



Billing Code: 4410-10

DEPARTMENT OF HOMELAND SECURITY

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: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) is promulgating two changes that apply to surety companies certified by the Department of the Treasury, Bureau of the Fiscal Service (Treasury), to underwrite bonds on behalf of the Federal Government. First, this final rule requires 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 will 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 rule sets 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 bond program and, in its regulations, allows agencies to prescribe in their regulations for cause standards and procedures for declining to accept bonds from a Treasury-certified surety company. ICE adopts 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: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Melinda A. Jones, Management and Program Analyst, MS 5207 Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Bond Management Unit, 500 12th Street SW, Washington, DC 20536; e-mail BLM-Treas@ice.dhs.gov or HQ-ERO-BOND@ice.dhs.gov. Telephone 202-271-9855 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Abbreviations
- II. Background
 - A. ICE Immigration Bonds Generally
 - B. Surety Bonds
 - C. Need for Exhaustion Requirement
 - D. Need for Ability to Decline Bonds from Non-Performing Surety Companies
 - E. Treasury Regulation Allows Federal Agencies to Decline Bonds from Certified Sureties for Cause
- III. Discussion of Final Rule
 - A. Exhaustion of Administrative Remedies
 - B. Issue Exhaustion
 - C. Standards and Process for Declining Bonds from a Treasury-Certified Surety
 - D. Technical Changes
- IV. Discussion of Comments
 - A. Comments on Exhaustion of Administrative Remedies
 - B. Comments on For Cause Standards for Declining Bonds
- V. Statutory and Regulatory Requirements
 - A. Executive Orders 12866, 13563, and 13771: Regulatory Planning and Review
 - B. Final Regulatory Flexibility Analysis
 - C. Unfunded Mandates Reform Act
 - D. Small Business Regulatory Enforcement Fairness Act of 1996
 - E. Collection of Information

	F. Federalism
	G. Civil Justice Reform
	H. Energy Effects
	I. Environment
VI.	The Amendments
I.	Abbreviations
AAO	Administrative Appeals Office
APA	Administrative Procedure Act
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
ROP	Record of Proceedings
Treasury	Department of the Treasury, Bureau of the Fiscal Service
USCIS	U.S. Citizenship and Immigration Services

II. Background

A. ICE 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) 236(a)(2)(A), 8 U.S.C. 1226(a)(2)(A); 8 CFR 236.1(c)(10). This rule

applies to all immigration bonds issued by ICE. There are currently three types of immigration bonds issued by ICE. A delivery bond is posted to guarantee the appearance of the bonded alien for removal, an interview, or at immigration court hearings; a voluntary departure bond is posted to secure the timely voluntary departure of an alien from the United States, 8 CFR 1240.26(b)(3)(i), (c)(3)(i); and an order of supervision bond is to secure compliance with an order of supervision, 8 CFR 241.5(b). *See also* INA 103(a)(3), 8 U.S.C. 1103(a)(3) (authorizing the Secretary of Homeland Security to “prescribe such forms of bond” as the Secretary deems necessary to carry out his immigration authorities).

ICE 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 <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>. 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. 12/17). This rule applies to surety bonds only, and not to cash bonds.

B. 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 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 after service of the decision. 8 CFR 103.3(a)(2)(i). 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 dismissed, 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

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 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(b)(1), (e). If the bond 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).

C. 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) (explaining that when the Administrative Procedure Act (APA) applies, an appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review).² An agency may also by regulation require issue exhaustion, meaning that

² *See also Air Espana v. Brien*, 165 F.3d 148, 151 (2d Cir. 1999) (noting that section 273 of 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) (party may seek judicial review without pursuing intra-agency appeal because filing of appeal did not

a litigant cannot raise an issue in federal court without first raising the issue in the litigant's administrative appeal. *See generally Sims v. Apfel*, 530 U.S. 103, 107-10 (2000).

In this rule, DHS requires *Darby* exhaustion by revising DHS regulations such that before a surety can sue on ICE's bond breach determination in federal court, the surety must appeal such determination to the AAO. Consistent with *Darby*, the rule also provides that the agency's breach determination remains inoperative during the pendency of such appeal. In addition, this rule requires 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 will streamline this type of litigation and conserve judicial resources because the bond obligors will be required to raise all factual and legal issues in an administrative appeal, and the AAO will issue a written decision addressing all defenses. The administrative appeal process will allow errors to be

make agency decision inoperative); *Young v. Reno*, 114 F.3d 879, 881-82 (9th Cir. 1997) (by regulation, appeal was not required).

corrected without resort to federal court litigation and will avoid the delay associated with remanding breach determinations to the agency to issue written administrative decisions addressing defenses. As noted by a district court, appropriate review of an agency determination would be simplified by requiring exhaustion of administrative remedies. *See Int'l Fidelity Ins. Co.*, ECF No. 86, at 9. This regulation will promote judicial economy by requiring obligors to present their defenses to the AAO in the first instance, thus allowing federal courts to review a written decision addressing those defenses under the APA's arbitrary and capricious standard of review, rather than remanding cases to ICE for necessary administrative determinations.

D. 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 future bonds from non-performing surety companies, after providing the due process specified in this rule, to give surety companies 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 at the bond-approving agency level. Specifically, certain surety companies' failure to pay amounts due on breached bonds had been ongoing for years, and the agency 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. *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 paying the invoice or disputing the validity of the breach determination before the agency, shows the need for this rule allowing ICE to decline bonds from non-performing surety companies.

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

Treasury 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 rule, DHS specifies the circumstances under which ICE will decline to accept new immigration bonds from Treasury-certified sureties. This rule also sets forth the procedures that ICE will follow before it declines bonds from a surety. This rule facilitates the prompt resolution of bond obligation disputes between ICE and sureties and minimizes the number of situations where the surety will routinely fail to pay administratively final bond obligations or fail to promptly seek administrative review of bond breach determinations.

III. Discussion of Final 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.

Therefore, under this rule, 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 will not be enforced while any timely administrative appeal is pending. ICE will 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 fails to file an administrative appeal during the filing period (currently 30 days) or files 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 will have waived all issues and will not be able to seek review of the breach determination in federal court.³ ICE will then issue an invoice to collect the amount due.⁴

B. Issue Exhaustion

The rule also requires 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 will 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

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 will not constitute failure to exhaust administrative remedies.

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 rule, DHS considers issue exhaustion to be mandatory in that a commercial surety or its agent is required to raise all issues before the AAO and waives and forfeits 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 rule, establishes the standards ICE will use to decline surety immigration bonds for cause (the “for cause” standards) and the procedures that ICE will follow before declining bonds from a Treasury-certified surety. The standards 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. 12/17). 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 “for cause” standards 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 establishes 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 is discretionary; ICE is not required to stop accepting new bonds every time one of the for cause standards has been violated, and ICE retains discretion to work with surety companies on an individual basis to ensure compliance.

First For Cause Standard: Ten or More Past-Due Invoices

⁵ Treasury’s regulation permitting agencies to promulgate “for cause” standards to decline new bonds is “prospective and is not intended to require a principal to obtain replacement bonds that have already been accepted.” 79 FR 61,992, 61,995. Accordingly, ICE’s notification would not have any effect on a surety’s open bonds.

Under the first for cause standard, ICE is authorized to issue a notice of its intention to decline new bonds when the surety has 10 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 and its agent 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 dismissed. *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.

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, such an invoice,

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, Bureau of the Fiscal Service, *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.

when it becomes past due, will be included as one of the 10 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 will be triggered when at least 10 invoices issued after this rule's effective date are past due. DHS establishes 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 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.

In fiscal year (FY) 2019, only five surety companies exceeded 10 unpaid past-due invoices. Three of these companies stopped posting new bonds, of their own volition. All five of these companies were either in liquidation or exhibited a practice of repeatedly failing to timely pay invoices, exhibiting that 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 10 invoices.

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

Under the second for cause standard, ICE is 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 this final rule, including interest and other fees assessed by law on delinquent debt. This rule includes a for cause standard based on cumulative debt

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.

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 October 31, 2019,⁸ for bonds in an “open” status (those that have not yet been breached or canceled), the lowest surety bond value was \$500 and the highest surety bond value was \$750,000, the average value of the over 40,000 open surety bonds was about \$11,200 and the median value was \$10,000.⁹

Data from FY 2019 illustrate the need for this standard. In FY 2019, ICE issued invoices to collect amounts due on breached immigration bonds to 13 different sureties. As of October 31, 2019, three of those thirteen sureties owed cumulative debts above \$50,000, and the median amount of cumulative debt owed by these three companies was substantial – \$253,500.¹⁰ One other surety, which of its own volition no longer posts bonds, accrued a cumulative debt of \$142,500 on 16 past-due invoices in FY 2019 before paying those invoices. Likewise, data from FY 2019 confirm that surety companies that regularly pay invoices on time do not generally exceed a cumulative total of \$50,000 in past due debt. Three sureties generally paid their debts in a timely manner with only a few late payments.¹¹ The highest amount of past-due debt accrued by any of those three companies was \$25,000. In addition, six surety companies had no past-due debts during FY 2019.

These numbers suggest that the \$50,000 threshold represents a reasonable trigger because, based on an average bond amount of \$11,200, a surety could quickly accumulate a

⁸ The data presented has been updated from the data provided in the proposed rule, but it is not meaningfully different. Although the data used here reflects FY 2019 information, the updated data supports the same conclusion as was reached in the proposed rule.

⁹ Immigration Bond Statistics maintained by ICE’s Financial Service Center Burlington.

¹⁰ An additional surety that has been in liquidation proceedings since 2001 owes a significant amount of past due debt, but no new invoices were issued to that surety in FY 2019.

¹¹ For purposes of this analysis, ICE considered payments to be timely when the payments were processed within 45 days of issuance of the invoice or were made in accordance with a payment agreement.

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 10 invoices may be past due. Because more than 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 allows ICE to take appropriate action when a surety company is not current on payments of administratively final breach determinations.

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

Finally, under the third for cause standard, ICE is 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 will be included in the breach rate calculation. In addition, for immigration delivery bonds, ICE will 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 includes these breach determinations in its calculation of a surety's breach rate.

Under this rule, ICE will 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 will be calculated for the first full fiscal year beginning after the effective date of this final rule, and each

fiscal year thereafter. If an appeal timely 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 or rejecting the appeal because the breach determination would not be administratively final.

This 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 2018, six of the eight surety companies that posted immigration bonds in that year had a breach rate, calculated using this approach, that was less than 35 percent. One of the surety companies with a breach rate that exceeded 35 percent also failed to meet the other standards set forth in this rule, and its failure to meet the breach rate standard reflects under-performance in complying with the terms and conditions of the bonds it has posted. The remaining surety company with a high breach rate had recently begun to post bonds in FY 2018, and as a result, it had only four breaches and three cancellations. Subsequently, this surety company has improved its performance such that it would have cured its deficiency prior to ICE making a final determination to decline bonds from the surety.

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 will 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 have some

latitude when they are, on occasion, unable to produce the alien, but to remain in compliance, they must surrender aliens for almost two-thirds of the demands issued.

2. Procedures

ICE will use 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 future bonds; and (4) provide an opportunity to cure the stated reasons, i.e., deficiencies, causing ICE's proposed non-acceptance of future 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 final rule also includes technical changes. It updates 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."

IV. Discussion of Comments

On June 5, 2018, DHS published a notice of proposed rulemaking (NPRM) proposing two changes that would apply to surety companies certified by Treasury to underwrite bonds on

behalf of the Federal Government. 83 FR 25951. Specifically, DHS proposed: (1) to require Treasury-certified sureties seeking to overturn a surety immigration bond breach determination to exhaust administrative remedies by filing an administrative appeal with the AAO raising all legal and factual defenses; and (2) to issue for cause standards and due process protections so that ICE may decline future bonds from non-performing sureties.

DHS received a total of eight comments in response to the NPRM. Five comments were submitted by a variety of entities and individuals associated with sureties. Specifically, two comments were submitted by trade associations, two comments were submitted by law firms representing surety companies currently underwriting immigration bonds, and one comment was submitted by a surety company that has not issued any immigration bonds. The five comments submitted on behalf of surety companies were opposed to the NPRM as written, and some of the commenters suggested that the NPRM be withdrawn because they believe the proposed changes are arbitrary, anticompetitive, and without sufficient authority.

In addition, two comments were submitted by individuals who had no apparent connection to sureties. The two individuals expressed general concerns about immigration policies without raising any concerns about the impact of the NPRM, and did not provide any recommendations for revising elements of the proposed rule. Accordingly, these two comments will not be discussed further.

A. Comments on Exhaustion of Administrative Remedies

The comments submitted by entities and individuals associated with sureties raised multiple issues related to the requirement that sureties exhaust administrative remedies before seeking judicial review. The following is a discussion of the issues that were raised and DHS's responses.

Adequacy of AAO Review Process

One commenter asserted that the exhaustion requirement should not be imposed because the AAO's review process is fatally flawed based upon a 2005 Recommendation from the USCIS Ombudsman to the USCIS Director. The commenter stated that the AAO had not issued a precedential decision addressing immigration bonds since August 7, 1998. The commenter further claimed that insufficient information had been issued about the applicable standard of review used by the AAO. The commenter also characterized the \$675 cost to file an appeal as outrageous, claiming that the process lacks any due process safeguards based upon the commenter's estimate that 95 percent of all immigration bond breach appeals are dismissed.

The report referenced by the commenter recommended that the AAO make available to the public four items: (1) the appellate standard of review; (2) the process under which cases are deemed precedent decisions; (3) the criteria under which cases are selected for oral argument; and (4) the statistics on decision-making by the AAO. Recommendation from the CIS Ombudsman to the Director, USCIS (Dec. 6, 2005), https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf. At the time, the USCIS Ombudsman recommended that the legal standards and procedures for the AAO be spelled out in regulation or in detailed policy guidance, and that data on AAO decisions be published on a regular basis.

After issuance of the 2005 report, the AAO changed its practices to address the report's concerns. For example, the AAO now provides detailed information about its decisions and the review process to stakeholders. The AAO has issued seven precedential decisions since the Ombudsman's report, including one issued in 2016. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). In addition, non-precedential decisions are available through the AAO's website,

including approximately 2,000 non-precedential decisions issued in response to appeals of breached immigration bonds. *See* Administrative Decisions, https://www.uscis.gov/laws/admin-decisions?topic_id=1&newdir=G1+-+Breach+of+Delivery+Bond.

Further, the AAO has published a handbook on its website, setting forth rules, procedures, and recommendations for practice before the AAO. AAO Practice Manual, <https://www.uscis.gov/ao-practice-manual>. The Practice Manual specifically describes the applicable standard of review, explaining that the AAO is independent and exercises *de novo* review of all issues of fact, law, policy, and discretion. *Id.* at sec. 3.4. The Practice Manual also provides information about the issuance of non-precedent and precedent decisions, explaining that AAO decisions may be designated as precedent by the Secretary of Homeland Security, with the approval of the Attorney General. *Id.* at sec. 3.15. In addition, the Practice Manual sets forth the process by which an appellant may request oral argument and the factors considered by the AAO in determining whether to grant a request for oral argument. *Id.* at sec. 6.5.

The AAO also publishes detailed statistics about its decisions, including statistics showing that appeals of bond breaches are adjudicated in a timely manner. Specifically, the AAO's published statistics reflect that in the second quarter of FY 2020, the AAO completed 212 bond breach appeals, and 99.53 percent of those appeals were completed within 180 days. *See* AAO Processing Times, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/ao-processing-times>.

The AAO's published statistics also reflect that the AAO independently reviews the validity of bond breaches in issuing its decisions. From FY 2017 – 2019, the AAO issued 244 decisions on the merits in bond breach appeals. Of those 244 decisions, 30 decisions (12.3 percent) sustained the appeal and determined that the bond breach was invalid. *See* AAO Appeal

Adjudications,

https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/AAO_Data_for_Publishing_Thru_FY19.pdf.

To the extent that the comment contends that USCIS' fee for processing the appeal is too high, DHS has previously explained the fee was set at \$675 because DHS must recover the full costs of the services that USCIS provides or else risk reductions in service quality. USCIS Fee Schedule, 81 FR 73,292, 73,306 (Oct. 24, 2016). This rule does not affect the prior published analysis setting the AAO appeal filing fee. In sum, because the AAO has altered its practices after issuance of the 2005 Ombudsman's report, and those changes are publicly documented, the commenter's reliance on criticisms of the AAO in the report is misplaced.

Sufficiency of 30-Day Time Period for Administrative Appeal

Three commenters objected to the exhaustion requirement because they believe that the 30-day time limit for filing an appeal does not afford sureties enough time to gather evidence to submit a defense to the bond breach determination. One of those commenters noted that surety companies that request documents related to the bond breach through the Freedom of Information Act (FOIA), 5 U.S.C. 552, may not receive responsive documents within the 30-day time period.

Another commenter stated that the rule would result in sureties underwriting an immigration bond as if there were no defenses to the validity of a bond breach, and, as a result, aliens would have more difficulty obtaining a bond because a surety would agree to underwrite an immigration bond only when it could fully collateralize the amount of the bond. The commenter predicted that sureties would underwrite fewer bonds because the commenter

believes that sureties will encounter difficulties in raising defenses to bond breaches based on the 30-day time period for filing an appeal.

This rule does not alter the time period for filing an administrative appeal, which is set forth in 8 CFR 103.3(a)(2)(i). This rule requires that before seeking judicial review, a surety must present any defenses to the AAO through existing procedures.

The AAO's procedures provide ample time for a surety to evaluate the validity of a bond breach, gather relevant evidence, and present any defenses to the validity of the breach. To appeal ICE's bond breach determination to the AAO, a surety must file a Notice of Appeal (Form I-290B) within 33 days after the breach determination was mailed (30 calendar days of the date of service with an additional 3 days because the decision was sent by mail). 8 CFR 103.3(a)(2)(i); Form I-290B Instructions at 2. The surety does not need to submit a brief in support of the appeal, but if a surety does wish to submit a brief or additional evidence, the surety may submit those materials with the Form I-290B or within 30 days of filing the Form I-290B. *Id.* at 5. If a surety needs more than 30 calendar days after filing Form I-290B to submit a brief, the surety must make a written request to the AAO within 30 calendar days of filing the appeal. *Id.* at 6. The AAO may grant more time to submit a brief for good cause. *Id.*

A surety need not have received a response to a FOIA request to file an appeal with the AAO or present any defenses to the bond breach determination. A surety should have access to the necessary information to evaluate the validity of the breach without obtaining additional documents through FOIA. Specifically, the surety receives a copy of the bond when the bond is posted, and the surety, or the surety's agent, receives all bond-related notices, including demand notices and breach notices. In addition, a surety can determine the status of an alien's immigration court proceedings by accessing the information system maintained by EOIR or by

obtaining information about the status of proceedings through the alien or his/her attorney. If the surety seeks documents needed for a bond breach appeal through FOIA that it does not have access to otherwise, the surety may request an extension of the briefing period from the AAO.

DHS does not expect this rule to significantly impact the availability of bonds. A large majority of immigration bonds are cash bonds, which are unaffected by this rule. Moreover, a surety will continue to have the same opportunities to challenge the validity of a breach after this rule as it does before the rule. Thus, a surety with valid defenses to a bond breach may raise those defenses by filing an appeal with the AAO and can obtain judicial review thereafter.

Records Needed to Challenge Breach and Applicable Standards

One commenter argued that DHS should not require exhaustion of administrative remedies unless ICE is required to produce non-privileged documents from the alien's registration file ("the A-File") to sureties after determining that a bond has been breached. The commenter asserted that all non-privileged documents in the A-File are needed to assist the surety in identifying defenses to the bond breach, to locate the alien, and to mitigate the bond breach. The commenter also stated that this rule provides no procedure for review of a dispute or appeal of a breach and argued that the rule should contain requirements to apply specific standards for review and incorporate court decisions addressing the validity of bond breaches.

A surety need not have access to the A-File to perform its obligations under the bond and to evaluate the validity of the breach because a surety should already possess the necessary information. As explained earlier, the surety receives a copy of the bond when it is issued, and the surety, or the surety's agent, receives all bond-related notices, including demand notices and breach notices. In addition, a surety can determine the status of an alien's immigration court proceedings by accessing the information system maintained by EOIR or by obtaining

information about the status of proceedings through the alien or his/her attorney. A surety also has a contractual relationship with the indemnitor who requested the bond be posted for the alien, and the surety may obtain information through the indemnitor. Moreover, the A-File contains numerous documents unrelated to bond breaches and requiring ICE to produce the entire A-File for every surety bond breach would be unduly burdensome and unproductive.

Incorporating the standards used by the AAO and courts to review the validity of bond breaches in this rule is unnecessary because both the procedural and substantive standards for assessing the validity of bond breaches are publicly available in existing regulations and judicial decisions. Specifically, as noted above, 8 CFR 103.3 governs the procedure for filing an appeal with the AAO, and the AAO has published a handbook containing applicable rules and procedures for matters submitted to it for review. AAO Practice Manual, <https://www.uscis.gov/aao-practice-manual>. 8 CFR 103.6(c)(3) explains that “[s]ubstantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability.” Conversely, “a bond is breached when there has been a substantial violation of the stipulated conditions” of the bond. 8 CFR 103.6(e). The terms and conditions of a bond are set forth in the bond form, and those terms and conditions have been interpreted in numerous judicial decisions, *e.g.* *AAA Bonding Agency, Inc. v. DHS*, 447 F. App’x 603 (5th Cir. 2011); *United States v. Gonzales & Gonzales Bonds and Ins. Agency, Inc.*, 103 F. Supp. 3d 1121 (N.D. Cal. 2015).

Relationship to Other Processes

Two commenters expressed uncertainty about the relationship between review of a bond breach by the AAO and other avenues for contesting the validity of a bond breach. Specifically, one commenter stated that the proposed regulations are ambiguous as to whether an appeal to the

AAO is the exclusive manner to challenge a bond breach. The commenter stated that the proposed rule appeared to suggest that sureties could dispute invoices via a written procedure as an alternative to filing an appeal to the AAO, and that this apparent alternative was in conflict with a requirement that the surety file an AAO appeal. Another commenter perceived a conflict between the rule's requirement of exhaustion through an appeal to the AAO and provisions set forth in settlement agreements known as the Amwest Agreements for using points of contact (POCs) to resolve complaints and questions.

Both the invoice dispute process and the provisions for resolving complaints for signatories of the Amwest Agreements will continue to be available after this rule takes effect, but a surety cannot satisfy the exhaustion requirement through those processes.

This rule requires that, before seeking judicial review, a surety must exhaust administrative remedies by filing an administrative appeal with the AAO raising all legal and factual defenses. The failure by a Treasury-certified surety or its bonding agent to exhaust administrative appellate review before the AAO waives all defenses to the breach before a district court.

Based on the timing of filing an administrative appeal and disputing an invoice, a surety can exhaust administrative remedies and still raise a dispute on an invoice. An invoice for a surety bond breach is issued only after a bond breach becomes administratively final. The breach is inoperative during the administrative appeal period and while a timely-filed administrative appeal to the AAO is pending. If a surety chooses not to file an appeal to the AAO, ICE issues an invoice after appeal period has ended. On the other hand, if a surety submits a timely appeal to the AAO, ICE issues an invoice after the AAO issues a decision upholding the breach determination. In either case, a surety may submit a dispute of an invoice pursuant to 31 CFR 901.2(b)(1) and ICE policy as set forth on the invoice, and ICE will review

the dispute. However, the submission of an invoice dispute is neither necessary nor sufficient to satisfy the exhaustion requirement under this rule. To satisfy the exhaustion requirement, a surety must appeal the bond breach to the AAO, an entity that independently reviews the breach using *de novo* review.

Likewise, filing of an administrative appeal does not preclude a signatory to the Amwest Agreements from seeking review available under those agreements. The Amwest Agreements were executed in 1995 and 1997 by Amwest Surety Insurance Co., Far West Surety Insurance Co, Gonzales & Gonzales Bonds and Insurance Agency, and the INS to resolve litigation filed in 1993 by those companies challenging the INS's interpretation of the bond contract. The Amwest Agreements provided that the INS would designate certain officials to serve as POCs for the resolution of the signatories' comments, complaints, and questions regarding bonds or bond practices. Specifically, the 1997 Amwest Agreement states that the signatories are "entitled to seek resolution through the appropriate POC without paying any filing fee."¹²

The commenter claims that ICE will violate the Amwest Agreements if the proposed rule is adopted, contending that a signatory's only option for administrative review would be filing an appeal with the AAO, which necessitates paying the applicable filing fee. The 1997 Amwest Agreement, however, expressly states that the parties to the Agreement did not intend that submission of a complaint to a POC would "replace the existing procedures for filing either a motion for reconsideration with the Office issuing a breach notice, or an appeal with the AAU [now called the AAO]. It was their intent, however, to create an alternative procedure for

¹² Draft Memorandum re; Implementation of Settlement *Amwest v. Reno*, at 5, attachment to Settlement Agreement executed by the United States of America and the Gonzales & Gonzales Bonds and Insurance Agency, Inc., the Amwest Surety Insurance Co., and the Far West Surety Insurance Co. (Sept. 10, 1997).

resolution of questions relating *solely* to the implementation of the Settlement [the Amwest Agreements].”¹³

The option of submitting disputes to a POC about issues arising under the Amwest Agreements does not preclude DHS from requiring exhaustion of administrative remedies. An Amwest signatory is still entitled to raise issues arising under the Amwest Agreements to a POC. However, if the signatory ultimately seeks to challenge ICE’s breach determination in federal court, it must first exhaust administrative remedies by filing an appeal with the AAO raising all legal and factual defenses to the breach.

B. Comments on For Cause Standards for Declining Bonds

The five comments submitted by Treasury-certified sureties and their representatives also raised numerous issues related to the proposal to adopt for cause standards so that ICE can decline to accept surety immigration bonds from underperforming sureties. Each of the issues is addressed below.

Authority of ICE to Decline Bonds

Two commenters argued that only Treasury has the authority to prevent a surety from conducting business and that ICE lacks delegated authority to decline bonds. The commenters noted that Congress has authorized Treasury to revoke the authority of a surety to do business when Treasury decides the corporation is insolvent, is in violation of 31 U.S.C. 9304-9306, or has failed to pay a final judgment. The commenters contended that Treasury does not have the right to delegate by regulation its authority to administer the federal surety bond program.

Congress has granted Treasury the power to authorize sureties to post bonds in favor of the Federal government and to revoke that authorization. 31 U.S.C. 9305(b), (d); *Concord*

¹³ *Id.* (emphasis in original).

Casualty & Surety Co. v. United States, 69 F.2d 78, 80 (2d Cir. 1934). However, Congress has also expressly conditioned acceptance of a bond on the approval of the Federal agency issuing the bond. 31 U.S.C. 9304(b); *see American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229, 1233 (11th Cir. 1983) (recognizing that even if a surety has been approved by Treasury, an agency may refuse a bond proffered by the surety if it has reason to doubt the surety's willingness to perform according to the conditions of the bond).

In issuing its regulation authorizing agencies to decline bonds from underperforming sureties, Treasury noted that several comments on its rule made the same objection raised in response to this rule: specifically, the comments stated that 31 U.S.C. 9305(e) provides the only circumstances under which an agency may decline to accept a new bond from a surety. *Surety Companies Doing Business with the United States*, 79 FR 61992-01, 61993 (Oct. 16, 2014). As Treasury explained, section 9305(e) is the statutory standard under which a surety's certificate of authority to write any additional bonds for any agency is revoked by operation of law for failure to pay a final court judgment or order. However, section 9304(b) reflects that Treasury-certification does not provide a guarantee to a surety that its bonds will be accepted by a particular agency in all situations. That is, Congress expressly conditioned acceptance of a bond on the approval of a Federal agency bond-approving official. 79 FR at 61993. This rule applies only to ICE's ability to decline bonds from non-performing sureties based on authority derived from section 9304(b) as recognized by Treasury in 31 CFR 223.17.

For Cause Standards Appropriately Differ from Treasury's Statutory Standards for Revoking a Surety's Authorization to Issue Bonds on behalf of the Federal Government

Two commenters asserted that ICE's for cause standards could not differ from Treasury's standards for decertification (revocation of a surety's certification). One of those commenters

stated that ICE's for cause standards improperly altered the existing standard of review in revocation proceedings because ICE's for cause standards allow it to refuse to accept bonds based on administratively final breach determinations where payment is past due. The commenter claimed that the standards would result in unprecedented deference to ICE's interpretation of the law, depriving sureties of due process. The second commenter claimed that ICE's for cause standards could not include past-due invoices unless the surety had failed to pay a final judgment issued by a court because Treasury's statutory standard for decertification under 31 U.S.C. 9305(e) refers to final judgments.

The commenters incorrectly characterize ICE's for cause standards as being inconsistent with Treasury's revocation authority. The existing Treasury regulation for revocation proceedings initiated by an agency complaint specifically recognizes that Treasury may revoke a surety's authority based on the failure to satisfy administratively final bond obligations. 31 CFR 223.20(a)(1). Moreover, in its regulation authorizing other agencies to decline bonds based on for cause standards, Treasury provides that an agency can decline to accept new bonds pursuant to section 9304(b) based on for cause standards that can include "circumstances when a surety has not paid or satisfied an administratively final bond obligation due to the agency." 31 CFR 223.17(b)(3).

In its final rulemaking promulgating 31 CFR 223.17, Treasury explained its reasoning for allowing agencies to base for cause standards on administratively final breaches. 79 FR 61,992-01, 61,993. Treasury stated that it did not believe "it is necessary or appropriate to require an agency to reduce every surety claim to judgment or submit a surety revocation complaint in every instance, in order to facilitate equitable and efficient resolution of surety performance and collection concerns at the agency level." *Id.*

In addition, the requirements for decertification under 31 U.S.C. 9305(e) are inapplicable to ICE's decision to decline bonds from a surety because ICE is not revoking a surety's ability to post all government bonds. Unlike a court judgment or order meeting the requirements of section 9305(e), which would preclude a surety from underwriting any Federal bond for any agency, a surety's failure to comply with ICE's for cause standards in this rule may result in ICE declining to accept future bonds, but will not prevent the surety from posting bonds issued by other Federal agencies.

Need for Rule

Four commenters opined that this rule is unnecessary because Treasury has existing authority to revoke a surety's certificate of authority to write additional bonds. The commenters asserted that an agency's appropriate remedy for underperforming sureties is to request that Treasury revoke the surety's certificate of authority.

In issuing 8 CFR 223.17, Treasury indicated that an agency may appropriately decline to accept future bonds based upon agency-specific for cause standards. In its final rulemaking, Treasury stated that, in some cases, sureties appeared "to have simply ignored agency final decisions for extended periods of time." 79 FR 61992-01, 61995. Treasury explained that an agency's ability to decline bonds based upon its own for cause standards could reduce litigation because the agency and the surety would have the proper incentive to resolve disputes at the administrative level. *Id.* In addition, giving agencies discretion to decline bonds based on for cause standards is consistent with, and gives effect to, 31 U.S.C. 9304(b). *Id.*

These for cause standards are necessary to implement an agency-specific process for addressing underperforming sureties. The for cause standards are expected to provide greater

incentive to underperforming sureties to timely pay administratively final breaches and to maintain an acceptable breach rate.

Prevention of Erroneous Application of For Cause Standards

One commenter stated that ICE's bond breach determinations are error-prone, arguing that ICE should not implement for cause standards because of possible errors in breach determinations.

Ample procedural protections exist to allow a surety to challenge bond breach determinations to avoid any erroneous breaches from being the basis of a determination that the surety is not in compliance with the for cause standards. Before a bond breach becomes administratively final, a surety may appeal the breach determination to the AAO and obtain administrative review of any defenses that the surety wishes to raise to the breach determination. If a surety timely appeals to the AAO, the breach determination will not become administratively final until the AAO issues a decision either dismissing or rejecting the appeal. Independent of the AAO review process, a surety may also dispute the validity of a bond breach debt invoiced by ICE pursuant to 31 CFR 901.2(b)(1) and ICE policy as set forth on the invoice, and ICE will review the dispute.

In addition, under the final rule, before declining bonds from a surety, ICE will inform the surety of its intent to decline future bonds and provide the surety with an opportunity to submit a written response and cure deficiencies in its performance. ICE will consider the surety's written response and efforts to cure before making a final determination whether to decline future bonds from the surety.

The For Cause Standards Appropriately Measure a Surety's Performance and Are Not Anticompetitive

One commenter asserted that ICE's for cause standards are flawed and anticompetitive. The commenter claimed that the for cause standards are arbitrary, fail to reflect a surety's performance in paying legally valid bond breach determinations, and penalize sureties and their agents in favor of cash bond obligors. The commenter also described specific perceived flaws in each of the for cause standards, each of which will be addressed in the sections that follow, along with other comments about each specific for cause standard.

The for cause standards are designed to measure the performance of sureties in complying with their bond obligations. Two of the for cause standards measure a surety's prompt payment of invoices after administratively final bond breach determinations. As recognized by Treasury's regulation, "[f]or cause' includes, but is not limited to, circumstances where a surety has not paid or satisfied an administratively final bond obligation due the agency." 8 CFR 223.17(b)(3). When a bond is breached, sureties are expected to pay the amount due as a result of the bond breach, and when a surety fails to pay an invoice within 30 days, it represents nonperformance. Thus, the for cause standards appropriately allow the agency to decline bonds based on the nonpayment of invoices issued on administratively final bond breach determinations.

ICE's for cause standards also appropriately consider a surety's breach rate. The purpose of an immigration bond is to provide a mechanism for obtaining an alien's compliance with his or her obligations during immigration proceedings and after the issuance of a final order in those proceedings. When a surety has a high breach rate, it indicates that bonds posted by that surety are not effectively serving the purpose of the bond to ensure the alien's compliance.

While a commenter expressed the opinion that the rule should apply to cash bonds as well as surety bonds, ICE has three reasons for applying the for cause standards only to surety

bonds. First, the majority of cash bond obligors are individuals who post a single bond to secure the release of a friend or relative. Thus, ICE sees no utility in issuing a notice to a cash bond obligor who likely will post only one bond that ICE will decline any future bonds from the obligor.

Second, because a cash bond obligor deposits the bond amount with ICE when posting a bond, no invoice is issued when a cash bond breach becomes administratively final to collect the amount forfeited because ICE already is in possession of the cash deposit securing performance. Thus, a cash bond obligor would never have unpaid invoices and could not violate two of the three for cause standards. In addition, because the majority of cash bond obligors post only one bond, ICE would not have a reasonable sample size to use in calculating the breach rate for cash bonds – the breach rate for a cash bond obligor who posted one bond would either be 0 percent or 100 percent.

Third, although cash bond obligors are not subject to this rule, ICE retains authority to decline to accept a bond if it has specific information indicating that a cash bond obligor will not comply with the terms of a bond. *See American Druggists Ins. Co*, 707 F.2d at 1233 (noting the government’s authority to refuse a bond when there is reason to doubt the obligor’s willingness to perform the terms of the bond agreement).

For Cause Standard for Unpaid Invoices – Inclusion of Disputed Invoices

Five commenters expressed concern that the use of unpaid invoices as a basis for declining future bonds would have the effect of requiring sureties to pay for bond breaches for which they have legitimate defenses. The commenters contend that a surety will be forced to forego judicial review of a breach determination even if it has strong defenses because ICE could decline to accept future bonds if the surety fails to pay invoices within 30 days. Another

commenter argued that the standard fails to provide adequate due process and suggested excluding any breaches undergoing judicial review in determining whether a surety has 10 or more unpaid invoices or a cumulative unpaid amount of \$50,000 or more.

All delinquent unpaid invoices are appropriately included in the determination of whether a surety is in compliance with its obligations because a surety has ample opportunity to challenge the validity of a bond breach prior to issuance of an invoice. ICE issues an invoice on a breached immigration bond only after the surety has had an opportunity to seek administrative review by the AAO. If the surety files a timely appeal of a bond breach to the AAO, ICE will issue the invoice only after the AAO issues a decision dismissing the appeal. While this rule will not prevent sureties from seeking judicial review of a bond breach determination, because the applicable statute of limitations for judicial review is six years, 28 U.S.C. 2401(a), it would be impractical to wait for a judicial challenge to be completed or until a surety's ability to bring the case has expired before taking action to decline new bonds posted by a surety that fails to pay for administratively final breach determinations. Consistent with 31 C.F.R. 223.17(b)(5)(i), ICE does not have authority to decline new bonds from a Treasury-certified surety when a court of competent jurisdiction has issued a stay or injunction of enforcement of the breach determinations that would otherwise support the for cause reasons.

For Cause Standard for Unpaid Invoices – Number and Amount of Delinquent Invoices

One commenter suggested that the number of past-due invoices be increased in the for cause standard for declining bonds. The commenter stated that using a standard of 10 past-due invoices could affect even attentive sureties. The commenter also suggested that declining bonds from a surety with past-due invoices in the cumulative amount of \$50,000 was problematic because a surety with a few or even one large invoice could exceed the \$50,000 threshold. In

addition, the commenter stated that the \$50,000 threshold may be unnecessary because sureties with a practice of repeatedly not paying invoices would likely have both more than 10 past-due invoices and a cumulative past due amount exceeding \$50,000.

The standard appropriately sets thresholds that will not affect attentive sureties, while giving ICE the ability to decline bonds from sureties that are not complying with their obligations to timely pay invoices for breached bonds. Sureties that routinely pay invoices on a timely basis are unlikely to inadvertently fail to comply with these standards. Moreover, when a surety is given notice of ICE's intent to decline bonds based on noncompliance with this standard, the surety has an opportunity to cure the deficiency. Thus, there is no need to raise the threshold amount to accommodate sureties with a practice of complying with obligations because DHS anticipates that those sureties will remain in compliance with these standards or timely cure any deficiencies.

In addition, it is appropriate to decline bonds from a surety that has past-due invoices totaling more than \$50,000 even when the surety has fewer than 10 past-due invoices. A surety that posts higher-value bonds can accumulate debt more quickly than sureties that post lower-value bonds if it is not committed to fulfilling its obligations by paying invoices timely. Thus, ICE runs a greater risk by continuing to accept bonds from such an entity.

For Cause Standard for Breach Rate – Purpose

Two commenters stated that ICE should not use a surety's breach rate as a basis for declining to accept new bonds. One of those commenters argued that monitoring a surety's breach rate does not serve the purpose of this rule because the preamble of the NPRM states that the purpose of the rule is to resolve problems with collecting breached bond amounts from

sureties and their agents. The second commenter asserted that the breach rate standard would make a surety more risk averse when furnishing bonds.

The purpose of the for cause standards is to create a mechanism that allows ICE to decline bonds from underperforming surety companies. Most ICE immigration bonds posted by sureties are delivery bonds, which require the surety to deliver the alien to ICE's custody upon demand. If a surety has a breach rate that exceeds 35 percent, it means that the surety has routinely failed to perform its obligation to deliver the alien, which necessitates that ICE bring the alien into custody using its own resources. If a surety demonstrates that it is routinely unable to deliver the alien in accordance with the terms of the bond, it is appropriate for ICE to decline to accept future bonds from that surety.

ICE expects that inclusion of the breach rate for cause standard will incentivize surety companies to use appropriate practical measures to comply with the terms of the bond agreement. For example, sureties and their agents will likely choose more effective methods to ensure delivery of the alien in response to demand notices on delivery bonds to avoid a high breach rate that may result in ICE declining to accept future bonds from that surety.

For Cause Standard for Breach Rate – Methodology

One commenter suggested multiple changes to the methodology for calculating the breach rate. The commenter stated that calculating the breach rate on an annual basis could cause the breach rate to be more a function of luck instead of reflecting the surety's performance because a surety could have several cancellations a few days or weeks shortly before the start or after the end of the fiscal year that would substantially reduce the surety's breach rate. The commenter also argued that the calculation of the breach rate should consider the number of

open bonds for a surety because a surety that has a small number of breaches and cancellations may have a large number of open bonds that will subsequently be cancelled.

Because the breach rate calculation will be performed on an annual basis, the calculation will be based on a sample size of the surety's performance over the entire year. Performing the calculation on an annual basis will provide ICE with a meaningful sample while also giving ICE the ability to react in a timely manner if a surety begins to show a pattern of repeatedly breaching bonds. Additionally, before ICE declines bonds from a surety based on the surety's breach rate, it will provide notice to the surety and afford the surety an opportunity to rebut the determination of the breach rate and cure deficient performance. Thus, a surety that improves its performance shortly after the calculation period may be allowed to continue underwriting new immigration bonds.

This rule does not include open bonds in the calculation of the breach rate for two reasons. First, when a bond is open, it is not yet determined whether the surety will successfully perform its obligations under the bond agreement. An open bond has not yet been breached or cancelled. Therefore, including the number of open bonds in the calculation would not provide an accurate or meaningful measure of the surety's performance of its obligations.

Second, including the number of open bonds in the calculation would unfairly favor sureties that have posted large numbers of bonds. For example, if open bonds were counted, a surety company that has 500 breached bonds and 5 cancelled bonds during one fiscal year could still have a breach rate of 10 percent if the company had 5,000 open bonds. In contrast, if the surety instead had 1,000 open bonds, 500 breached bonds, and 5 cancelled bonds, it would have a breach rate of 50 percent if open bonds were included in the calculation. No principled distinction exists for treating sureties with more open bonds more favorably than sureties with

fewer open bonds. Because the number of open bonds has no bearing on the surety's performance, the breach rate calculation properly disregards the number of open bonds.

V. Statutory and Regulatory Requirements

DHS developed this 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, 13563, and 13771: Regulatory 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 not subject to 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).

This rule requires Treasury-certified sureties seeking to overturn an ICE breach determination to file a timely administrative appeal raising all legal and factual defenses in their appeal. DHS anticipates that more appeals will be filed with the AAO as a result of this requirement. The costs to sureties to comply with this requirement include the transactional costs associated with filing an appeal with the AAO. Sureties that do not timely appeal a breach determination could incur the cost of foregoing the opportunity to obtain judicial review of a breach determination. Surety companies will also incur familiarization costs in learning about the rule’s requirements.

The rule also establishes ICE standards for declining surety immigration bonds for cause and the procedures that ICE will 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 provision imposes 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 rule to be approximately \$1.2 million at a seven percent discount rate and approximately \$1.5 million at a three percent discount rate.¹⁴ The cost of the rule increased from the estimates presented in the

¹⁴ USCIS proposed the Form I-290B fee to be \$705 in its NPRM, “Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” on Nov. 14, 2019. 84 FR 62,280, 62,360. If this proposed rule is finalized, this increased fee would add \$47,409 to the 10-year discounted cost of the rule at a seven percent discount rate and \$57,579 to the 10-year discounted cost of the rule at a three percent discount rate.

NPRM due to updated assumptions which reflect more current data ranging from FY 2017 – 2019, particularly because the anticipated number of additional appeals that will be filed as a result of this rule’s exhaustion requirements increased from 190 in the NPRM to 225 in the analysis for this final rule.

The benefits of the rule include improved efficiency and lower costs in litigating unresolved breach determinations. In addition, the rule increases incentives for surety companies to timely perform obligations, provides ICE with a mechanism to stop accepting new bonds from non-performing sureties after due process has been provided, and reduces 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, this rule allows ICE to resolve or avoid certain disputes, thereby decreasing the number of debts referred to Treasury for further collection efforts or the cases referred to the Department of Justice (DOJ) for litigation.

Table 1 shows a summary of the costs of the final rule and list of the updates to the inputs used in the NPRM. The wages and the annual number of breached bonds were updated using the latest available data. Since the publication of the NPRM, the Bureau of Labor Statistics released more recent data on wages and fringe benefits; these updates resulted in higher loaded wage rates. The updated analysis in this rule relies on statistical data about bond breaches from FY 2017-2019. Using the data available for the NPRM, FY 2012-2015, there were 18,892 surety bonds posted, an average of 4,723 per year. 2,486 surety bonds were breached during this time period (average of 622 per year). During FY 2017-2019, there were 28,022 surety bonds posted, an average of 9,341 per year. 3,603 surety bonds were breached during this time period, an

average of 1,201 per year. Because the number of bond breaches in FY 2017-2019 was greater than the number of breaches that occurred when the NPRM was published, the estimated total cost of this rule is greater than the estimate in the NPRM. Another change from the proposed rule is a reduction in costs because ICE no longer sends a Record of Proceedings (ROP) to the AAO when a bond breach appeal is filed with the AAO. Instead, the AAO now uses an electronic system to request the A-File from the DHS office that currently has the A-File. That DHS office transfers the file to the AAO with a minimal cost. These input updates are discussed throughout the regulatory impact analysis.

Table 1: Changes from the Initial Regulatory Impact Analysis to the Final Regulatory Impact Analysis

	NPRM	Final Rule	Difference	Description of Changes
Total Annual Cost, 10-year 3% discount rate	\$1.3 million	\$1.5 million	\$0.2 million	Increase in the number of breached bonds and wages used to estimate annual cost.
Population				
<i>Number of additional breached bonds that might be appealed as a result of this rule</i>	190	225	35	Updated using most recent three years of data, FY 2017 – 2019.
Wages Weighted Average Hourly Wage Rate (loaded)				
<i>Insurance Agent</i>	\$44.31	\$45.59	\$1.28	Average hourly wage updated from BLS release of Occupational Employment Statistics, May 2018. Loaded Wage with fringe benefits from BLS release of the Employer Costs for Employee Compensation, June 2018.
<i>Attorney in-house</i>	\$96.06	\$100.93	\$4.87	
<i>Attorney Outsourced</i>	\$240.14	\$252.33	\$12.19	Outsourced attorney rate is estimated to be 2.5 times the wage of an in-house attorney.
<i>Government Bond Control Specialist</i>	\$30.40	This cost is no longer applicable.	N/A	This cost is no longer applicable to this rule.

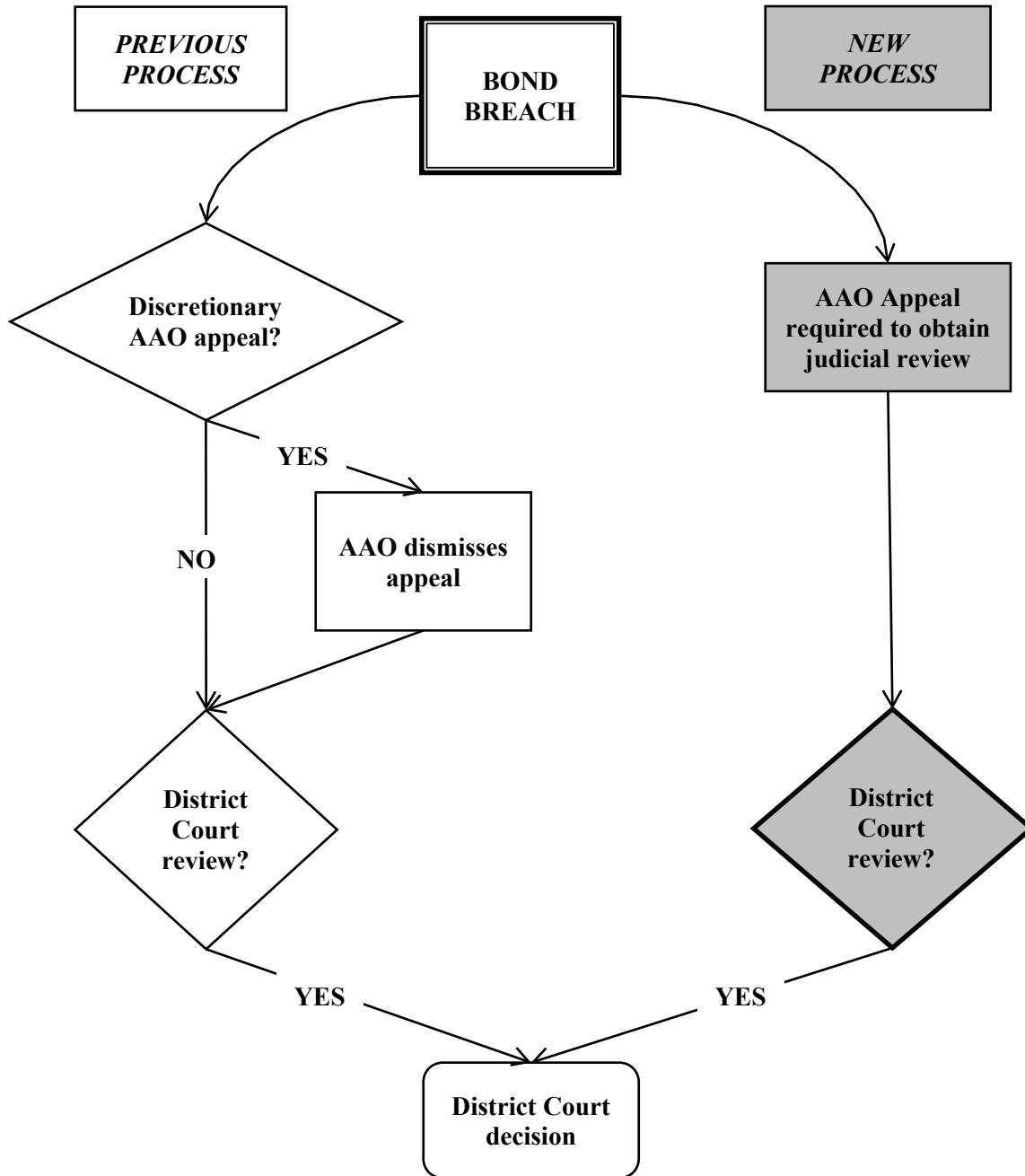
1. Exhaustion of Administrative Remedies

i. Costs

To comply with the exhaustion of administrative remedies requirement, sureties are required to timely appeal a breach determination to the AAO and raise all issues or defenses during the appeal or waive them in future court proceedings. Previously, if a surety company decided to challenge a breach determination, the surety company could choose to appeal the breach determination to the AAO or seek review in federal district court. The previous and new

appeal processes, beginning at the stage of an ICE bond breach determination, are represented in Figure 1.

Figure 1: Previous and New Process



Anticipated costs for sureties to comply with this 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 USCIS¹⁵ 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 requirement imposes no additional costs.

More current information than was available when the NPRM was published shows that a larger number of surety bond breaches are being appealed to the AAO. Data from FY 2017 through FY 2019 show that, on average, 1,201 surety bonds were breached annually¹⁶ and approximately 415 surety bond breaches were appealed annually.¹⁷ Thus, approximately 35 percent of breached surety bonds were appealed annually during FY 2017 through FY 2019.

DHS believes that the requirement to exhaust administrative remedies will likely increase the number of bond breach appeals submitted by sureties because they will waive their right to federal district court review if they do not file an administrative appeal. In its updated economic analysis, DHS used the following assumptions to develop an estimate of the number of additional appeals that will be filed because of this rule. DHS employed a similar methodology in its NPRM, and no comments were submitted about this methodology.

To estimate the likely increase in bond breach appeals, DHS presumes that it is unlikely that surety companies will file appeals with the AAO to contest bond breach determinations that were paid timely.¹⁸ Conversely, DHS assumes that invoices that were not paid promptly can serve as a proxy for breaches that may be subject to dispute and thus might be appealed. In FY

¹⁵ USCIS I-290B, Notice of Appeal or Motion, Filing Fee \$675, <https://www.uscis.gov/i-290b>.

¹⁶ ICE's Financial Service Center Burlington.

¹⁷ USCIS's AAO.

¹⁸ "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.

2017, there were 235 invoices not paid promptly. In FY 2018 and FY 2019, there were 763 and 729 invoices not paid promptly, respectively.¹⁹ For bond breaches subject to a settlement agreement with DHS, DHS assumes that those breaches would have been appealed to the AAO if this rule were in effect because the surety did not pay them promptly. In FY 2017, 99 surety bonds appeals were filed. In FY 2018 and FY 2019, there were 239 and 906 surety bond appeals filed. In FY 2019, DHS expected 7 additional disputed bond breaches to be appealed.²⁰ DHS excluded from its analysis bond breaches that the agency rescinded because no AAO appeal was needed to overturn these breach determinations.

Using this methodology, based on FY 2017 – FY 2019 data, DHS estimates that approximately 225 additional surety bond breaches might have been appealed annually if an exhaustion requirement had been in place.²¹ In the proposed rule, DHS estimated 190 additional surety bond breaches might have been appealed annually based on the average annual number of invoices that were not timely paid and could be considered “disputed” and potential candidates for AAO appeals during FY 2013-FY 2015 ($142 + 119 + 313 = 574$. $574 \div 3 = 191.33$).

Sureties that appeal 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.²² 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

¹⁹ ICE's Financial Service Center Burlington.

²⁰ *Ibid.*

²¹ DHS estimates that an additional 136 breaches would have been appealed in FY 2017 ($235 - 99 = 136$), 524 additional breaches would have been appealed in FY 2018 ($763 - 239 = 524$), and 7 additional breaches would have been appealed in FY 2019. The estimated number of additional appeals was found to be smaller for FY 2019 because 906 appeals were filed in FY 2019. Thus, the average estimated annual number of additional appeals for FY 2017 – 2019 is 222. DHS rounds this estimate to 225.

²² Form I-290B, 2018 Information Collection Request Supporting Statement, Question 12, **Error! Hyperlink reference not valid.** https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201804-1615-002.

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. The average hourly loaded wage rate of an insurance agent is \$45.59.²³ The average hourly loaded wage rate of an attorney is \$100.93.²⁴ 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 (\$100.93) by 2.5 for a total of \$251.23 to roughly approximate an hourly billing rate for outside counsel.²⁵ 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 \$68 ($\45.59×1.5 hours, rounded). DHS assumes that an in-house attorney or an insurance agent (or equivalent) is equally likely to prepare a surety's appeal. Thus, the primary estimate for the cost to prepare the appeal is \$110 -- the average of the wage rates for an in-house attorney and an insurance agent multiplied by the estimated time to prepare the appeal ($\$73.26^{26} \times 1.5$ hours, rounded). DHS estimates a

²³ Bureau of Labor Statistics, Occupational Employment Statistics May 2018, Standard Occupational Code 41-3021 Insurance Sales Agents, Mean hourly wage \$32.64, <http://www.bls.gov/oes/2018/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 2018, Table 5. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: private industry workers, by major occupational group, Sales and Office Occupational Group, http://www.bls.gov/news.release/archives/ecec_09182018.pdf. Wages are 71.6 percent of total compensation. $\$45.59 = \$32.64/0.716$.

²⁴ Bureau of Labor Statistics, Occupational Employment Statistics May 2018, Standard Occupational Code 23-1011 Lawyers, Mean hourly wage \$69.34, <http://www.bls.gov/oes/2018/may/oes231011.htm>. <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 2018, Table 5. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: private industry workers, by major occupational group, Management, Professional, and related Group, http://www.bls.gov/news.release/archives/ecec_09182018.pdf. Wages are 68.7 percent of total compensation. $\$100.93 = \$69.34/0.687$.

²⁵ 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>.

²⁶ $\$73.26 = (\$45.59 + \$100.93) / 2$.

maximum cost scenario in which a surety would hire outside counsel to prepare the appeal, resulting in a cost of \$378 ($\252.33×1.5 hours, rounded). Sureties also incur a \$675 filing fee per appeal. When the filing fee is added to the cost of preparing the appeal, the total cost per appeal ranges from \$743 ($\$675 + \68) to \$1,053 ($\$675 + \378), with a primary estimate of \$785 ($\$675 + \110). This results in a total annual cost between \$167,175 and \$236,925, with a primary estimate of \$176,625 ($\785×225 breached bonds).

DHS expects minimal costs to the Federal government associated with this rule.

Although a cost was estimated for ICE to submit an ROP to the AAO in the proposed rule, ICE no longer performs this task. The proposed rule estimated that each ROP took approximately 90 minutes to compile by an ICE Bond Control Specialist. However, now no ROP is prepared; instead, the AAO bases its review of the bond breach determination on the A-File. When the AAO receives a new appeal, it uses a DHS system to request the A-File from the DHS office that currently has the A-File. That DHS office transfers the file to the AAO at a minimal additional burden. 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

This rule assists both DOJ's and ICE's efforts in litigation to collect amounts due on breached surety bonds. For example, the rule eliminates the need for remand decisions required by two federal courts in litigation to collect unpaid breached bond invoices because the AAO will already have had an opportunity to issue a written decision addressing all of the surety company's defenses raised as part of the required administrative appeal. As with any requirement for exhaustion of administrative remedies, this rule promotes judicial and administrative efficiency by resolving many claims without the need for litigation. Furthermore,

review confined to a defined administrative record will eliminate the need for discovery as part of litigation.

2. Process for Declining Bonds

i. Costs

This rule establishes for cause standards that ICE will use to decline new immigration bonds from a surety company. If the surety does not meet these standards, ICE may notify the surety that it has fallen below the required performance levels and, if the surety fails to cure its deficient performance, ICE may stop accepting new bonds from the company. The anticipated costs of a surety's response to ICE's notification derive from the due process requirements set by Treasury for all agencies that issue rules to decline new bonds from Treasury-certified sureties. The rule provides an opportunity for the surety to rebut the stated reasons for non-acceptance of new bonds and provides 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 rule only applies 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. As part of its updated economic analysis since publishing the NPRM, DHS examined the impacts to surety companies that actively posted bonds with ICE in FY 2018. In FY 2018, eight sureties posted immigration bonds with ICE and would have been subject to the requirements of this rule had it been in place. Of those eight sureties, three would have been subject to at least one of the proposed for cause standards as of the end of FY 2018. Two of those sureties would have been subject to two of the three for cause standards as of the end of FY 2018. These two sureties together had more than 244 invoices that

were past due, with a total outstanding balance of over \$2.0 million. The third surety was subject to the for cause standard for breach rate, but as explained earlier, subsequently improved its breach rate substantially.

DHS is establishing 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.

Under this 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 is authorized to notify the surety that it has fallen below the required performance levels. The surety will 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 receives a notification from ICE of its intention to decline any new bonds underwritten by the surety, the surety will have had ample opportunities to evaluate and rebut each administratively final breach determination. Furthermore, the for cause standards for declining new bonds will 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 rule will 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) employed by the surety

company, an in-house attorney, or outside counsel is equally likely to respond to the notification. The opportunity cost estimate per response is \$399 ($\133×3 hours).²⁷

Because a surety will 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 for cause standards. However, for the purposes of this cost analysis, DHS assumes that it will send one to three notifications during a 10-year period.²⁸ 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 \$120 (30 percent \times \$399). The cost of responding to one notification over 10 years (the likely minimum number of notifications) is approximately \$40 (10 percent \times \$399). Thus, the range of response costs per year is \$40 to \$120, with a primary, or most likely, estimate of \$80 (20 percent \times \$399).

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 will 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 revenue to these companies. However, ICE notes that, although it would no longer accept immigration bonds underwritten by these sureties, this rule does not prohibit these sureties from underwriting bonds for other agencies in

²⁷ \$133 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and outside counsel hired by the surety. $\$133 = (\$45.59 + \$100.93 + \$252.33) / 3$.

²⁸ As discussed previously, one or more of the for cause standards would have applied to three companies as of the end of FY 2018. DHS assumes that, at most, the for cause standards will be triggered for three 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 for cause standards over 10 year timeframe.

the Federal government.

ii. Benefits

This rule addresses 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 may 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. This rule provides greater incentive for surety companies to timely pay their administratively final bond breach determinations and helps ensure that sureties comply with the requirements imposed by the terms of a bond. In turn, this will 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, this rule allows 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 will need to learn about the new rule and its requirements. DHS assumes that each Treasury-certified surety company currently issuing immigration bonds will 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 will 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. Although DHS requested comments regarding this estimate, no comments addressed the time necessary for regulatory review.

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, \$73.26. DHS calculates that the familiarization cost per surety company is \$586.08 (8 hours × \$73.26). Nine sureties posted immigration bonds with ICE in FY 2019. DHS calculates the total estimated regulatory familiarization cost for all sureties currently issuing immigration bonds as \$5,275 ($73.26 \times 8 \text{ hours} \times 9 \text{ sureties}$).

4. Alternatives

OMB Circular A-4 directs agencies to consider regulatory alternatives to the provisions of the rule.²⁹ This section addresses two alternative regulatory approaches and the rationales for rejecting these alternatives in favor of this rule.

The first alternative would be to include different for cause standards for surety companies that fall in different ranges of underwriting limitations.³⁰ 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 \$254,000 per bond and the highest is \$11.6 billion per bond.³¹ 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.

²⁹ OMB Circular A-4, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

³⁰ 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, 2018), <https://www.fiscal.treasury.gov/surety-bonds/circular-570.html#1>.

³¹ Department of the Treasury's Listing of Certified Companies, <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>.

This alternative was rejected because the amount of a non-performing surety company's underwriting limitation should have no bearing on whether ICE 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 \$11,200,³² 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, DHS rejected this alternative.

The second regulatory alternative DHS considered would be to apply the requirements of the 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 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 2015 – FY 2019, at least 65 percent of cash bonds were posted by an obligor who only posted one bond.³³ 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.

³² Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

³³ ICE's Financial Service Center Burlington.

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.³⁴ In contrast, the number of cash bond cases challenging bond breaches litigated in federal courts has averaged less than two per year for the past five years.³⁵

5. Conclusion

This rule requires 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 allows 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 rule, as well as the rule's benefits. Table 2 summarizes the costs and benefits of the final rule.

³⁴ *AAA Bonding Agency Inc., v. DHS*, 447 F. App'x 603, 606 (5th Cir. 2011).

³⁵ ICE's Financial Service Center Burlington.

Table 2: Summary of Costs and Benefits of the Rule (2018 US\$)

Category	Discount Rate	Minimum Estimate	Primary Estimate	Maximum Estimate
Annualized Monetized Costs				
Exhaustion of administrative remedies	7%	\$167,175	\$176,630	\$236,925
	3%	\$167,175	\$176,630	\$236,925
For Cause Standards	7%	\$40	\$80	\$120
	3%	\$40	\$80	\$120
Familiarization*	7%	\$702	\$702	\$702
	3%	\$600	\$600	\$600
Total Annualized Cost	7%	\$167,917	\$177,407	\$237,747
	3%	\$167,815	\$177,305	\$237,645
Total 10-Year Undiscounted Cost		\$1,677,424	\$1,722,323	\$2,375,722
Total 10-Year Discounted Cost	7%	\$1,179,377	\$1,246,030	\$1,669,832
	3%	\$1,431,498	\$1,512,449	\$2,027,161
Unquantified Costs	<ul style="list-style-type: none"> • Surety companies may lose revenue if ICE declines new immigration bonds. 			
Unquantifiable Benefits	<ul style="list-style-type: none"> • The rule will assist DOJ’s efforts in preparing cases for litigation and eliminate the need for remand decisions. • The rule will decrease the debt referred to Treasury for further collection efforts and streamline the litigation of any breached bond claims referred to DOJ. • The rule will 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		N/A	N/A	N/A

* Familiarization cost is the cost to businesses to familiarize themselves with the 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 \$586 per surety company.

B. Final 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 Final Regulatory Flexibility Analysis that examines the impacts of the final 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.

1. A statement of the need for, and objectives of, the rule.

DHS establishes procedural and substantive standards under which it may decline new immigration bonds from a Treasury-certified surety and an exhaustion of administrative remedies requirement. This rule will facilitate the resolution of disputes between ICE and sureties that arise after its effective date.

This rule promotes judicial and administrative efficiency by allowing Federal courts to review the AAO’s written decision on the validity of a breach determination under the APA without first remanding breach decisions to ICE to prepare written decisions based on defenses raised for the first time in federal court. In addition, the discovery process will 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 will have a greater incentive to surrender aliens in response to demand notices, thereby reducing agency resources expended in locating aliens. They also will 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.

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. 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.

- 2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.**

DHS did not receive any public comments raising issues in response to the initial regulatory flexibility analysis and did not make any revisions to the standards and procedures for declining bonds underwritten by small entities in this final rule.

- 3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.**

DHS did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

- 4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.**

As part of its updated economic analysis, ICE determined that for FY 2019 nine of the 266 Treasury-certified sureties³⁶ would have been subject to the requirements of this rule had it been in place because these nine sureties are the only ones that posted new immigration bonds

³⁶ The list of Treasury-certified sureties can be found here: <https://fiscal.treasury.gov/surety-bonds/list-certified-companies.html>. There are 266 sureties as of July 1, 2019.

with ICE during FY 2019. 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 rule.

Most surety companies are subsidiaries or divisions of insurance companies,³⁷ where bail bonds are a small part of their portfolios. Other lines of surety bonds include contract, commercial, customs, construction, notary, and fidelity bonds.³⁸

DHS used multiple data sources such as Dun & Bradstreet, Inc. and ReferenceUSA³⁹ 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.⁴⁰ These four sureties issued approximately 70 percent of the total number of surety bonds to ICE in FY 2019. The following table provides the industry descriptions of the small entities that will be impacted by this rule.

None of the nine entities that posted bonds with ICE in FY 2019 were small governmental organizations or small organizations not dominant in their field.

³⁷ National Association of Surety Bond Producers and Surety and Fidelity Association of America, “Frequently-Asked Questions,” 2016, http://suretyinfo.org/?page_id=84#surety.

³⁸ 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.

³⁹ These databases offer information of location, number of employees, and estimated sales revenue for millions of U.S. businesses. The Dun & Bradstreet, Inc’s website is www.hoovers.com. The Reference USA website is <http://www.referenceusa.com>. ICE collected data from these sources in November 2019.

⁴⁰ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, August 19, 2019. <https://www.sba.gov/document/support-table-size-standards>.

Table 3: Small Entities to which this Rule Applies

NAICS Code	NAICS Description	Count of Small Entities impacted by 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	2	1,500 employees
524210	Insurance Agencies and Brokerages	1	\$8,000,000
Total		4	

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

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

Estimated Cost and Impact as a Percentage of Revenue

To estimate the impact on small entities, DHS has calculated the cost of this rule as a percentage of the revenue of those entities. During the first year that this rule is in effect, sureties of all sizes will 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),

\$73.26,⁴¹ to estimate the familiarization cost. DHS estimates that it will take eight hours for the regulatory review.

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, \$73.26. DHS calculates that the familiarization cost per surety is \$586 rounded (8 hours × \$73.26).

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. In the analysis in its NPRM, DHS assumed that the surety company pays for all the appeals filed. DHS requested comments regarding this assumption, but no comments addressed this assumption. Therefore, DHS uses the same methodology here.

As discussed previously, sureties that choose 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. Based on FY 2017 – 2019 data, DHS estimates that approximately 225 additional surety bond breaches might be appealed to the AAO annually if an exhaustion requirement had been in place. For the purposes of this analysis, DHS assumes that the additional 225 AAO appeals are divided among the sureties at the same ratio at which the sureties posted bonds in FY 2019. DHS multiplies the percent of bonds posted in FY 2019 that may be appealed, or 2.3 percent, by the number of bonds posted in FY 2019 for each of the 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

⁴¹ Bureau of Labor Statistics, supra notes 12 and 13. The average of the described wages is $\$73.26 = (\$100.93 + \$45.59) / 2$.

businesses during FY 2019, DHS estimates that each of the four sureties would file between 19 and 61 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.⁴² 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, \$73.26, 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 \$110 per appeal ($\73.26×1.5 hours, rounded). The total cost per appeal is \$785 for fees and opportunity costs ($\$110$ opportunity cost + $\$675$ fee).

DHS multiplies the total cost per appeal (\$785) 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 \$15,501 ($\785 cost per appeal \times 19 appeals + $\$586$ familiarization cost) and the company with the highest first year costs would incur costs of \$48,471 ($\785 cost per appeal \times 61 appeals + $\$586$ 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 this

⁴² Form I-290B, 2018 Information Collection Request Supporting Statement, Question 12, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201804-1615-002.

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 entail no additional recordkeeping or reporting other than preparing a response to ICE's notification. Surety companies will, 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 \$399 ($\133×3 hours).⁴³ 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 \$80 (20 percent \times \$399).

DHS estimates this 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 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 2019 sales revenue reported by Dun & Bradstreet, Inc., ranges from approximately \$2.6 million to \$285.7 million. The

⁴³ \$133 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and an outside counsel hired by the surety. $\$133 = (\$45.59 + \$100.93 + \$252.33) / 3$.

annual impact of the rule is estimated to be two percent or less of each company’s annual revenue. The following tables summarize the quantified impacts of this 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.⁴⁴

Table 4: 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%	2	50%
1% < Impact ≤ 2%	2	50%
Total	4	100%

Table 5: 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%	2	50%
1% < Impact ≤ 2%	2	50%
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

⁴⁴ USCIS proposed the I-290B fee to be \$705 in its NPRM, “Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” on Nov. 14, 2019. 84 FR at 62360. If this proposed rule is finalized, the increased fee will not change the results of Tables 4 and 5.

which surety companies may choose non-compliance and is not able to factor in the loss of surety companies' revenue.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

DHS examined two regulatory alternatives that could potentially reduce the burden of this rule on small entities. The alternatives to the rule were: (1) different for cause standards for surety companies with different underwriting limitations; and (2) application of the 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. 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 \$254,000 per bond and the highest is \$11.6 billion per bond.⁴⁵ 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

⁴⁵ Department of the Treasury's Listing of Certified Companies, <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>.

underwriting limitation should have no bearing on whether ICE 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 \$11,200,⁴⁶ 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.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified at 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

⁴⁶ Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

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, 110 Stat. 847, 858-59, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them. This rulemaking is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. *See* 5 U.S.C. 804(2). As indicated in the Executive Orders 12866, 13563, and 13771: Regulatory Review, Section V, the rule is expected to have an effect on compliance costs and regulatory burden for employers. As small businesses may be impacted under this regulation, DHS has prepared a RFA analysis.

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, as amended, Pub. L. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501-3520). This rule will 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 rule under that Order and have determined that it does not have implications for federalism.

G. Civil Justice Reform

This 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 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 and Instruction Manual (IM) 023-01-001-01 establish procedures that DHS and its Components use to implement the requirements of 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. The CEQ regulations allow federal agencies to establish categories of actions that 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. The IM 023-01-001-01, Rev. 01 lists the Categorical Exclusions that DHS has found to have no such effect. IM 023-01-001-01 Rev. 01, Appendix A, Table 1.

For an action to be categorically excluded, IM 023-01-001-01 Rev. 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. IM 023-01-001-01 Rev. 01 § V(B)(2)(a)-(c). 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.

This rule requires Treasury-certified sureties seeking to overturn a breach determination to file an administrative appeal raising all legal and factual defenses in this appeal. The rule also allows ICE to decline additional immigration bonds from Treasury-certified surety companies for cause after certain procedures have been followed. The procedures 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 rule under MD 023-01 and IM 023-01-001-01 Rev. 01. DHS has made a 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 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 rule is not part of a larger action. This rule presents no extraordinary circumstances creating the potential for significant environmental effects.

Therefore, this rule is categorically excluded from further NEPA review.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Surety bonds.

Accordingly, for the reasons set forth in the preamble, the Department of Homeland Security amends chapter I of title 8 of the Code of Federal Regulations 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; 125 Stat. 550; 31 CFR part 223.

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

Subpart A—[Amended]

§ 103.6 Immigration Bonds.

* * * * *

(b) *Acceptable sureties*—(1) *Acceptable sureties generally*. 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) *Authority to decline bonds underwritten by Treasury-certified surety*. 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 [INSERT 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.

(iv) Consistent with 31 CFR 223.17(b)(5)(i), ICE may not decline a future bond from a Treasury-certified surety when a court of competent jurisdiction has stayed or enjoined enforcement of a breach determination that would support ICE's decision to decline future bonds. For example, if collection of a past-due invoice has been stayed by a court, it cannot be counted as one of the ten or more invoices under paragraph (b)(1)(i) of this section.

(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) *Notice of intention to decline future bonds.* 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 notification 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) *Surety's response.* 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) *Written determination.* 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.

(7) *Effect of decision to decline future bonds.* Consistent with 31 CFR 223.17(b)(4), ICE will use best efforts to ensure persons conducting business with the agency are aware that future bonds underwritten by the surety will be declined by ICE. For example, ICE will notify any bonding agents who have served as co-obligors with the surety that ICE will decline future bonds underwritten by the surety.

* * * * *

(f) *Appeals of Breached Bonds Issued by Treasury-Certified Sureties.*

(1) *Final agency action.* 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 a timely 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 by the AAO makes the dismissal decision no longer final.

(2) *Exhaustion of administrative remedies.* 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) *Requirement to raise all issues.* 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) *Failure to file a timely administrative appeal.* 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.

Chad R. Mizelle,
Senior Official Performing the Duties of the
General Counsel.

[FR Doc. 2020-14824 Filed: 7/30/2020 8:45 am; Publication Date: 7/31/2020]