

**§ 1739.18 Grant documents.**

The terms and conditions of grants shall be set forth in grant documents prepared by RUS. The documents shall require the applicant to own all equipment and facilities financed by the grant. Among other matters, RUS may prescribe conditions to the advance of funds that address concerns regarding the Project feasibility and sustainability. RUS may also prescribe terms and conditions applicable to the construction and operation of the Project and the delivery of Broadband Transmission Service to Rural Areas, as well as other terms and conditions applicable to the individual Project.

**§ 1739.19 Reporting and oversight requirements.**

(a) A project performance activity report will be required of all recipients on an annual basis until the Project is complete and the funds are expended by the applicant. Recipients are to submit an original and one copy of all project performance reports, including, but not limited to, the following:

(1) A comparison of actual accomplishments to the objectives established for that period;

(2) A description of any problems, delays, or adverse conditions which have occurred, or are anticipated, and which may affect the attainment of overall Project objectives, prevent the meeting of time schedules or objectives, or preclude the attainment of particular Project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation; and

(3) Objectives and timetable established for the next reporting period.

(b) A final project performance report must be provided by the recipient. It must provide an evaluation of the success of the Project in meeting the objectives of the program. The final report may serve as the last annual report.

(c) RUS will monitor recipients, as it determines necessary, to assure that Projects are completed in accordance with the approved scope of work and that the grant is expended for Eligible Grant Purposes.

(d) Recipients shall diligently monitor performance to ensure that time schedules are being met, projected work within designated time periods is being accomplished, and other performance objectives are being achieved.

**§ 1739.20 Audit requirements.**

A grant recipient shall provide RUS with an audit for each year, beginning

with the year in which a portion of the financial assistance is expended, in accordance with the following:

(a) If the recipient is a for-profit entity, an existing Telecommunications or Electric Borrower with RUS, or any other entity not covered by the following paragraph, the recipient shall provide an independent audit report in accordance with 7 CFR part 1773, "Policy on Audits of RUS Borrowers."

(b) If the recipient is a State or local government, or non-profit organization, the recipient shall provide an audit in accordance with 7 CFR part 3052, "Audits of States, Local Governments, and Non-Profit Organizations."

**§ 1739.21 OMB control number.**

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0572-0127.

**Subpart B—[Reserved]**

Dated: July 16, 2004.

**Hilda Gay Legg,**

*Administrator, Rural Utilities Service.*

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**DEPARTMENT OF JUSTICE****8 CFR Parts 1001, 1003, 1103, 1239 and 1287**

[EOIR No. 139I; AG Order No. 2728-2004]

RIN 1125-AA43

**Executive Office for Immigration Review; Definitions; Fees; Powers and Authority of DHS Officers and Employees in Removal Proceedings**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule amends regulations relating to the Executive Office for Immigration Review to conform with certain regulatory changes made by the Department of Homeland Security (DHS) for consistency and clarity. This rule makes no substantive changes in the Department of Justice regulations, but makes appropriate revisions to the definitions and fee provisions and the regulations relating to issuance of notices to appear and subpoenas in the EOIR regulations, in order to avoid confusing and unnecessary duplication of provisions already set forth in the DHS regulations. Finally, this rule

makes a necessary technical change to an existing regulation.

**DATES:** *Effective date:* This interim rule is effective on July 28, 2004.

*Comment date:* Written comments must be submitted on or before August 27, 2004.

**ADDRESSES:** Please submit written comments to Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference RIN No. 1125-AA43 on your correspondence. You may view an electronic version of this interim rule at [www.regulations.gov](http://www.regulations.gov). You may also comment via the Internet to EOIR at [eoir.regs@usdoj.gov](mailto:eoir.regs@usdoj.gov) or by using the [www.regulations.gov](http://www.regulations.gov) comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125-AA43 in the subject box.

**FOR FURTHER INFORMATION CONTACT:**

Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

**SUPPLEMENTARY INFORMATION:****Background**

On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (HSA) creating the new Department of Homeland Security (DHS) and transferring the functions of the former Immigration and Naturalization Service (INS) to the Department of Homeland Security. Public Law 107-296, tit. IV, subtitles. D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002). The Attorney General retained the functions of the Executive Office for Immigration Review (EOIR) in the Department of Justice. HSA section 1101, 116 Stat. at 2273.

In order to implement the transfer of functions under the HSA, the Attorney General reorganized title 8 of the Code of Federal Regulations and divided the regulations into chapters relating to the functions of the then-INS (chapter I) and the functions of EOIR (chapter V). 68 FR 9824 (Feb. 28, 2003); *see also* 68 FR 10349 (March 5, 2003). The Attorney General transferred appropriate parts, subparts and sections of the regulations, and duplicated other parts, subparts and sections, to ensure continuity in the regulations pertaining to EOIR, while making the appropriate division of authority under the HSA. The Secretary of Homeland Security has since issued two regulations amending 8 CFR

chapter I. In light of those changes, the Attorney General is making conforming amendments to ensure continuity and to clarify the regulations in 8 CFR chapter V.

#### Definitions; Powers and Authority of DHS Officers in Removal Proceedings

On June 13, 2003, the Secretary of Homeland Security issued a final regulation conforming portions of the regulations in 8 CFR chapter I regarding legacy INS functions transferred into the structures established in the HSA in accordance with DHS' reorganization plan. 68 FR 35273 (June 13, 2003). Relevant changes made by DHS included revised definitions in 8 CFR part 1, and revisions to provisions in part 239 and part 287 designating DHS officers who are authorized to issue Notices to Appear in connection with proceedings before immigration judges and the Board of Immigration Appeals, and who are authorized to issue and serve administrative subpoenas. The Attorney General has determined that it is appropriate to adjust the regulations in 8 CFR parts 1001, 1239, and 1287 relating to EOIR in order to reflect these changes, eliminate unnecessary duplication, and ensure greater clarity.

Specifically, in 8 CFR 1.1, DHS has changed the definitions of the terms "Service" and "Commissioner," and added the terms "Secretary," "Bureau," "BCIS," "CBP," and "ICE." These definitions refer directly to DHS or legacy components of the INS, and this rule revises the definitions in 8 CFR 1001.1 to cross-reference relevant terms rather than attempting to duplicate the specific DHS definitions, which DHS may change over time.

This rule makes two exceptions to the definitions promulgated by DHS. Unless otherwise specifically noted, the term "Department" in 8 CFR chapter V refers to the Department of Justice, while the DHS regulations in 8 CFR chapter I use the term to refer to the Department of Homeland Security. Moreover, this rule revises the definition of the term "Director" in 8 CFR chapter V to refer to the Director of EOIR, unless otherwise specified. The definition in 8 CFR 1001.1(o) now cross-references the term "director," when used in the context of a DHS official, to the definitions in the DHS regulations in 8 CFR 1.1(o).

The rule also revises 8 CFR 1239.1 to cross-reference rather than duplicate the list of officers authorized to issue a notice to appear in 8 CFR 239.1 and to make conforming changes to regulatory references reflecting the transfer of functions to DHS from the former INS. Cross-referencing the list of officers

authorized to issue a notice to appear, a rule within DHS' authority, will simplify the regulations. Additionally, 8 CFR 1239.2 has been amended to remove unnecessary provisions, and cross-reference the provisions of 8 CFR 239.2 regarding motions to dismiss a notice to appear.

The rule also amends 8 CFR 1287.4 to focus solely on the issuance of subpoenas by immigration judges during the course of immigration proceedings. As revised, the rule eliminates duplicative provisions relating to DHS's authority by simply cross-referencing the provisions of the DHS regulations relating to the issuance and service of subpoenas by DHS officers and employees. The authority of DHS officers to issue and serve subpoenas prior to commencement of proceedings is within the jurisdiction of DHS. Additionally, a reference to naturalization proceedings under 8 CFR part 335 has been removed from 8 CFR 1287.4(a)(2)(ii) as unnecessary.

#### Changes to the Fees Provisions

The Secretary of Homeland Security published a final rule in the **Federal Register** on April 15, 2004 altering the schedule of fees collected from persons filing immigration benefit applications, and making other changes in 8 CFR 103.7. 69 FR 20528. In this interim rule, the Department removes provisions from 8 CFR 1103.7 that relate solely to DHS in order to eliminate the duplicative schedule of DHS fees contained in 8 CFR 1103.7(b) as well as in 8 CFR 103.7(b). This rule also makes revisions in 8 CFR 1103.7 to clarify the requirements and processes for filing fees charged in proceedings before immigration judges.

In addition, this rule refines the provisions regarding filing fees before the immigration judges and the Board of Immigration Appeals in 8 CFR 1003.24 and 1003.8, respectively. The Department is not changing the amount of the fee required for filing appeals, motions, or fees related solely to EOIR Forms. Fees for applications for relief based on DHS Forms that are filed with the immigration court or the Board continue to depend on the DHS fee schedule. Nor is the Department changing the existing process for how fees are paid for such filings.

Instead, this rule changes the structure of the fees regulations at 8 CFR 1003.8, 1003.24, and 1103.7 to make it easier for the public to understand when and how to pay a filing fee in matters relating to proceedings before the immigration judges and the Board. The Department is providing a clearer enumeration of when fees are and are

not required, clearer direction on how fees are paid, and cross-references to the list of forms and fees published by the Department of Homeland Security that may be filed during the course of removal and related proceedings that require a fee, such as Form I-485 (Application to Register Permanent Residence or to Adjust Status), and Form I-881 (NACARA, Application for Suspension of Deportation or Special Rule Cancellation of Removal). All forms published by the Department of Justice that require a fee are now listed separately from Department of Homeland Security forms. This rule also includes new language to allow for future electronic fee payment before the Board, a concept that is under consideration.

The provisions in this interim rule with request for comments that have not previously appeared in the regulations of the Department are extracted from the Board of Immigration Appeals Practice Manual and explain with greater clarity when fees are not required, how fees may be waived, the amount required, payment of single fees in consolidated proceedings, forms of payment, and payment to DHS of application fees. These provisions reflect current practice and reduce that practice to regulatory form.

#### Technical Change

A technical change removes 8 CFR 1003.1(a)(7) to eliminate potential confusion with the language of 8 CFR 1003.1(e)(4). On August 26, 2002, the Department published a final rule improving the management of the Board of Immigration Appeals. 67 FR 54878. That rule included new provisions relating to the Board's case management process, and incorporated into that process the authority for the issuance of an affirmance without opinion. *See* 8 CFR 1003.1(e)(4). The final regulation inadvertently failed to remove the prior regulatory language addressing affirmance without opinion, contained in 8 CFR 1003.1(a)(7), which serves no further purpose in view of the regulatory changes incorporating this subject into the broader case management provisions in § 1003.1(e). Therefore, this rule removes 8 CFR 1003.1(a)(7).

#### Administrative Procedure Act

The Department of Justice is publishing this rule as an interim rule, with provisions for post-promulgation public comments, because the rule affects only the internal management of the Department of Justice and does not make any substantive changes to rules that affect the general public. 5 U.S.C.

552(d). The language of the regulations pertaining to payment of fees is intended to state more clearly the existing standards and procedures for payment of fees, and is drawn from previously published guidance from the Executive Office for Immigration Review. These changes do not alter the amount, standards, or procedures for payment of fees that are payable in connection with proceedings before the immigration judges and the Board of Immigration Appeals. Other changes in this rule merely make conforming changes in response to regulations promulgated by the Department of Homeland Security, and delete an outdated procedural provision that the Department inadvertently failed to remove when it published new procedural rules for the Board in 2002.

#### Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this rule under the Administrative Procedure Act (5 U.S.C. 553), the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

#### Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule because there are no new or revised recordkeeping or reporting requirements.

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review.

#### Executive Order 13132

This rule will not have substantial direct effects 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. Therefore, in accordance with section 6 of Executive Order 13132, the Department of Justice has determined that this rule does not have sufficient federalism implications to warrant a federalism summary impact statement.

#### Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

#### List of Subjects

##### 8 CFR Part 1001

Administrative practice and procedure and Immigration.

##### 8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal Services, Organization and function (Government agencies).

##### 8 CFR Part 1103

Administrative practice and procedure, Authority delegations (Government agencies), Reporting and recordkeeping requirements.

##### 8 CFR Part 1239

Administrative practice and procedure, Aliens, and Immigration.

##### 8 CFR Part 1287

Immigration and Law enforcement officers.

■ Accordingly, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 1001—DEFINITIONS

■ 1. The authority citation for 8 CFR part 1001 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103.

■ 2. Amend § 1001.1 by revising paragraphs (c), (d), (o), (p), and (s), and adding paragraphs (u) through (w) to read as follows:

#### § 1001.1 Definitions.

\* \* \* \* \*

(c) The term *Service* means the Immigration and Naturalization Service, as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service on or after that date mean the offices of the Department of Homeland Security to which the functions of the former Service were transferred pursuant to the Homeland Security Act, Public Law 107-296 (Nov. 25, 2002), as provided in 8 CFR chapter I.

(d) The term *Commissioner* means the Commissioner of the Immigration and Naturalization Service prior to March 1, 2003. Unless otherwise specified, references to the Commissioner on or after that date mean those officials of the Department of Homeland Security who have succeeded to the functions of the Commissioner of the former Service, as provided in 8 CFR chapter I.

\* \* \* \* \*

(o) The term *Director*, unless otherwise specified, means the Director of the Executive Office for Immigration Review. For a definition of the term *Director* when used in the context of an official with the Department of Homeland Security, see 8 CFR 1.1(o).

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.

\* \* \* \* \*

(s) The terms *government counsel* or *Service counsel*, in the context of proceedings in which the Department of Homeland Security has appeared, mean any officer assigned to represent the Department of Homeland Security in any proceeding before an immigration judge or the Board of Immigration Appeals.

\* \* \* \* \*

(u) The term *Department*, unless otherwise specified, means the Department of Justice.

(v) The term *Secretary*, unless otherwise specified, means the Secretary of Homeland Security.

(w) The term *DHS* means the Department of Homeland Security. These rules incorporate by reference the organizational definitions for components of DHS as provided in 8 CFR 1.1.

## PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for 8 CFR part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

### § 1003.1 [Amended]

■ 4. Section 1003.1 is amended by removing and reserving paragraph (a)(7).  
 ■ 5. Section 1003.8 is revised to read as follows:

#### § 1003.8 Fees before the Board.

(a) *Appeals and motions before the Board—(1) When a fee is required.* Except as provided in paragraph (a)(2) of this section, a filing fee prescribed in 8 CFR 1103.7, or a fee waiver request pursuant to paragraph (a)(3) of this section, is required in connection with the filing of an appeal, a motion to reopen, or a motion to reconsider before the Board.

(2) *When a fee is not required.* A filing fee is not required in the following instances:

- (i) A custody bond appeal filed pursuant to § 1003.1(b)(7);
- (ii) A motion to reopen that is based exclusively on an application for relief that does not require a fee;
- (iii) A motion to reconsider that is based exclusively on a prior application for relief that did not require a fee;
- (iv) A motion filed while an appeal, a motion to reopen, or a motion to reconsider is already pending before the Board;
- (v) A motion requesting only a stay of removal, deportation, or exclusion;
- (vi) Any appeal or motion filed by the Department of Homeland Security;
- (vii) A motion that is agreed upon by all parties and is jointly filed; or
- (viii) An appeal or motion filed under a law, regulation, or directive that specifically does not require a filing fee.

(3) *When a fee may be waived.* The Board has the discretion to waive a fee for an appeal, motion to reconsider, or motion to reopen upon a showing that the filing party is unable to pay the fee. Fee waivers shall be requested through the filing of a Fee Waiver Request (Form EOIR–26A), including the declaration to be signed under penalty of perjury substantiating the filing party's inability to pay the fee. The fee waiver request shall be filed along with the Notice of Appeal or the motion. If the fee waiver

request does not establish the inability to pay the required fee, the appeal or motion will not be deemed properly filed.

(4) *Method of payment.* When a fee is required for an appeal or motion, the fee shall accompany the appeal or motion.

(i) *In general.* Except as provided in paragraph (a)(4)(ii) of this section, the fee for filing an appeal or motion with the Board shall be paid by check, money order, or electronic payment in a manner and form authorized by the Executive Office for Immigration Review. When paid by check or money order, the fee shall be payable to the "United States Department of Justice," drawn on a bank or other institution that is located within the United States, and payable in United States currency. The check or money order shall bear the full name and alien registration number of the alien. A payment that is uncollectible does not satisfy a fee requirement.

(ii) *Appeals from Department of Homeland Security decisions.* The fee for filing an appeal, within the jurisdiction of the Board, from the decision of a Department of Homeland Security officer shall be paid to the Department of Homeland Security in accordance with 8 CFR 103.7(a).

(b) *Applications for relief.* Fees for applications for relief are not collected by the Board, but instead are paid to the Department of Homeland Security in accordance with 8 CFR 103.7. When a motion before the Board is based upon an application for relief, only the fee for the motion to reopen shall be paid to the Board, and payment of the fee for the application for relief shall not accompany the motion. If the motion is granted and proceedings are remanded to the immigration judge, the application fee shall be paid in the manner specified in 8 CFR 1003.24(c)(1).

■ 6. Section 1003.24 is revised to read as follows:

#### § 1003.24 Fees pertaining to matters within the jurisdiction of an immigration judge.

(a) *Generally.* All fees for the filing of motions and applications in connection with proceedings before the immigration judges are paid to the Department of Homeland Security in accordance with 8 CFR 103.7, including fees for applications published by the Executive Office for Immigration Review. The immigration court does not collect fees.

(b) *Motions to reopen or reconsider—(1) When a fee is required.* Except as provided in paragraph (b)(2) of this section, a filing fee prescribed in 8 CFR 1103.7, or a fee waiver request pursuant

to paragraph (d) of this section, is required in connection with the filing of a motion to reopen or a motion to reconsider.

(2) *When a fee is not required.* A filing fee is not required in the following instances:

(i) A motion to reopen that is based exclusively on an application for relief that does not require a fee;

(ii) A motion to reconsider that is based exclusively on a prior application for relief that did not require a fee;

(iii) A motion filed while proceedings are already pending before the immigration court;

(iv) A motion requesting only a stay of removal, deportation, or exclusion;

(v) A motion to reopen a deportation or removal order entered in absentia if the motion is filed pursuant to section 242B(c)(3)(B) of the Act (8 U.S.C. 1252b(c)(3)(B)), as it existed prior to April 1, 1997, or section 240(b)(5)(C)(ii) of the Act (8 U.S.C. 1229a(b)(5)(C)(ii)), as amended;

(vi) Any motion filed by the Department of Homeland Security;

(vii) A motion that is agreed upon by all parties and is jointly filed; or

(viii) A motion filed under a law, regulation, or directive that specifically does not require a filing fee.

(c) *Applications for relief—(1) When filed during proceedings.* When an application for relief is filed during the course of proceedings, the fee for that application must be paid in advance to the Department of Homeland Security in accordance with 8 CFR 103.7. The fee receipt must accompany the application when it is filed with the immigration court.

(2) *When submitted with a motion to reopen.* When a motion to reopen is based upon an application for relief, the fee for the motion to reopen shall be paid to the Department of Homeland Security and the fee receipt shall accompany the motion. Payment of the fee for the application for relief must be paid to the Department of Homeland Security within the time specified by the immigration judge.

(d) *Fee waivers.* The immigration judge has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. The request for a fee waiver must be accompanied by a properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. 1746 substantiating the filing party's inability to pay the fee. If the request for a fee waiver is denied, the application or motion will not be deemed properly filed.

**PART 1103—APPEAL, RECORDS, AND FEES**

■ 7. The authority citation for 8 CFR part 1103 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510.

■ 8. Section 1103.7 is revised to read as follows:

**§ 1103.7 Fees.**

(a) *Remittances—(1) In general.* Fees shall be submitted in connection with any formal appeal, motion, or application prescribed in this chapter in the amount prescribed by law or regulation. Payment of any fee under this section does not constitute filing of the appeal, motion, or application with the Board of Immigration Appeals or with the immigration court.

(2) *Board of Immigration Appeals.* The fee for filing an appeal or a motion with the Board of Immigration Appeals shall be paid pursuant to the provisions of 8 CFR 1003.8 when a fee is required.

(3) *All other fees payable in connection with immigration proceedings.* Except as provided in 8 CFR 1003.8, the Executive Office for Immigration Review does not accept the payment of any fee relating to Executive Office for Immigration Review proceedings. Instead, such fees, when required, shall be paid to, and accepted by, an office of the Department of Homeland Security authorized to accept fees, as provided in 8 CFR 103.7(a)(1). The Department of Homeland Security shall return to the payer, at the time of payment, a receipt for any fee paid, and shall also return to the payer any documents, submitted with the fee, relating to any immigration proceeding. The fee receipt and the application or motion shall then be submitted to the Executive Office for Immigration Review. Remittances to the Department of Homeland Security for applications, motions, or forms filed in connection with immigration proceedings shall be payable subject to the provisions of 8 CFR 103.7(a)(2).

(b) *Amounts of fees—(1) Appeals.* For filing an appeal to the Board of Immigration Appeals, when a fee is required pursuant to 8 CFR 1003.8, as follows:

Form EOIR–26. For filing an appeal from a decision of an immigration judge—\$110.

Form EOIR–29. For filing an appeal from a decision of an officer of the Department of Homeland Security—\$110.

Form EOIR–45. For filing an appeal from a decision of an adjudicating official in a practitioner disciplinary case—\$110.

(2) *Motions.* For filing a motion to reopen or a motion to reconsider, when

a fee is required pursuant to 8 CFR 1003.8 or 1003.24—\$110.

(3) *Multiple parties.* When an appeal or motion is filed on behalf of two or more aliens and the aliens are covered by one decision, only one fee is required.

(4) *Applications for Relief—(i) Forms published by the Executive Office for Immigration Review.* Fees for applications for relief shall be paid in accordance with 8 CFR 1003.8(b) and 1003.24(c) as follows:

Form EOIR–40. Application for Suspension of Deportation—\$100.

Form EOIR–42A. Application for Cancellation of Removal for Certain Permanent Residents—\$100.

Form EOIR–42B. Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents—\$100.

(ii) *Forms published by the Department of Homeland Security.* The fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by 8 CFR 103.7.

(c) *Fee waivers.* For provisions relating to the authority of the Board or the immigration judges to waive any of the fees prescribed in paragraph (b) of this section, see 8 CFR 1003.8 and 1003.24. No waiver may be granted with respect to the fee prescribed for a Department of Homeland Security form or action that is identified as non-waivable in regulations of the Department of Homeland Security.

(d) *Requests for records under the Freedom of Information Act.* Fees for production or disclosure of records under 5 U.S.C. 552 may be waived or reduced in accordance with 28 CFR 16.11.

**PART 1239—INITIATION OF REMOVAL PROCEEDINGS**

■ 9. The authority citation for 8 CFR part 1239 is revised to read as follows:

**Authority:** 8 U.S.C. 1103, 1221, 1229.

■ 10. In § 1239.1, paragraph (a) is revised to read as follows:

**§ 1239.1 Notice to appear.**

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a).

\* \* \* \* \*

■ 11. Section 1239.2 is amended by:

■ a. Removing and reserving paragraph (b); and by

■ b. Revising paragraphs (a), (c), and (d), to read as follows:

**§ 1239.2 Cancellation of notice to appear.**

(a) *Prior to commencement of proceedings.* For provisions relating to the authority of an immigration officer to cancel a notice to appear prior to the vesting of jurisdiction with the immigration judge, see 8 CFR 239.2(a) and (b).

(b) [Reserved]

(c) *Motion to dismiss.* After commencement of proceedings pursuant to 8 CFR 1003.14, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the alien or the Department of Homeland Security.

(d) *Motion for remand.* After commencement of the hearing, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for remand of the matter to the Department of Homeland Security on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Department of Homeland Security.

\* \* \* \* \*

**PART 1287—FIELD OFFICERS; POWERS AND DUTIES**

■ 12. The authority citation for Part 1287 is revised to read as follows:

**Authority:** 8 U.S.C. 1103, 1182, 1225, 1226, 1251, 1252, 1357.

■ 13. Section 1287.4 is amended by:

■ a. Revising paragraphs (a)(1), (a)(2)(i), (a)(2)(ii)(A), and paragraph (c) to read as set forth below; and

■ b. Amending paragraph (d) by removing the words “officer or”.

**§ 1287.4 Subpoena.**

(a) *Who may issue—(1) Criminal or civil investigations.* For provisions relating to the authority of immigration officers to issue a subpoena requiring the production of records and evidence for use in criminal or civil investigations, see 8 CFR 287.4(a)(1).

(2) *Proceedings other than naturalization proceedings—(i) Prior to commencement of proceedings.* For provisions relating to who may issue a subpoena requiring the attendance of witnesses or the production of documentary evidence, or both, for use in any proceeding under this title, other

than under 8 CFR part 335, or any application made ancillary to the proceeding, *see* 8 CFR 287.4(a)(2)(i).

(ii) *Subsequent to commencement of any proceeding.* (A) In any proceeding under this chapter and in any proceeding ancillary thereto, an immigration judge having jurisdiction over the matter may, upon his/her own volition or upon application of government counsel, the alien, or other party affected, issue subpoenas requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both.

\* \* \* \* \*

(c) *Service.* For provisions relating to who may serve a subpoena issued under this section, *see* 8 CFR 287.4(c).

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Dated: July 21, 2004.

**John Ashcroft,**

*Attorney General.*

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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 3**

[Docket No. 04-19]

RIN 1557-AC76

**FEDERAL RESERVE SYSTEM**

**12 CFR Parts 208 and 225**

[Regulations H and Y; Docket No. R-1162]

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 325**

RIN 3064-AC75

**DEPARTMENT OF THE TREASURY**

**Office of Thrift Supervision**

**12 CFR Part 567**

[No. 2004-36]

RIN 1550-AB79

**Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Consolidation of Asset-Backed Commercial Paper Programs and Other Related Issues**

**AGENCIES:** Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance

Corporation; and Office of Thrift Supervision, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision (OTS) (collectively, the agencies) are amending their risk-based capital standards by removing a sunset provision that would preclude a certain capital treatment for asset-backed commercial paper (ABCP) programs after a certain date. The final rule will permanently permit sponsoring banks, bank holding companies, and thrifts (collectively, sponsoring banking organizations) to exclude from their risk-weighted asset base those assets in ABCP programs that are consolidated onto sponsoring banking organizations' balance sheets as a result of Financial Accounting Standards Board Interpretation No. 46, Consolidation of Variable Interest Entities, as revised (FIN 46-R).

The agencies also are implementing more risk-sensitive risk-based capital standards for credit exposures arising from involvement with ABCP. This final rule generally requires banking organizations to hold risk-based capital against eligible ABCP liquidity facilities with an original maturity of one year or less that provide liquidity support to ABCP by imposing a 10 percent credit conversion factor on such facilities.

The agencies have decided not to implement the proposed risk-based capital charge for securitizations of revolving retail credit facilities (for example, credit card receivables) that incorporate early amortization provisions. In addition, the agencies are making technical amendments to their risk-based capital standards by deleting tables and attachments that summarize risk categories, credit conversion factors, and transitional arrangements.

**DATES:** This final rule is effective September 30, 2004. However, any banking organization may elect to adopt, as of July 28, 2004, the capital treatment described in this final rule for assets in ABCP programs that are consolidated onto the balance sheets of sponsoring banking organizations as a result of FIN 46-R. All liquidity facilities that provide support to ABCP will be treated as "eligible ABCP liquidity facilities," regardless of their compliance with the definition of "eligible ABCP liquidity facilities" in the final rule, until September 30, 2005. On that date and thereafter, liquidity facilities that do not meet the final rule's definition of "eligible ABCP liquidity facility" will

be treated as recourse obligations or direct credit substitutes.

**FOR FURTHER INFORMATION CONTACT:**

OCC: Amrit Sekhon, Risk Expert, Capital Policy Division, (202) 874-5211; Laura Goldman, Counsel, or Ron Shimabukuro, Special Counsel, Legislative and Regulatory Activities Division, (202) 874-5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Thomas R. Boemio, Senior Project Manager, Policy, (202) 452-2982, David Kerns, Supervisory Financial Analyst, (202) 452-2428, Barbara Bouchard, Deputy Associate Director, (202) 452-3072, Division of Banking Supervision and Regulation; or Mark E. Van Der Weide, Senior Counsel, (202) 452-2263, Legal Division. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263-4869.

FDIC: Jason C. Cave, Chief, Policy Section, Capital Markets Branch, (202) 898-3548, Robert F. Storch, Chief Accountant, (202) 898-8906, Division of Supervision and Consumer Protection; Michael B. Phillips, Counsel, (202) 898-3581, Supervision and Legislation Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: Christine A. Smith, Project Manager, (202) 906-5740; or Karen Osterloh, Special Counsel, Regulation and Legislation Division, Chief Counsel's Office, (202) 906-6639, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Asset-Backed Commercial Paper Programs*

An asset-backed commercial paper (ABCP) program typically is a program through which a banking organization provides funding to its corporate customers by sponsoring and administering a bankruptcy-remote special purpose entity that purchases asset pools from, or extends loans to, those customers.<sup>1</sup> The asset pools in an ABCP program might include, for example, trade receivables, consumer loans, or asset-backed securities. The ABCP program raises cash to provide funding to the banking organization's customers through the issuance of externally rated commercial paper into the market. Typically, the sponsoring banking organization provides liquidity

<sup>1</sup> ABCP programs generally also include structured investment vehicles, which are entities that earn a spread by issuing commercial paper and medium-term notes and using the proceeds to purchase highly-rated debt securities.