally, an invoice is "past due" when the bond obligor does not pay the invoice within 30 days of ICE's issuance of the invoice. 31 CFR 901.2(b)(3). This 30-day period can be tolled if the obligor disputes the debt during the 30-day period.[6] If the obligor disputes the debt, ICE will review the underlying breach determination and issue a written response to any issues raised by the surety or bonding agent. If ICE, in its written response to the obligor's dispute, concludes that the debt is invalid, ICE will cancel the invoice. If, however, ICE concludes that the debt is valid, the obligor has 30 days from issuance of the written decision to pay the debt. If a disputed invoice is valid, or if the obligor has declined to timely dispute the invoice at all, such an invoice, when it becomes past due, would be included as one of the ten past due invoices that may trigger the issuance of a notice that ICE intends to decline new bonds underwritten by the surety.[7]

Again, the first for cause standard would be triggered when at least 10 invoices issued after the final rule's effective date are past due. DHS proposes this standard because, when a surety company has 10 past-due invoices, such a company is not fulfilling its obligation to diligently and promptly act on demands for payment. DHS

[6] Treasury has issued guidance to federal agencies instructing them to "develop clear policies and procedures on how to respond to a debtor's request for copies of records related to the debt, consideration for a voluntary repayment agreement, or a review or hearing on the debt." Department of the Treasury, *Managing Federal Receivables*, at 6-16 (Mar. 2015). When it issues an invoice, ICE includes information about its collection policies, including a statement that: "If a timely written request disputing the debt is received, the debt will be reviewed and collection will cease on the debt or disputed portion until verification or correction of the debt is made and a written summary of the review is provided." ICE Form Invoice, "Important Information Regarding This Invoice," maintained by ICE's Financial Service Center Burlington.

[7] There is no further administrative review of ICE's determination that a disputed invoice is valid. This is because the administratively final breach determination underlying each invoice has already been subject to appellate review. In other words, because ICE does not issue an invoice until after the related breach has become administratively final, ICE's issuance of an invoice, and its review of a disputed invoice, would not occur until after the AAO had already resolved the obligor's appeal, if any, of the underlying breach determination.

considered using a smaller number of past due invoices as the trigger for this standard, but concluded that some leeway should be given for missed payments. However, DHS believes that a reasonably attentive surety company should be able to avoid having 10 past due invoices at the same time. For example, in FY 2015, the only surety companies that exceeded 10 unpaid invoices were four companies that either were in liquidation or exhibited a practice of repeatedly not paying invoices. In other words, nonpayment of 10 invoices did not occur through mistake or inadvertence. During this same period, multiple surety companies had timely paid all of their invoices or were late in submitting payments on fewer than ten. DHS requests comment on this proposed standard, including whether the number of past due invoices should be higher or lower, and if so, on what basis.

Second For Cause Standard: Cumulative Debt of $50,000 or More on Past Due Invoices

Under the second for cause standard, ICE would be authorized to issue a notice of its intention to decline new bonds when the surety owes a cumulative total of $50,000 or more on past due invoices issued after the effective date of the final rule, including interest and other fees assessed by law on delinquent debt. This proposed rule includes a for cause standard based on cumulative debt because bond amounts differ based on custody determinations and a surety could have a fairly large cumulative debt (over $50,000) when fewer than 10 invoices are unpaid. As of September 27, 2016, the lowest surety bond value was $500 and the highest surety bond value was $340,000, the average value of the over 23,000 open surety bonds (those that have not yet been breached or canceled) was about $10,200, the median value was $8,000, and almost 11,000 of the

open surety bonds had a face value of $10,000 or more.[8] As of September 27, 2016, seven surety companies (some of which, of their own volition, no longer post new bonds) owed past due invoices. Five of the sureties owed cumulative debts above $50,000, and the median amount of cumulative debt owed by these companies was substantial – $450,500. Two companies that regularly pay invoices promptly had less than $50,000 of past due debts and six other sureties' payments were current.

Likewise, data from FY 2015 confirm that surety companies that regularly pay invoices on time do not generally exceed a cumulative total of $50,000 in past due debt. In FY 2015, there were four companies that generally paid their debts in a timely manner but had late payments. One of those companies accumulated a total amount of $22,000 in past due debt during FY 2015. Two other companies had no past due debts during FY 2015. In comparison, five non-performing sureties accumulated past due debts greater than $50,000 during FY 2015, and the median amount of past due debt accumulated among those companies was $194,000.

These numbers suggest that the $50,000 threshold represents a reasonable trigger because, based on an average bond amount of $10,200, a surety can quickly accumulate a substantial debt if it is not committed to fulfilling its obligations by paying invoices timely. Continuing to accept bonds from such an entity places an unacceptable risk on the agency. If a surety company is approaching $50,000 in unpaid obligations and cannot pay such obligations, it should stop attempting to post new bonds.

This standard also gives ICE the flexibility to take action when a surety's non-performance is problematic even though fewer than ten invoices may be past due.

[8] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

Because almost half of the open surety bonds are in the amount of $10,000 or more, a surety could incur a cumulative debt of $50,000 or more with relatively few unpaid invoices. This second for cause standard recognizes that possibility and gives ICE the option of taking action when the surety has failed to timely pay invoices, while still giving the surety some latitude in making late payments. Having separate standards based either on a designated number of unpaid invoices or the dollar value of past due debt would allow ICE to take appropriate action when a surety company is not current on payments of administratively final breach determinations. DHS requests comment on this proposed standard, including whether the cumulative total debt should be higher or lower, and if so, on what basis.

Third For Cause Standard: Bond Breach Rate of 35 Percent or Greater

Finally, under the third for cause standard, ICE would be authorized to issue a notice of its intention to decline new bonds when the surety's breach rate for bonds is 35 percent or greater during a fiscal year. The breach rate is important because it measures the surety's compliance with its obligations under the terms of the immigration bond. The breach rate is calculated by dividing the number of administratively final breach determinations during a fiscal year for a surety company by the sum of the number of bonds breached and the number of bonds cancelled for that surety company during the same fiscal year. For example, if 50 bonds posted by a surety company were declared breached from October 1 to September 30, and 50 bonds posted by that same surety were cancelled during the same fiscal year (for a total of 100 bond dispositions), that surety would have a breach rate of 50 percent for that fiscal year.

ICE issues notices of breach determinations on Form I-323, Notice - Immigration

Bond Breached. As noted above, if the surety does not appeal ICE's breach determination to the AAO, ICE's breach determination becomes administratively final after the appeal period has expired and would be used in the breach rate calculation. If the surety files an appeal with AAO, only those breach determinations upheld by the AAO would be included in the breach rate calculation. In addition, for immigration delivery bonds, ICE would include in the breach rate calculation instances when ICE's mitigation policy applies because these bonds have been breached. As set forth in prior ICE policy statements and as recognized by courts, see Gonzales & Gonzales Bonds, 103 F. Supp. 3d at 1150, the mitigation policy applies to delivery bond breaches when the surety company or its agent has delivered the alien within 90 days of the surrender date set forth on the Form I-340, Notice to Obligor to Deliver Alien (demand notice). Currently, the amount forfeited is reduced when the surety or its agent surrenders the alien within 90 days of the surrender date. The mitigation policy does not apply when the alien appears on his or her own at an ICE office or when the alien appears with the indemnitor. Gonzales & Gonzales Bonds, 103 F. Supp. 3d at 1150. Because breaches to which the mitigation policy applies are still breached bonds, ICE would include these breach determinations in its calculation of a surety's breach rate.

This rule proposes to calculate breach rates on a Federal fiscal year basis (October 1 - September 30) to generate a meaningful sample size for each company. ICE will perform the breach rate calculation in the month of January after the end of the relevant fiscal year so that ICE can work with "closed out" data. The breach rate calculations used in the standard would be calculated for the first full fiscal year beginning after the effective date of any final rule, and each fiscal year thereafter. If an appeal filed with the

AAO is still pending while the breach rate calculation is being performed, ICE will not include that breach in its calculations until the AAO has issued a decision dismissing the appeal. This proposed rule uses 35 percent as the trigger because past performance shows that sureties can meet this standard by exercising reasonable diligence. Higher breach rates signal that obligors are not taking adequate actions to fulfill their responsibility to surrender aliens. During FY 2016, all surety companies currently posting immigration bonds had a breach rate, calculated using this approach, that was less than 35 percent. Surety companies have demonstrated their ability to comply with a 35 percent breach rate; a higher breach rate would demonstrate a departure from their own and their peers' past performance. Moreover, as set forth in the bond agreement's terms and conditions, bonds are automatically cancelled when certain events occur before the bond has been breached, such as the death of the alien or the alien's departure from the United States. These types of bond cancellations would assist the surety companies in maintaining a relatively low breach rate. Using 35 percent as a threshold for taking action is reasonable because surety companies would be given some latitude when they are, on occasion, unable to produce the alien, but they would still be accountable for surrendering aliens for almost two-thirds of the demands issued. DHS requests comment on this proposed standard, including whether the breach rate should be higher or lower, and if so, on what basis.

2. Procedures

Under the proposed rule, ICE would implement the following procedures to afford the surety company procedural due process protections consistent with 31 CFR 223.17: (1) provide advance written notice to the surety stating the agency's intention to

decline future bonds underwritten by the surety; (2) set forth the reasons for the proposed non-acceptance of such bonds; (3) provide an opportunity for the surety to rebut the stated reasons for non-acceptance of the bonds; and (4) provide an opportunity to cure the stated reasons, i.e., deficiencies, causing ICE's proposed non-acceptance of the bonds. ICE will consider any written submission presented by the surety in response to the agency's notice provided that the response is received by ICE on or before the 30th calendar day following the date ICE issued the notice. ICE may decline bonds underwritten by the surety only after issuing a written determination that the bonds should be declined when at least one of the for cause standards set forth in this rule has been triggered.

D. Technical Changes

The proposed rule also includes technical changes. DHS proposes to update the reference to Treasury's authority to certify surety companies to underwrite bonds on behalf of the Federal Government in 8 CFR 103.6(b) from "6 U.S.C. 6-13" to "31 U.S.C. 9304-9308" to reflect Pub. L. 97-258 (96 Stat. 877, Sept. 13, 1982), an Act that codified without substantive change certain laws related to money and finance as title 31, United States Code, "Money and Finance."

V. Statutory and Regulatory Requirements

DHS developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. The following sections summarize our analyses based on a number of these statutes or executive orders.

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Orders 12866 ("Regulatory Planning and Review") and 13563 ("Improving Regulation and Regulatory Review") direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") directs agencies to reduce regulation and control regulatory costs and provides that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."

The Office of Management and Budget (OMB) has not designated this rule a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See OMB's Memorandum "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017). An initial regulatory assessment follows.

This proposed rule would require Treasury-certified sureties seeking to overturn an ICE breach determination to file an administrative appeal raising all legal and factual defenses in their appeal. DHS anticipates that more appeals would be filed with the AAO

as a result of this proposed requirement. The costs to sureties to comply with this proposed requirement include the transactional costs associated with filing an appeal with the AAO. Sureties that do not appeal a breach determination could incur the cost of foregoing the opportunity to obtain judicial review of a breach determination. Surety companies would also incur familiarization costs in learning about the proposed requirements.

The proposed rule would also establish ICE standards for declining surety immigration bonds for cause and the procedures that ICE would follow before making a determination that it will no longer accept new bonds from a Treasury-certified surety. If a surety fulfills its obligations and is not subject to these for cause standards, this proposed provision would impose no additional costs on that surety. Surety companies that fail to fulfill their obligations and are subject to the for cause standards may incur minimal costs in responding to ICE's notification. If they fail to cure any deficiencies in their performance, they may also lose business when ICE declines to accept new bonds submitted by the surety.

DHS estimates the most likely total 10-year discounted cost of the proposed rule to be approximately $1.1 million at a seven percent discount rate and approximately $1.3 million at a three percent discount rate. The benefits of the proposed rule include improved efficiency and lower costs in litigating unresolved breach determinations. In addition, the rule would increase incentives for surety companies to timely perform obligations, provide ICE with a mechanism to stop accepting new bonds from non-performing sureties after due process has been provided, and reduce adverse consequences both of sureties' failures to pay invoices timely on administratively final

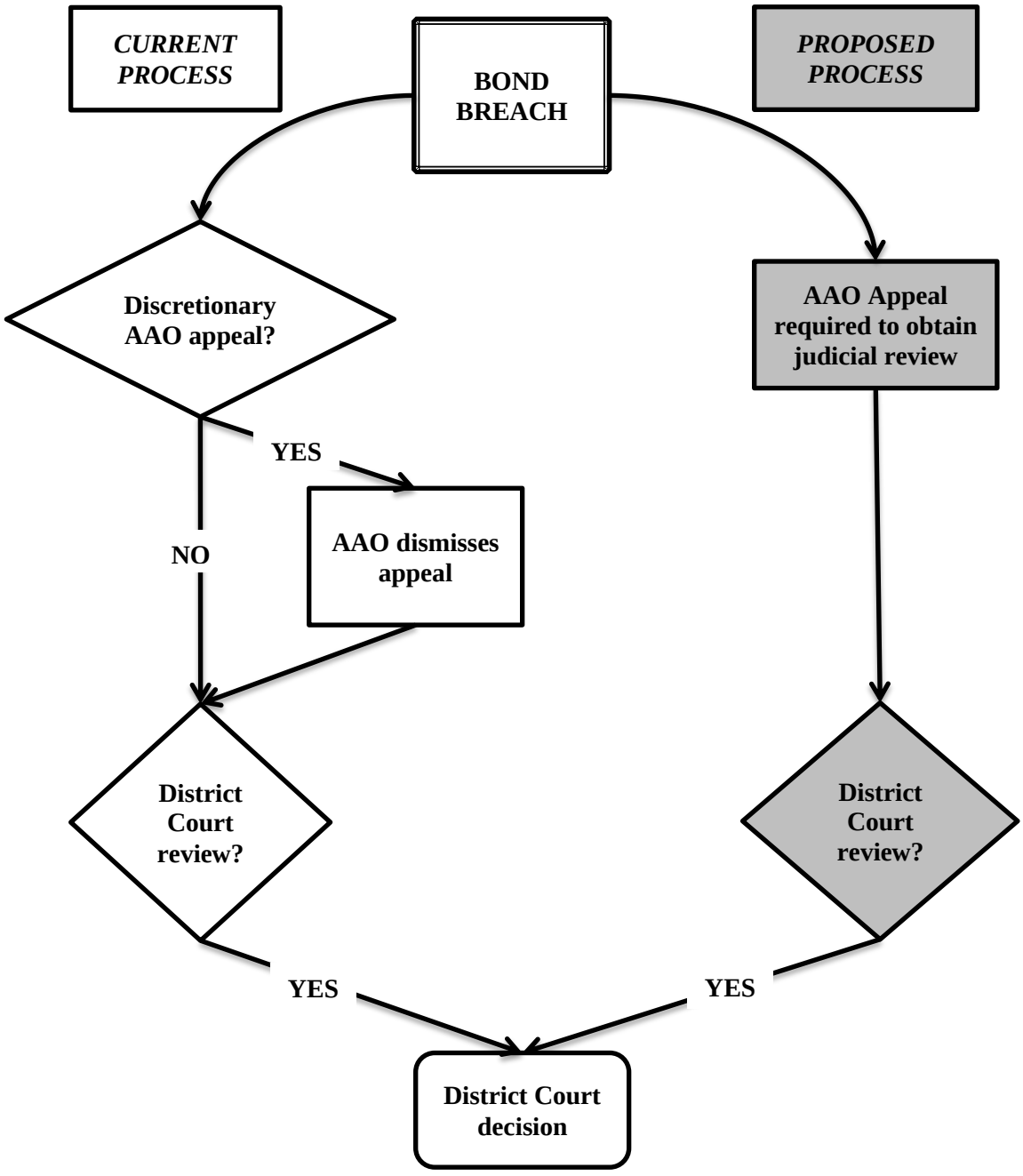
breach determinations and unacceptably high breach rates. When a surety fails to perform its obligation to deliver an alien and the bond is breached, ICE's resources are expended in locating aliens who have not been surrendered in response to ICE's demands. Finally, the proposed rule would allow ICE to resolve or avoid certain disputes, thereby decreasing the debt referred to Treasury for further collection efforts or the cases referred to DOJ for litigation.

1. Exhaustion of Administrative Remedies

i. Costs

To comply with the exhaustion of administrative remedies requirement, sureties would be required to appeal a breach determination to the AAO and to raise all issues or defenses during the appeal or waive them in future court proceedings. Currently, if a surety company decides to appeal a breach determination, the surety company can choose to appeal the breach determination to the AAO or undergo a federal district court review. The current and proposed appeal processes, beginning at the stage of an ICE bond breach determination, are represented in Figure 1.

Figure 1: Current and Proposed Process



Anticipated costs for sureties to comply with this proposed requirement are costs associated with filing an appeal with the AAO. Sureties filing an appeal must complete Form I-290B, Notice of Appeal or Motion, and submit the form together with the $675

filing fee set by USCIS[9] along with a brief written statement setting forth the reasons and evidence supporting the appeal. If a surety or its agent decides not to timely challenge a breach determination, this proposed requirement would impose no additional costs.

In the recent past, sureties have filed few administrative appeals of bond breach determinations. From fiscal year (FY) 2013 through FY 2015, on average 466 surety bonds were breached annually, and only 23 bond breaches for both cash bonds and surety bonds were appealed annually.[10] In other words, less than five percent of all surety bond breaches were appealed annually during FY 2013 through FY 2015.

DHS believes that the proposed exhaustion of administrative remedies requirement would likely increase the number of appeals of breach determinations by sureties because they would waive their right to federal district court review if they did not file an administrative appeal.

To estimate the number of appeals under this proposed rule, DHS assumes that invoices that were paid promptly can serve as a proxy for breaches that are not subject to disputes and are thus not likely to be appealed. In FY 2013, ICE issued invoices for 401 breached surety bonds. Sixty-five percent of the invoices (259 invoices) were timely paid.[11] Because these bond breach determinations were not disputed and the invoices were paid timely, DHS presumes that it is unlikely that surety companies would file appeals with the AAO to contest these breaches. The remaining 35 percent of the FY

[9] USCIS I-290B, Notice of Appeal or Motion, Filing Fee $675, https://www.uscis.gov/i-290b.

[10] USCIS AAO Appeals Adjudications. All cash and surety breached bond appeals for Immigration Bond Form I-352 are presented for FY 2011 through FY 2015. https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/AAO_Appeal_Adjudications_FY11-FY15.pdf.

[11] "Timely" as used in this context means that the payments were processed within 45 days of issuance of the invoice or were made in accordance with a payment agreement.

2013 surety bond invoices (142 invoices) that were not timely paid could be considered "disputed" and potential candidates for AAO appeals if the proposed exhaustion of administrative remedies requirement were in effect. In FY 2014, 119 out of 382 or 31 percent of invoices were not timely paid. In FY 2015, 313 out of 616 or 51 percent of invoices were not timely paid. Based upon this information, DHS estimates that approximately 41 percent of the surety bond breaches from FY 2013 - FY 2015 might have been appealed if an exhaustion requirement had been in place compared to the current average annual appeal rate of less than five percent.[12] DHS calculates that the total expected number of AAO appeals for surety bonds that might be filed each year is approximately 190.[13] DHS requests comment on all aspects of this analysis and the assumptions underlying the analysis.

Sureties that appeal would incur an opportunity cost for time spent filing an appeal with the AAO. USCIS estimates the average burden for filing Form I-290B is 90 minutes.[14] The person preparing the appeal could either be an attorney or a non-attorney in the immigration bond business. DHS does not have information on whether all surety companies have an in-house attorney, so we considered a range of scenarios depending on the opportunity cost of the person who would prepare the appeal. DHS assumes the closest approximation to the cost of a non-attorney in the immigration bond business is an insurance agent. DHS requests comment on these assumptions. The average hourly

[12] ICE's Financial Service Center Burlington.

[13] Three-year average (FY 2013 – FY 2015) of invoices not timely paid. 142 + 119 + 313 = 574. 574 ÷ 3 = 191.33.

[14] Form I-290B, 2016 Information Collection Request Supporting Statement, Question 12, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-002 .

loaded wage rate of an insurance agent is $44.31.[15] The average hourly loaded wage rate of an attorney is $96.06.[16] To determine the full opportunity costs if a surety company hired outside counsel, we multiplied the fully loaded average wage rate for an in-house attorney ($96.06) by 2.5 for a total of $240.14 to roughly approximate an hourly billing rate for outside counsel.[17] For purposes of this analysis, DHS assumes the minimum opportunity cost scenario is one where a non-attorney, or insurance agent (or equivalent), prepares the appeal. The opportunity cost per appeal in this scenario would be approximately $66.47 ($44.31 × 1.5 hours). DHS assumes that an in-house attorney or an insurance agent (or equivalent) is equally likely to prepare a surety's appeal. Thus, the primary estimate for the cost to prepare the appeal is $105.27 -- the average of the wage rates for an in-house attorney and an insurance agent multiplied by the estimated time to prepare the appeal ($70.19[18] × 1.5 hours). DHS estimates a maximum cost scenario in which a surety would hire outside counsel to prepare the appeal, resulting in a cost of

[15] Bureau of Labor Statistics, Occupational Employment Statistics May 2015, Standard Occupational Code 41-3021 Insurance Sales Agents, Mean hourly wage $31.15, http://www.bls.gov/oes/2015/may/oes413021.htm. The fully loaded wage rate is calculated using the percentage of wages to total compensation, found in the Bureau of Labor Statistics, Employer Costs for Employee Compensation June 2015, Table 1: Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, Sales and Office Occupational Group, http://www.bls.gov/news.release/archives/ecec_09092015.pdf. Wages are 70.3 percent of total compensation. $44.31 = $31.15/0.703.

[16] Bureau of Labor Statistics, Occupational Employment Statistics May 2015, Standard Occupational Code 23-1011 Lawyers, Mean hourly wage $65.51, http://www.bls.gov/oes/2015/may/oes231011.htm. The fully loaded wage rate is calculated using the percentage of wages to total compensation, found in the Bureau of Labor Statistics, Employer Costs for Employee Compensation June 2015, Table 1: Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, Management, Professional, and related group, http://www.bls.gov/news.release/archives/ecec_09092015.pdf. Wages are 68.2 percent of total compensation. $96.06 = $65.51/0.682.

[17] DHS has previously calculated the hourly cost of outside counsel using this methodology of multiplying the fully loaded average wage rate for an in-house attorney by 2.5. See the Final Small Entity Impact Analysis of the Supplemental Proposed Rule "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," page G-4, at http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922.

[18] $70.19 = ($44.31 + $96.06) / 2.

$360.21 ($240.14 × 1.5 hours). Sureties would also incur a $675 filing fee per appeal. When the filing fee is added to the cost of preparing the appeal, the total cost per appeal would range from $741 ($675 + $66.47) to $1,035 ($675 + $360.21), with a primary estimate of $780 ($675 + $105.27). This results in a total annual cost between $140,790 and $196,650, with a primary estimate of $148,200 ($780 × 190 breached bonds).

DHS expects minimal costs to the Federal government associated with the proposed regulation. When a surety files an appeal with the AAO seeking review of a breach determination, an ICE Enforcement and Removal Operations (ERO) Bond Control Specialist at the ERO field office that issued the breach determination submits to the AAO a Record of Proceedings (ROP) containing documents relevant to the breach determination. Each ROP takes approximately 90 minutes to compile, for a total of 285 hours annually (1.5 hours × 190 appeals). The fully loaded average hourly wage rate, including locality pay, for an ERO Bond Control Specialist is $30.40[19]. The total annual cost to ICE to compile the ROPs is approximately $8,664. The costs to USCIS for conducting an administrative review of the appeals are covered by the $675 fee charged for each appeal, as well as by funds otherwise available to USCIS.

ii. Benefits

The proposed rule would assist both DOJ's and ICE's efforts in litigating unpaid invoices to collect on breached surety bonds. For example, the proposed rule would eliminate the need for the type of remand decisions required by two federal courts in litigation to collect unpaid breached bond invoices because the AAO would already have had an opportunity to issue a written decision addressing all of the surety company's

[19] ICE Office of Human Capital.

defenses raised as part of the required administrative appeal. As with any requirement for exhaustion of administrative remedies, the proposed rule would promote judicial and administrative efficiency by resolving many claims without the need for litigation. Furthermore, with an exhaustion requirement, any court would review the AAO decision under the APA's arbitrary and capricious standard of review. Review confined to a defined administrative record would eliminate the time-consuming discovery process.

2. Process for Declining Bonds

i. Costs

The proposed rule would establish for cause standards that ICE would use to decline new immigration bonds from a surety company. If the surety does not meet these standards, ICE would be authorized to notify the surety that it has fallen below the required performance levels and, if the surety fails to cure its deficient performance, ICE will stop accepting new bonds from the company. The anticipated costs of a surety's response to ICE's notification would derive from the due process requirements set by Treasury for all agencies that issue rules to decline new bonds from Treasury-certified sureties. The proposed rule would provide an opportunity for the surety to rebut the stated reasons for non-acceptance of new bonds and would provide an opportunity to cure the stated deficiencies. In addition to costs in responding to ICE's notifications, sureties may lose future revenue if ICE makes a final determination to decline new bonds underwritten by the surety.

The proposed rule would only apply prospectively. However, for purposes of this economic analysis, DHS uses a snapshot of sureties' past financial performance to estimate the possible impacts of the proposed rule on future performance. DHS

examined the impacts to surety companies that actively posted bonds with ICE in FY 2015. In FY 2015, nine sureties posted immigration bonds with ICE and would have been subject to the requirements of this rule had it been in place. Of those nine sureties, three would have met at least one of the proposed for cause standards as of the end of FY 2015. Moreover, two of those three surety companies would have met two of the three for cause standards as of the end of FY 2015. These two sureties together had more than 1,500 invoices that were on average more than 1,000 days past due. In addition, they had a total outstanding balance of over $13.4 million, although DOJ has filed cases or is negotiating settlements on debts referred to it for litigation to resolve these past due balances. The third surety company would have exceeded one for cause standard with an aggregate of more than $50,000 past due. DHS proposes the for cause standards to deter deficient performance. DHS believes that less stringent standards would allow historical, deficient business practices to continue. DHS also believes that more stringent standards could result in unnecessarily sanctioning sureties when they are making good-faith efforts to comply with their obligations.

Currently, sureties have ample opportunities to evaluate and challenge breach determinations. When ICE issues a breach determination, sureties have 30 days to file an appeal with the AAO. If obligors do not appeal in a timely manner, or if the appeal is dismissed, then the breach determination becomes an administratively final agency action. When ICE issues a demand for payment on administratively final breach determinations, the surety is given 30 days to pay the invoice, during which time the surety may dispute the amount as well as the validity of the breach determination. The surety may also ask to review documents supporting the debt. If the surety disputes the

debt, ICE will review and provide a written response to any issues raised by the surety. These opportunities are available each time a bond is breached and invoiced.

Under the proposed rule, if a surety has 10 or more invoices past due at one time, owes a cumulative total of $50,000 or more on past due invoices, or has a breach rate of 35 percent or greater in a fiscal year, ICE would be authorized to notify the surety that it has fallen below the required performance levels. The surety would have the opportunity to review ICE's written notice identifying the for cause reasons for declining new bonds, rebut the agency's reasons for non-acceptance of new bonds, and cure its performance deficiencies. Before any surety would receive a notification from ICE of its intention to decline any new bonds underwritten by the surety, the surety would have had ample opportunities to evaluate and rebut each administratively final breach determination. Furthermore, the for cause standards for declining new bonds would be triggered only when the surety has failed to pay amounts due on administratively final breach determinations or has an unacceptably high breach rate. If a surety fulfills its obligations and is not subject to these for cause standards, this proposed rule would impose no additional costs on that surety.

Surety companies may incur a new opportunity cost when responding to the agency's notification of its intention to decline any new bonds underwritten by the surety. DHS estimates that personnel at a surety company may spend three hours to complete a response to the ICE notification. DHS assumes that an insurance agent (or equivalent) of the surety company, an in-house attorney, or outside counsel is equally likely to respond to the notification. The opportunity cost estimate per response would be $381 ($127 × 3

hours).[20] DHS requests comment on all aspects of this analysis and the assumptions underlying the analysis.

Because a surety would have had ample opportunities to evaluate and challenge administratively final breach determinations, DHS anticipates that it will rarely need to send a notification of its intent to decline new bonds because sureties will use good faith efforts to avoid triggering the proposed for cause standards. However, for the purposes of this cost analysis, DHS assumes that it would send one to three notifications during a 10-year period.[21] To calculate the cost of responding to three notifications over 10 years (the likely maximum number of notifications), the likelihood of issuing a notification during any given year is multiplied by the opportunity cost per response. This equals about $114 (30 percent × $381). The cost of responding to one notification over 10 years (the likely minimum number of notifications) would be approximately $38 (10 percent × $381). Thus, the range of response costs per year would be $38 to $114, with a primary, or most likely, estimate of $76 (20 percent × $381).

Sureties that receive, after being afforded due process, a written determination that future bonds will be declined pursuant to the for cause standards set forth in this rule would also incur future losses from the inability to submit to ICE future bonds underwritten by the surety. Because DHS does not have access to information about the surety companies' profit margins per bond, DHS is unable to estimate any future loss in

[20] $127 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and outside counsel hired by the surety. $127 = ($44.31 + $96.06 + $240.14) / 3.

[21] As discussed previously, one or more of the proposed for cause standards would have applied to three companies as of the end of FY 2015. DHS assumes that, at most, the for cause standards would be triggered for the same number of companies over the course of 10 years. DHS assumes that it is possible and somewhat likely that at a minimum, one company's failure to perform will trigger the proposed for cause standards over 10 year timeframe.

revenue to these companies. However, DHS notes that, although it would no longer accept immigration bonds underwritten by these sureties, the proposed rule would not prohibit these sureties from underwriting bonds for other agencies in the Federal Government.

ii. Benefits

This rule would address problems that ICE has had with certain surety companies failing to pay amounts due on administratively final bond breach determinations or having unacceptably high breach rates. For example, certain companies have realized an undeserved windfall when they have refused to timely pay invoices, yet have foreclosed on collateral securing the bonds because the bonds have been breached. The proposed rule would provide greater incentive for surety companies to timely pay their administratively final bond breach determinations and help ensure that sureties comply with the requirements imposed by the terms of a bond. In turn, this would minimize the number of situations where the surety routinely fails to pay and reduce the number of times agency resources are expended in locating aliens when the alien is not surrendered in response to demands issued pursuant to bonds. In addition, the proposed rule would allow ICE to resolve or avoid certain disputes, thereby decreasing the debt referred to Treasury for further collection efforts or the cases referred to DOJ for litigation.

3. Regulatory Familiarization Costs

During the first year that this rule is in effect, sureties would need to learn about the new rule and its requirements. DHS assumes that each Treasury-certified surety company currently issuing immigration bonds would conduct a regulatory review. DHS assumes that this task is equally likely to be performed by either an in-house attorney or

by a non-attorney at each surety company. DHS estimates that it would take eight hours for the regulatory review by either an in-house attorney or a non-attorney, such as an insurance agent (or equivalent), at each surety. No data were identified from which to estimate the amount of time required to review the regulation. DHS requests that commenters provide data if possible.

To calculate the familiarization costs, DHS multiplies its estimated review time of eight hours by the average hourly loaded wage rate of an attorney and an insurance agent, $70.19. DHS calculates that the familiarization cost per surety company is $562 (8 hours × $70.19). DHS calculates the total estimated regulatory familiarization cost for all sureties currently issuing immigration bonds as $5,054 ($70.19 × 8 hours × 9 sureties).

4. Alternatives

OMB Circular A-4 directs agencies to consider regulatory alternatives to the provisions of the proposed rule.[22] This section addresses two alternative regulatory approaches and the rationales for rejecting these alternatives in favor of the proposed rule.

The first alternative would be to include different for cause standards for surety companies that fall in different ranges of underwriting limitations.[23] For example, surety companies with higher underwriting limitations could be held to more stringent for cause standards than companies with lower underwriting limitations. The difference of underwriting limitations is great for some Treasury-certified sureties: the lowest underwriting limitation of all of the Treasury-certified sureties is $251,000 per bond and

[22] OMB Circular A-4, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf .

[23] The underwriting limitations set forth in the Treasury's Listing of Certified Companies are on a per bond basis. Department of the Treasury's Listing of Certified Companies Notes, (b) (updated July 1, 2017), https://www.fiscal.treasury.gov/fsreports/ref/suretybnd/notes.htm.

the highest is $9.7 billion per bond. This distinction might be supported by the assumptions that companies with higher underwriting limitations would issue more bonds and possibly bonds of higher values and thus their actions should be monitored more closely, and larger companies have greater resources to ensure compliance with the for cause standards.

This alternative was rejected because the amount of a non-performing surety company's underwriting limitation should have no bearing on whether DHS can stop accepting bonds from that surety company. The underwriting limitation is an indication of the surety company's financial resources. A surety company can comply with its immigration bond responsibilities regardless of its underwriting limitation. In addition, because the average amount of a surety bond is about $10,200,[24] and the lowest underwriting limitation per bond set by Treasury greatly exceeds this average bond amount, it would serve no purpose to make a distinction among surety companies based on their underwriting limitations. Thus, the agency rejected this alternative.

The second regulatory alternative DHS considered would be to apply the requirements of the proposed rule to cash bond obligors as well as to surety companies to further the goal of treating all bond obligors similarly. DHS has rejected this alternative for several reasons. First, by definition, cash bond obligors cannot be delinquent in paying invoices on administratively final breach determinations. Cash bond obligors deposit with ICE the full face amount of the bond before the bond is issued. Thus, when a bond is breached, no invoice is issued because the Federal Government already has the funds on deposit. Second, because cash bond obligors generally will post only one

[24] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

immigration bond, the same concerns about repeated violations of applicable standards do not apply to them. The majority of cash bond obligors are not institutions, but friends or family members of the alien who has been detained. From FY 2011 – FY 2015, at least 65 percent of cash bonds were posted by an obligor who only posted one bond.[25] Finally, the volume of disputes regarding surety bonds, as opposed to cash bonds, necessitates administrative and issue exhaustion requirements for claims based on surety bonds. The number of claims in federal court involving breached surety bonds in litigation has far exceeded the number of claims involving breached cash bonds. One surety bond case alone presented more than 1,400 breached bond claims for adjudication.[26] In contrast, the number of cash bond cases litigated in federal courts has averaged less than two per year for the past five years.[27]

DHS requests public comment on the alternatives considered, as well as any additional alternatives that DHS does not include here but should consider in the future.

5. Conclusion

The proposed rule would require Treasury-certified sureties or their bonding agents seeking to overturn a breach determination to file an administrative appeal raising all legal and factual defenses in this appeal, and would allow ICE to decline new bonds from surety companies that fail to meet for cause standards. DHS has provided an estimate of the transactional costs, the opportunity costs, and the familiarization costs associated with this proposed rule, as well as the proposed rule's benefits. DHS requests public comment on all aspects of its analysis, including assumptions and alternatives

[25] ICE's Financial Service Center Burlington.

[26] AAA Bonding Agency Inc., v. DHS, 447 F. App'x 603, 606 (5th Cir. 2011).

[27] ICE's Financial Service Center Burlington.

considered. Table 1 summarizes the costs and benefits of the proposed rule.

Table 1: Summary of Costs and Benefits of the Proposed Rule (2015$)

Category	Discount Rate	Minimum Estimate	Primary Estimate	Maximum Estimate
Annualized Monetized Costs				
Exhaustion of administrative remedies	7%	$140,790	$148,200	$196,650
	3%	$140,790	$148,200	$196,650
For Cause Standards	7%	$38	$76	$114
	3%	$38	$76	$114
Familiarization*	7%	$673	$673	$673
	3%	$575	$575	$575
Government Costs to prepare record of proceedings	7%	$8,664	$8,664	$8,664
	3%	$8,664	$8,664	$8,664
Total Annualized Cost	7%	**$150,165**	**$157,613**	**$206,101**
	3%	$150,067	$157,515	$206,004
Total 10-Year Undiscounted Cost		**$1,499,975**	**$1,574,456**	**$2,059,337**
Total 10-Year Discounted Cost	7%	$1,054,693	$1,107,005	$1,447,566
	3%	$1,280,104	$1,343,638	$1,757,252
Unquantified Costs	• Surety companies may lose revenue if ICE declines new immigration bonds.			
Unquantifiable Benefits	• The proposed rule would assist DOJ's efforts in preparing cases for litigation and eliminate the need for remand decisions. • The proposed rule would decrease the debt referred to Treasury for further collection efforts, and streamline the litigation of any breached bond claims referred to DOJ. • The proposed rule would increase compliance with a surety company's duty to surrender aliens and reduce the number of times agency resources are expended in locating aliens when the alien is not surrendered.			
Net Benefits		NA	NA	NA

* Familiarization cost is the cost to businesses to familiarize themselves with the proposed rule. It is a one-time cost expected to be incurred within the first year of the rule's effective date. The cost is estimated to be $562 per surety company.

B. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to

consider the economic impact its rules will have on small entities. In accordance with the RFA, DHS has prepared an Initial Regulatory Flexibility Analysis (IRFA) that examines the impacts of the proposed rule on small entities (5 U.S.C 601 et seq.). The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of fewer than 50,000.

DHS requests information and data from the public that would assist with better understanding the impact of this proposed rule on small entities. DHS also seeks alternatives that will accomplish the objectives of this rulemaking and minimize the proposed rule's economic impact on small entities.

1. A description of the reasons why the action by the agency is being considered

DHS proposes procedural and substantive standards under which it may decline new immigration bonds from a Treasury-certified surety and an exhaustion of administrative remedies requirement. If finalized, this rule would facilitate the resolution of disputes between ICE and sureties that arise after the effective date of any final rule.

The proposed rule would promote judicial and administrative efficiency by allowing Federal courts to review the AAO's written evaluation of the validity of a breach determination under the APA without first remanding breach decisions to DHS to prepare written decisions based on defenses raised for the first time in federal court. In addition, the discovery process would be unnecessary in cases solely involving the review of a written AAO decision on a defined administrative record.

By establishing the for cause standards, surety companies would have a greater incentive to surrender aliens in response to demand notices, thereby reducing agency

resources expended in locating aliens. They also would have a greater incentive to either pay amounts due on invoices for breached bonds or appeal the breach determination, thereby reducing the number of delinquent debts referred to Treasury for further collection efforts and claims referred to DOJ for litigation.

2. A succinct statement of the objectives of, and legal basis for, the proposed rule

DHS's objective in requiring exhaustion of administrative remedies and issue exhaustion for disputed surety bond breaches is to allow the agency to correct any mistakes it may have made before claims are filed in federal court, and to allow for more efficient judicial review of breach determinations under the APA. Currently, sureties are not required to file administrative appeals, and one case involving breached bond claims took over 10 years to litigate and another took over seven years. The legal bases for requiring exhaustion of administrative remedies and issue exhaustion are well-established. See Darby v. Cisneros, 509 U.S. 137, 154 (1993); Sims v. Apfel, 530 U.S. 103, 107-108 (2000).

DHS's objective in adopting the for cause standards for declining bonds is to provide an incentive for sureties to comply with their obligations to surrender aliens in response to demand notices and to timely pay the amounts due on invoices for breached bonds or appeal the breach determinations.

3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply

For FY 2015 nine of the 273 Treasury-certified sureties[28] would have been subject to the requirements of this proposed rule had it been in place because these nine sureties are the only ones that posted new immigration bonds with ICE during FY 2015. However, any of the Treasury-certified sureties could potentially post new immigration bonds with ICE and would then be subject to the requirements of this proposed rule. Most surety companies are subsidiaries or divisions of insurance companies,[29] where bail bonds are a small part of their portfolios. Other lines of surety bonds include contract, commercial, customs, construction, notary, and fidelity bonds.[30]

DHS used multiple data sources such as Hoover's and ReferenceUSA[31] to determine that four of these sureties are small entities as that term is defined in 5 U.S.C. 601(6). This determination is based on the number of employees or revenue being less than their respective Small Business Administration (SBA) size standard.[32] These four sureties issued approximately 85 percent of the total number of surety bonds to ICE in FY 2015. The following table provides the industry descriptions of the small entities that would be impacted by the proposed rule.

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[28] The list of Treasury-certified sureties can be found here: https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/CertifiedCompanies.pdf. There are 266 sureties as of July 1, 2017.

[29] National Association of Surety Bond Producers and Surety and Fidelity Association of America, "Frequently-Asked Questions," 2016, http://suretyinfo.org/?page_id=84#surety.

[30] International Credit Insurance & Surety Association, "What kind of surety bonds does a surety insurance company issue?", 2016, http://www.icisa.org/surety/1548/mercury.asp?page_id=1899.

[31] These databases offer information of location, number of employees, and estimated sales revenue for millions of U.S. businesses. The Hoover's website is www.hoovers.com. The Reference USA website is http://www.referenceusa.com. ICE collected data from these sources in April 2016.

[32] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, February 26, 2016. https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

None of the nine entities that posted bonds with ICE in FY2015 were small governmental organizations or small organizations not dominant in their field.

Table 2: Small Entities to which the Proposed Rule Would Apply

NAICS Code	NAICS Description	Count of Entities impacted by proposed rule	SBA Size Standard (in sales receipts or number of employees)
523930	Investment Advice	1	$38,500,000
524126	Direct Property and Casualty Insurance Carriers	3	1,500 employees
Total		**4**	

4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record

The proposed rule would require that a surety company, or its bonding agent, that receives a breach determination notification must seek administrative review of that breach determination by filing an appeal with the AAO before seeking judicial review. The proposed rule would also require a surety company to respond to any notification that it violated a for cause standard. Other than responding to such a notification, the proposed rule would impose no recordkeeping or reporting requirement.

Estimated Cost and Impact as a Percentage of Revenue

To estimate the impact on small entities, DHS has calculated the cost of this proposed rule as a percentage of the revenue of those entities. During the first year that this rule would be in effect, sureties of all sizes would need to learn about the new rule and its requirements. DHS assumes that this task would be equally likely to be performed by either an attorney or by a non-attorney in the immigration bond business.

DHS uses the average compensation of an attorney and an insurance agent (the closest approximation to the cost of a non-attorney in the immigration bond business), $70.19,[33] to estimate the familiarization cost. DHS estimates that it will take eight hours for the regulatory review. No data were identified from which to estimate the amount of time required to review the regulation. DHS requests that commenters provide data if possible.

To calculate the familiarization costs, DHS multiplies its estimated review time of eight hours by the average of an attorney and an insurance agent's hourly loaded wage rate, $70.19. DHS calculates that the familiarization cost per surety is $562 (8 hours × $70.19).

Another cost that sureties may incur is the fee for filing an appeal with the AAO. One possibility that DHS cannot account for in its analysis is that a surety company's agent may pay the filing fee instead of the surety company. DHS has no information about the contractual arrangements between a surety company and its agent, but either party can file an appeal with the AAO and pay the required fee. For purposes of its analysis, DHS assumes that the surety company pays for all the appeals filed. DHS requests comment on this assumption.

As discussed previously, sureties that chooses to appeal complete Form I-290B, Notice of Appeal, and submit the form with a $675 filing fee and a brief written statement setting forth the reasons and evidence supporting the appeal. From FY 2013 through FY 2015, 466 bonds were breached on average annually. Of these 466 breached bonds, only 23 bond breaches for all types of bonds (cash bonds and surety bonds) were

[33] Bureau of Labor Statistics, supra notes 12 and 13. The average of the described wages is $70.19 = ($96.06 + $44.31) / 2.

appealed each year on average. DHS believes that the proposed exhaustion of administrative remedies requirement would likely increase the number of appeals filed by sureties because otherwise they would waive their right to judicial review.

To estimate the number of appeals under this proposed rule, DHS assumes that invoices that were paid promptly can serve as a proxy for breaches that are not subject to disputes and are thus not likely to be appealed. In FY 2013, ICE issued invoices for 401 breached surety bonds. Sixty-five percent of the invoices (259 invoices) were timely paid. Because these bond breach determinations were not disputed and the invoices were paid timely, DHS presumes that it is unlikely that surety companies would file appeals with the AAO to contest these breaches. The remaining 35 percent of the FY 2013 surety bond invoices (142 invoices) that were not timely paid could be considered "disputed" and potential candidates for AAO appeals if the proposed exhaustion of administrative remedies requirement were in effect. In FY 2014, 119 out of 382 or 31 percent of invoices were not timely paid. In FY 2015, 313 out of 616 invoices or 51 percent of invoices were not timely paid. Based upon this information, DHS estimates that approximately 41 percent of the surety bond breaches from FY 2013 - FY 2015 might have been appealed if an exhaustion requirement had been in place. DHS calculates that the total expected number of AAO appeals for surety bonds that might be filed each year is approximately 190.

For the purposes of this analysis, DHS assumes that the 190 appeals are divided among the sureties at the same ratio at which the sureties posted bonds in FY 2015. DHS multiplies the percent of bonds posted in FY 2015 that may be appealed, or 4.8 percent, by the number of bonds posted in FY 2015 for each of four small business sureties to

estimate the annual number of breached bonds that the companies might appeal. Applying this methodology to the number of bonds posted by the four small businesses during FY 2015, DHS estimates that each of the four sureties would file between 29 and 68 appeals.

Sureties that appeal will incur an opportunity cost for time spent filing an appeal with the AAO. USCIS has estimated that the average burden for filing Form I-290B is 90 minutes.[34] The person preparing the appeal could either be an attorney or a non-attorney in the immigration bond business. The closest approximation to the cost of a non-attorney in the immigration bond business is an insurance agent. For purposes of this analysis, DHS uses as its primary estimate the average of the hourly loaded wage rate of an in-house attorney and insurance agent, $70.19, to reflect that an in-house attorney or an insurance agent (or equivalent) is equally likely to prepare the appeal. Thus, an approximation of the cost to prepare the appeal would be $105 per appeal ($70.19 × 1.5 hours). The total cost per appeal is $780 for fees and opportunity costs ($105 opportunity cost + $675 fee).

DHS multiplies the total cost per appeal ($780) by the estimated annual number of breached bonds that a surety company might appeal to determine the annual cost per surety for additional appeals filed because of the exhaustion requirement. DHS adds the familiarization costs per surety to the first year of costs incurred by the surety. For the four small businesses analyzed, the company with the lowest first year costs would incur costs of $23,182 ($780 cost per appeal × 29 appeals + $562 familiarization cost) and the company with the highest first year costs would incur costs of $53,602 ($780 cost per

[34] Form I-290B, 2013 Information Collection Request Supporting Statement, Question 12, http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201309-1615-002.

appeal × 68 appeals + $562 familiarization cost).

The four surety companies that are small entities would not have to change any of their current business practices if they do not violate any of the for cause standards set forth in the proposed rule. If one of the entities were to receive notification from ICE that it violated a for cause standard, the entity would then have the opportunity to submit a written response either explaining why the company is not in violation or how the company intends to cure any deficiency. These due process protections benefit the small entity and would entail no additional recordkeeping or reporting other than preparing a response to ICE's notification. Surety companies would, however, incur a new opportunity cost when responding to ICE's notification of its intent to decline new bonds underwritten by the surety. DHS estimates that personnel at a surety company may spend three hours to complete a response to ICE's notification. The opportunity cost estimate per response would be $381 ($127[35] × 3 hours). Because a surety would have had ample opportunities to evaluate and challenge administratively final breach determinations, DHS anticipates that it will rarely need to send a notification of its intent to decline new bonds. However, for the purposes of this opportunity cost estimate, DHS assumes that it may send about two notifications during a 10-year period to the small sureties. To calculate the cost of responding to two notifications over 10 years, the likelihood of issuing a notification during any given year is multiplied by the opportunity cost per response. This equals about $76 (20 percent × $381).

DHS estimates the proposed rule's annual impact to each small surety company by calculating its total costs as a percentage of its annual revenue. The costs are the cost

[35] $127 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and an outside counsel hired by the surety. $111 = ($44.31 + $96.06 + $240.14) / 3.

of filing appeals for each small surety company, the opportunity cost to respond to a notification that ICE intends to decline future bonds posted by the company, plus the familiarization costs.

The annual revenue for these four sureties, according to the 2015 sales revenue reported by Hoover's, ranges from approximately $3 million to $26 million. The annual impact of the proposed rule is estimated to be less than two percent of each company's annual revenue. The following tables summarize the quantified impacts of the proposed rule on the four small surety companies for the first year which includes the one-time familiarization costs and for the subsequent years, not including the familiarization costs.

Table 3: Quantified First Year Impact to Small Entities for Exhaustion of Administrative Remedies and Responding to a Notification of ICE's intent to Decline New Bonds, Including Regulatory Familiarization Costs

Revenue Impact Range	Number of Small Entities	Percent of Small Entities
0% < Impact ≤ 1%	3	75%
1% < Impact ≤ 2%	1	25%
Total	**4**	**100%**

Table 4: Quantified Annual Impact to Small Entities for Exhaustion of Administrative Remedies and Responding to a Notification of ICE's intent to Decline New Bonds

Revenue Impact Range	Number of Small Entities	Percent of Small Entities
0% < Impact ≤ 1%	3	75%
1% < Impact ≤ 2%	1	25%
Total	**4**	**100%**

The above estimated impacts reflect the quantified direct costs to comply with the rule. Surety companies may be impacted in other ways that DHS is unable to quantify. This rule may result in some surety companies changing behavior to pay breached bonds

when they otherwise may not have, thereby impacting revenue. For surety companies that fail to fulfill their obligations and cure deficiencies in their performance, this rule may result in business losses when ICE declines to accept new bonds submitted by the surety. DHS is not able to predict which surety companies may choose non-compliance and is not able to factor in the loss of surety companies' revenue.

5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule

DHS is unaware of any Federal rules applying to sureties that may duplicate, overlap, or conflict with the proposed rule.

6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities

DHS examined two regulatory alternatives that could potentially reduce the burden of this proposed rule on small entities. The alternatives to the proposed rule were: (1) different for cause standards for surety companies with different underwriting limitations; and (2) application of the proposed rule to cash bond obligors as well as surety bond obligors. The first alternative would include different for cause standards for surety companies that fall in different ranges of underwriting limitations.[36] For example, surety companies with higher underwriting limitations could be held to more stringent for cause standards than companies with lower underwriting limitations. The difference of underwriting limitations is great for some Treasury-certified sureties: the lowest underwriting limitation of the Treasury-certified sureties is $251,000 per bond and the

[36] Department of the Treasury's Listing of Certified Companies, https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm.

highest is $9.7 billion per bond. This distinction might be supported by the assumptions that companies with higher underwriting limitations are larger companies that might issue more bonds and possibly bonds of higher values, and smaller companies might have fewer resources to ensure compliance with the for cause standards. Based on these differences, an argument could be made that larger companies' actions should be monitored more closely than smaller companies' actions.

This alternative was rejected because the amount of a non-performing surety company's underwriting limitation should have no bearing on whether DHS can stop accepting bonds from that surety company. The underwriting limitation is an indication of the surety company's financial resources. A surety company can comply with its immigration bond responsibilities regardless of its underwriting limitation. In addition, because the average amount of a surety bond is about $10,200,[37] and the lowest underwriting limitation per bond set by Treasury greatly exceeds this average bond amount, it would serve no purpose to make a distinction among surety companies based on their underwriting limitations. Thus, the agency rejected this alternative.

DHS rejected the second alternative because many of the for cause standards would not be applicable to cash bond obligors. For cash bond obligors, the Federal government already has collected the face value of the bond as collateral and thus does not need to issue invoices to collect amounts due on breached bonds. The majority of cash bond obligors are not in the business of issuing bonds for profit and thus do not raise concerns about manipulating the bond management process for institutional gain. DHS, however, requests comment on all aspects of this analysis, including any alternatives that

[37] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

would minimize the impact to small entities.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

D. Small Business Regulatory Enforcement Fairness Act of 1996

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance; please consult ICE using the contact information provided in the **FOR FURTHER INFORMATION** section above.

E. Collection of Information

Agencies are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995), 44 U.S.C. 3501-3520. This proposed rule would not require a collection of information.

As protection provided by the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

F. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

G. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

H. Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. Environment

DHS Management Directive (MD) 023-01, Rev. 01 establishes procedures that DHS and its Components use to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4375, and the Council on Environmental Quality (CEQ)

regulations for implementing NEPA, 40 CFR parts 1500–1508. CEQ regulations allow federal agencies to establish categories of actions, which do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1508.4. MD 023-01 lists the Categorical Exclusions for categories of actions that DHS has found to have no such effect. MD 023-01, app. A, tbl. 1.

For an action to be categorically excluded, MD 023-01 requires the action to satisfy each of the following three conditions:

(1) The entire action clearly fits within one or more of the Categorical Exclusions;

(2) The action is not a piece of a larger action; and

(3) No extraordinary circumstances exist that create the potential for a significant environmental effect. MD 023-01, app. A, § V.B(2). Where it may be unclear whether the action meets these conditions, MD 023-01 requires the administrative record to reflect consideration of these conditions. MD 023-01, app. A, § V.B.

The proposed rule would require Treasury-certified sureties seeking to overturn a breach determination to file an administrative appeal raising all legal and factual defenses in this appeal. The proposed rule would also allow ICE to decline additional immigration bonds from Treasury-certified surety companies for cause after certain procedures have been followed. The procedures would require ICE to provide written notice before declining additional bonds to allow sureties the opportunity to challenge ICE's proposed action and to cure any deficiencies in their performance.

DHS has analyzed this proposed rule under MD 023-01. DHS has made a preliminary determination that this action is one of a category of actions, which do not

individually or cumulatively have a significant effect on the human environment. This proposed rule clearly fits within the Categorical Exclusion found in MD 023-01, Appendix A, Table 1, number A3(d): "Promulgation of rules . . . that interpret or amend an existing regulation without changing its environmental effect." This proposed rule is not part of a larger action. This proposed rule presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is categorically excluded from further NEPA review.

DHS seeks any comments or information that may lead to the discovery of any significant environmental effects from this proposed rule.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Surety bonds.

The Proposed Amendments

Accordingly, by the authority vested in me as the Acting Deputy Secretary of Homeland Security, and for the reasons set forth in the preamble, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

Subchapter B—Immigration Regulations

PART 103--IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

1. The authority citation for part 103 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112-54; 31 CFR part 223.

2. Section 103.6 is amended by revising the section heading and paragraph (b), and adding paragraph (f) to read as follows:

§ 103.6 Immigration bonds.

* * * * *

(b) Acceptable sureties. (1) Immigration bonds may be posted by a company holding a certificate from the Secretary of the Treasury under 31 U.S.C. 9304-9308 as an acceptable surety on Federal bonds (a Treasury-certified surety). They may also be posted by an entity or individual who deposits cash or cash equivalents, such as postal money orders, certified checks, or cashier's checks, in the face amount of the bond.

(2) In its discretion, ICE may decline to accept an immigration bond underwritten by a Treasury-certified surety when--

(i) Ten or more invoices issued to the surety on administratively final breach determinations are past due at the same time;

(ii) The surety owes a cumulative total of $50,000 or more on past due invoices issued to the surety on administratively final breach determinations, including interest and other fees assessed by law on delinquent debt; or

(iii) The surety has a breach rate of 35 percent or greater in any Federal fiscal year after [DATE 30 DAYS AFTER PUBLICATION OF FINAL RULE].The surety's breach rate will be calculated in the month of January following each Federal fiscal year after the effective date of this rule by dividing the sum of administratively final breach determinations for that surety during the fiscal year by the total of such sum and bond cancellations for that surety during that same year. For example, if 50 bonds posted by a surety company were declared breached from October 1 to September 30, and 50 bonds

posted by that same surety were cancelled during the same fiscal year (for a total of 100 bond dispositions), that surety would have a breach rate of 50 percent for that fiscal year.

(3) Definitions: For purposes of paragraphs (b)(2)(i) and (ii) of this section—

(i) A breach determination is administratively final when the time to file an appeal with the Administrative Appeals Office (AAO) has expired or when the appeal is dismissed or rejected.

(ii) An invoice is past due if it is delinquent, meaning either that it has not been paid or disputed in writing within 30 days of issuance of the invoice; or, if it is a debt upon which the surety has submitted a written dispute within 30 days of issuance of the invoice, ICE has issued a written explanation to the surety of the agency's determination that the debt is valid, and the debt has not been paid within 30 days of issuance of such written explanation that the debt is valid.

(4) When one or more of the for cause standards provided in paragraph (b)(2) of this section applies to a Treasury-certified surety, ICE may, in its discretion, initiate the process to notify the surety that it will decline future bonds. To initiate this process, ICE will issue written notice to the surety stating ICE's intention to decline bonds underwritten by the surety and the reasons for the proposed non-acceptance of the bonds. This notice will inform the surety of its opportunity to rebut the stated reasons set forth in the notice, and its opportunity to cure the stated reasons, i.e., deficient performance.

(5) The Treasury-certified surety must send any response to ICE's notice in writing to the office that sent the notice. The surety's response must be received by the designated office on or before the 30th calendar day following the date the notice was issued. If the surety or agent fails to submit a timely response, the surety will have

waived the right to respond, and ICE will decline any future bonds submitted for approval that are underwritten by the surety.

(6) After considering any timely response submitted by the Treasury-certified surety to the written notice issued by ICE, ICE will issue a written determination stating whether future bonds issued by the surety will be accepted or declined. This written determination constitutes final agency action. If the written determination concludes that future bonds will be declined from the surety, ICE will decline any future bonds submitted for approval that are underwritten by the surety.

* * * * *

(f) Appeals of breached bonds issued by Treasury-certified sureties. (1) Consistent with section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, the AAO's decision on appeal of a breach determination constitutes final agency action. The initial breach determination remains inoperative during the administrative appeal period and while an administrative appeal is pending. Dismissal of an appeal is effective upon the date of the AAO decision. Only the granting of a motion to reopen or reconsider makes the decision no longer final.

(2) The failure by a Treasury-certified surety or its bonding agent to exhaust administrative appellate review before the AAO, or the lapse of time to file an appeal to the AAO without filing an appeal to the AAO, constitutes waiver and forfeiture of all claims, defenses, and arguments involving the bond breach determination. A Treasury-certified surety's or its agent's failure to move to reconsider or to reopen a breach decision does not constitute failure to exhaust administrative remedies.

(3) A Treasury-certified surety or its bonding agent must raise all issues and present all facts relied upon in the appeal to the AAO. A Treasury-certified surety's or its agent's failure to timely raise any claim, defense, or argument before the AAO in support of reversal or remand of a breach decision waives and forfeits that claim, defense, or argument.

(4) If a Treasury-certified surety or its bonding agent does not timely file an appeal with the AAO upon receipt of a breach notice, a claim in favor of ICE is created on the bond breach determination, and ICE may seek to collect the amount due on the breached bond.

Claire M. Grady,

Acting Deputy Secretary.

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