

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael J. Harmon, ADFO, TSAC, U.S. Coast Guard Headquarters, CG-5222; 2100 Second Street, SW., STOP 7126, Washington, DC 20593-7126. Telephone (202) 372-1427, fax (202) 372-1926, or e-mail at: [Michael.J.Harmon@USCG.MIL](mailto:Michael.J.Harmon@USCG.MIL).

**SUPPLEMENTARY INFORMATION:** Notice of these meetings is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92-463).

#### Agenda of Meetings

*Navigation and Vessel Inspection Circular (NVIC) 04-01 Working Group.* The agenda for the working group is to continue discussions on possible revisions to NVIC 04-01, Licensing and Manning for Officers of Towing Vessels, including the enclosures on the Towing Officer Assessment Records (TOARs). (A copy of the amended Task Statement 08-01 is available in the docket where listed under ADDRESSES.) The current version of the NVIC can be viewed at <http://www.uscg.mil/hq/cg5/nvic/2000s.ASP#2001>.

*Towing Safety Advisory Committee.* The tentative agenda for the Committee is as follows:

- (1) Update on Commercial/Recreational Boating Interface;
- (2) Report on the Review and Recommendations for the Revision of NVIC 04-01 "Licensing and Manning for Officers of Towing Vessels;"
- (3) Report on the Review and Recommendations for the Revision of NVIC 04-01 Sub-Working Group on Assistance Towing;
- (4) Update on National Maritime Center (NMC) activities;
- (5) Report on Mariner credentialing policy including the Merchant Mariner Medical Advisory Committee;
- (6) Update on the Transportation Worker Identification Credential (TWIC);
- (7) Update on Office of Vessel Activities information; and
- (8) Discuss a Member recommended Task to examine the career path from Towing Vessel Master (Master 1600 GT) to Inland Mate Any Gross Tons.

#### Procedural

All meetings are open to the public. **Please note** that the meetings may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meetings. If you would like to make an oral presentation at a meeting, please notify the ADFO, listed above in the "FOR FURTHER INFORMATION CONTACT" section, no later than March 2, 2010. Written material (20 copies) for

distribution at a meeting should reach the Coast Guard no later than March 2, 2010. If you would like a copy of your material distributed to each member of the Committee or Working Groups in advance of a meeting, please submit it electronically to the ADFO, for e-mail distribution, no later than March 2, 2010. Also at the Chair's discretion, members of the public may present comment at the end of the Public Meeting. Please understand that the Committee's schedule may be quite demanding and time for public comment may be limited.

#### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meetings, contact the ADFO as soon as possible.

Dated: February 16, 2010.

**J. G. Lantz,**

*Director of Commercial Regulations and Standards.*

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#### DEPARTMENT OF HOMELAND SECURITY

#### U.S. Customs and Border Protection

#### Mitigation of Carrier Fines for Transporting Aliens Without Proper Documents; Modification of Memorandum of Understanding and Recalculation of Performance Levels To Measure Carrier Performance; CBP Dec. 09-06

**AGENCY:** Customs and Border Protection; Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** A carrier that transports to the United States an alien who does not have a valid passport and an unexpired visa, as required under applicable law, is subject to a fine for each alien transported lacking the required documentation. Pursuant to statute and regulations, a carrier may receive a reduction, refund, or waiver of the fine upon submission of an application for such relief supported by evidence that it screened all passengers on the conveyance providing the transport (flight or voyage). Alternatively, pursuant to statute and regulations, if a carrier that enters into a Memorandum of Understanding (MOU) with U.S. Customs and Border Protection (CBP), agreeing to follow procedures set forth in the MOU, commits a violation and becomes subject to a penalty, such

carrier would not have to apply for a reduction of the fine, but would be eligible for an automatic reduction. This notice announces that CBP has made changes to the existing MOU and has recalculated and reset the performance levels CBP will use to measure carrier performance of its travel document screening responsibilities pursuant to the MOU. The revised MOU is appended to this notice.

**DATES:** CBP will commence applying the revised performance levels explained in this document for all carriers, signatory to the MOU and non-signatory, on April 23, 2010. Although a carrier may submit a signed revised MOU any time after February 22, 2010, CBP will begin accepting (as explained in this document) signed revised MOU's on April 23, 2010. All terms of the MOU (except for performance levels) will take effect for the carrier that submitted the MOU on the date of acceptance by CBP. CBP will discontinue automatic processing of reduced fines based on the expired MOU practice on April 23, 2010.

**ADDRESSES:** Copies of the revised MOU may be obtained by writing to Mr. Dennis McKenzie, Director, Fines, Penalties, and Forfeitures Division, U.S. Customs and Border Protection, Office of Field Operations, Room 5.2C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229, and through the following e-mail address: [Dennis.McKenzie@dhs.gov](mailto:Dennis.McKenzie@dhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Mr. Dennis McKenzie, Director, Fines, Penalties, and Forfeitures Division, U.S. Customs and Border Protection, Office of Field Operations: (202) 344-2730; [Dennis.McKenzie@dhs.gov](mailto:Dennis.McKenzie@dhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Purpose of this Notice

Section 273 of the Immigration and Nationality Act (INA) (8 U.S.C. 1323), herein referenced as INA section 273, provides that it is unlawful for a transportation company to bring to the United States from any place outside the United States (other than from a foreign contiguous territory) any alien who does not have a valid passport and an unexpired visa, if a visa is required under the INA or regulations issued pursuant to the INA (INA section 273(a)(1)). INA section 273 further provides that a transportation company that violates this provision will be subject to a fine for each alien brought into the United States without the required documentation (INA section 273(b)). Further, no fine shall be remitted or refunded unless the

transportation company establishes that it did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a valid passport or visa was required (INA section 273(c)). INA section 273 allows for reduction, refund, or waiver of a fine under its provisions if a transportation company follows procedures prescribed in regulations which demonstrate that it has screened all passengers on the vessel or aircraft or if the violation involved circumstances described in regulations for which such a reduction, refund or waiver is justified (INA section 273(e)).

Part 273 of title 8 of the Code of Federal Regulations (8 CFR part 273) implements section 273 of the INA by establishing what a carrier must do to seek a reduction, refund, or waiver of a fine under that section. It describes steps a carrier must take to prevent the boarding of improperly documented aliens (8 CFR 273.3(b)); explains that the carrier needs to provide evidence that it has taken these steps (8 CFR 273.4); and provides for an application procedure for carriers seeking a reduction, refund, or waiver (8 CFR 273.5). It also establishes a procedure for carriers to obtain automatic reduction, refund, or waiver of a fine without the filing of an application (8 CFR 273.6).<sup>1</sup> Under this procedure, the Carrier and CBP enter into a Fines Mitigation Memorandum of Understanding (MOU) under which both parties agree to undertake certain responsibilities to improve the performance of the Carrier with respect to its duty under INA section 273 to prevent the transport of aliens to the United States without proper documentation (valid passport and, where required, an unexpired visa). The goal of the automatic fines reduction program is to maximize carrier cooperation and vigilance in its screening procedures to reduce INA section 273 violations.

The MOU that carriers signed with the legacy Immigration and Naturalization Service was published in the **Federal Register** (63 FR 23643) on April 30, 1998 as an Appendix to the final regulations promulgating Part 273 of Title 8 CFR.<sup>2</sup> Among other things, the

MOU identified the method CBP used to establish performance levels or benchmarks for measuring carrier performance. The benchmarks that were established in 1998 pursuant to the MOU were based on 1994 carrier statistics. Although the MOU allowed for the recalculation of these benchmarks periodically, as deemed warranted by CBP, they were never updated.

CBP is announcing in this document that it has revised and is reauthorizing the MOU. The primary revision is the recalculation and resetting of the benchmarks for measuring carrier performance under the revised MOU based on more recent statistics. After 11 years and significant improvement by the carriers in screening alien passengers, CBP has determined that this recalculation of the benchmarks is warranted to further the goal of the program. The revisions to the MOU and the resetting of the benchmarks will encourage carriers to continue to improve the effectiveness of their passenger screening operations. This goal has taken on special significance since the terrorist events of September 11, 2001, as it will enhance the capability of DHS to protect America from the threat of terrorism by individuals who may attempt to use fraudulent, counterfeit, or altered travel documents to board a commercial aircraft or vessel bound for the United States.

## II. The Revised MOU

The MOU published in the **Federal Register** with the 1998 final rule expired, by its terms, on September 30, 2000, and was extended for one year to September 30, 2001. However, since its expiration, legacy INS, CBP, and the carriers that signed the MOU continued to operate as though the expired MOU had continued in force. This notice terminates the practice of CBP honoring the expired MOU and reauthorizes the revised MOU for an indefinite period.

In order to benefit from automatic processing of reduced fines in the future, carriers must sign the MOU in its revised form. A copy is appended to this notice. Copies of the revised MOU may be obtained by writing to Mr. Dennis McKenzie, Director, Fines, Penalties and

Forfeitures Division, U.S. Customs and Border Protection, Office of Field Operations, Room 5.2C, 1300 Pennsylvania Avenue, NW., Washington, DC 20229 or through the e-mail address:

*Dennis.McKenzie@dhs.gov*. Carriers must submit to CBP two copies of the revised MOU, each with original signatures and all information requested. CBP will review the MOUs and determine whether to countersign. Soon after publication of this document, CBP will issue appropriate instructions through the CBP Web site for submitting an MOU and informing the public of CBP's approval process.

## III. The Performance Levels

The benchmarks set forth in the MOU, referred to in the MOU as the Acceptable Performance Level (APL) and the Second APL (APL2), are essentially standards that signatory carriers must meet to obtain automatic reduction of fines imposed under INA section 273. The 1998 final rule that established the regulations for passenger travel document screening and the method for reduction, refund, or waiver of fines for INA section 273 violations stated that any significant adverse change regarding fines reduction (which may include a change to the acceptable performance levels used to determine fines mitigation under the MOU) would be published in the **Federal Register**. CBP uses these same standards as part of the mitigation determination of fines for non-signatory carriers on a case-by-case basis when they apply for reduction, refund, or waiver of a fine under INA section 273. Non-signatory carriers have to apply for, and submit evidence to justify, mitigation in accordance with 8 CFR 273.5, 280.12, and 280.51.

CBP believes that, on the whole, the changes described in this notice do not constitute a substantial adverse change. Based on CBP's examination of fines reduction in 2006, use of the revised performance levels (rather than the original performance levels that have been used to determine fines reductions since 1998) would have reduced the total number of carriers eligible for mitigation of fines from 87% to 82%. The examination also revealed that 15 carriers (about 8%) possibly could lose eligibility for the higher level of mitigation permitted. Notwithstanding the foregoing, because the performance levels/benchmarks have not been changed since 1998, CBP has decided to publish this notice in the **Federal Register**.

<sup>1</sup> In practice, the primary function of the regulation is fine reduction (as opposed to refund or waiver); therefore, that term and the terms "mitigation" or "fines mitigation" often appear in this document.

<sup>2</sup> Under the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.* (Pub. L. 107-296, 116 Stat. 2135), the Department of Homeland Security (DHS) was created and, among other things, the U.S. Customs Service was renamed the Bureau of Customs and Border Protection (CBP) and the U.S. Immigration and Naturalization Service (INS) was abolished.

Under the Act, effective on March 1, 2003, CBP retained most of the components/functions of the Customs Service and assumed some functional elements of the former INS. Thus, under the Act, immigration functions under the INA vested in the Attorney General, with a few exceptions, were transferred to the Secretary of DHS. Accordingly, this document references the Secretary of DHS, CBP, and the Commissioner of CBP, except where references to the Attorney General, INS, or the Commissioner of INS are historically appropriate.

### *Calculation of Automatic Fines Mitigation*

Under the MOU, a signatory carrier's individual performance level (PL) is measured against the APL and the APL2 to determine the level of automatic fine reduction (mitigation) applied by CBP to the carrier's INA section 273 violations. Under both the old and the revised MOU, each carrier's PL is calculated by dividing the number of improper documentation violations under INA section 273 incurred by the carrier in a fiscal year by the number of documented non-immigrant aliens<sup>3</sup> transported by the carrier in that fiscal year and multiplying that result by 1000. The first carrier PLs were calculated for the 1998 final rule using relevant statistics from 1994 (and were used retroactively for fines mitigation for fiscal years 1994 through 1998). The PLs have been recalculated each year since 1998 through 2006, using the previous year's statistics.

Under the old MOU, the APL and APL2 also were calculated using relevant statistics from 1994, the former by dividing the number of section 273 violations by all carriers during that year by the number of documented non-immigrant aliens (as described above) transported to the United States by all carriers during that year, and multiplying the result by 1000, and the latter by performing the same calculation but using data relative only to carriers whose PL met or exceeded the APL. Under both the old MOU process (which has continued in practice since the MOU's expiration) and the revised MOU process, a signatory carrier with a PL that is equal to or better than the APL is automatically assessed a 25% fine reduction, provided that the carrier is otherwise operating in compliance with the MOU (paragraph 4.9 of the old MOU; paragraph 4.11 of the revised MOU). A signatory carrier with a PL that meets or exceeds the APL2 is automatically assessed a 50% fine reduction (if otherwise in compliance with the MOU) (paragraph 4.10 of the old MOU; paragraph 4.12 of the revised MOU). A signatory carrier performing below the APL is also eligible for the 25% reduction (if otherwise in compliance with the MOU) (paragraph 4.13 of the revised MOU, which is a revision of paragraph 4.11 of the old MOU); however, continued performance

below the APL warrants closer CBP scrutiny, and termination of the MOU is an option where CBP determines that INA section 273 violations are excessive, such as an unacceptable pattern of underperformance.

### *The Recalculated APL and APL2*

Under paragraph 4.8 of the old and revised MOU, the PLs, APL, and APL2 may be recalculated periodically, as deemed necessary by CBP based on carrier performance during the previous period. As stated above, the PLs were recalculated yearly through 2006 (using the previous year's statistics), but the APL and APL2, the benchmarks, have not been recalculated since they were originally calculated in 1998 (using 1994 carrier performance data). Any recalculation of the APL and APL2 performance levels under this paragraph is intended "to maximize carrier cooperation and vigilance in their screening procedures" (63 FR 23644). This provision of the MOU gives CBP flexibility to make appropriate adjustments to the performance levels, as carrier screening performance improves over time. Such adjustments are necessary to provide an effective incentive that encourages carriers to continue to improve their screening performance, the fundamental purpose of the MOU process.

In recalculating the APL and APL2 performance levels, CBP used 2005 carrier statistics and employed the same formula that was used to set the initial performance levels in 1998 (*i.e.*, dividing the number of INA section 273 violations by the number of documented non-immigrant aliens transported to the United States, as described previously, multiplied by 1000, for all carriers to yield the APL and for all carriers meeting the APL to yield the APL2). Because carrier performance has improved since 1998, the APL and APL2 recalculation results were significantly lower than the 1998 calculation results (the higher carrier success rates produced fewer carrier violations). However, rather than adopt the raw recalculations as the new performance levels that carriers must meet or exceed for reduced fines, as was done in 1998, CBP set the new APL and APL2 at points between the recent recalculations and the old APL and APL2, thereby raising the bar somewhat from what was required under the old APL and APL2 and lowering the bar somewhat from where it would have been set under the raw recalculations alone. CBP believes that the new

performance levels are reasonably obtainable performance targets.<sup>4</sup>

CBP believes that application of the new APL and APL2 will incrementally restore the efficacy observed in the program in the past without negatively impacting the industry or straying from the purpose of INA section 273(e).

As stated previously, the revised MOU (paragraph 4.8) permits the periodic recalculation of performance levels (but not necessarily yearly) as deemed warranted by CBP. CBP will publish notice of any future change that is deemed adverse to the carriers.

### **IV. Other Changes to the MOU**

The revised MOU includes a number of additional changes, including the following rudimentary changes: A change to the name of the applicable agency that is a party to the MOU, from INS to CBP; appropriate changes to the titles of pertinent officials; the appropriate renumbering of paragraphs necessitated by the addition of five new paragraphs in the revised MOU (paragraphs 3.4, 3.9, 3.16, 4.9, and 4.10); a change to the number of days that advance written notice is required by either party to terminate the MOU agreement, from 30 to 15 days (see MOU introductory text); and removal of the expiration date. In addition, the revised MOU reflects the following changes/additions (references are to paragraphs of the revised MOU unless specified otherwise):

1. In paragraph 1.4, the carrier must provide the email address of its contact person and must notify CBP of any changes to the contact information.

2. In paragraph 1.5, a carrier's contract staff is added to the carrier employees who must be required by the carrier to comply with the terms of the MOU.

3. In paragraph 3.3, the carrier agrees to conduct additional document checks for verification purposes at the boarding gate. This is a change from the old MOU which provided for carriers conducting additional checks "when deemed appropriate."

4. A new paragraph 3.4 is added. It reads as follows: "The Carrier is responsible for screening all passengers boarding their aircraft, regardless of who was the issuing agent for the ticket or what flight number exists on the tickets." This new paragraph

<sup>3</sup> Documented non-immigrant aliens are those subject to the Arrival/Departure Record (Form I-94 or I-94W) requirement, either to submit one upon arrival at a U.S. port or have an electronic equivalent and corresponding admission record created at time of arrival based on information submitted electronically prior to travel.

<sup>4</sup> Under the revised MOU process, signatory carriers whose performance level falls below the reset APL may still qualify for automatic 25% fines mitigation for periods determined by CBP if they are in compliance with the MOU. However, CBP may terminate the MOU if it deems that the carrier's continued performance below the APL is not justified or that INA section 273 violations are excessive.

necessitated the renumbering of the paragraphs that followed.

5. In paragraph 3.5 (paragraph 3.4 of the old MOU), “other U.S. Government (USG) officials” is added to the officials who may be allowed by carriers to examine passenger documents in the circumstances identified.

6. In paragraph 3.6 (paragraph 3.5 of the old MOU), regarding cases of suspected fraud, the carrier may contact CBP for advice and assistance.

7. In paragraph 3.7 (paragraph 3.6 of the old MOU), the “Regional Carrier Liaison Group” and “other USG officials” are added to the groups that a carrier may consult for advice on authentication of documents.

8. A new paragraph 3.9 is added. It reads as follows: “The Carrier agrees to provide CBP-required information regarding the date and number of improperly documented aliens intercepted by the Carrier at the port(s) of embarkation.”

9. Paragraphs 3.8 through 3.13 of the old MOU are redesignated as paragraphs 3.10 through 3.15 of the revised MOU.

10. A new paragraph 3.16 is added. It commits a carrier to comply with the CBP APIS regulations requiring electronic transmission of passenger and crew arrival and departure manifests (19 CFR 4.7b, 4.64, 122.49a–122.49c, 122.75a, and 122.75b; see also 8 CFR part 231). (Commercial carriers are required to comply with the APIS regulations regardless of this paragraph in the revised MOU.)

11. In paragraph 4.1 (also paragraph 4.1 of the old MOU), the CBP coordinator’s email address has been added to the information CBP will provide to the carrier.

12. In paragraph 4.3, the words “as necessary” have been added to the following sentence: “Initial and refresher training, as necessary, will be conducted by CBP or Carrier representatives trained by CBP.”

13. In paragraph 4.4, “other USG personnel” has been added to the officials identified who may be consulted by the carrier for assistance in performing its passenger screening function.

14. Language has been added at the end of both paragraphs 4.6 and 4.7 of the revised MOU (pertaining to how the APL and APL2, respectively, are determined) to reflect that CBP may adjust the calculation result to achieve, as deemed by CBP, the optimum measure that will encourage carriers to improve screening operations.

15. A new paragraph 4.9 is added to provide that: (a) CBP will review any carrier’s application for participation in the MOU program regardless of whether

the carrier’s PL meets or is below the APL; (b) CBP will consider evidence submitted by the carrier demonstrating that it has taken extensive measures to prevent the transportation of improperly documented aliens to the United States; and (c) CBP will accept the carrier’s MOU, by signature of the Director, Fines, Penalties, and Forfeitures Division, if satisfied with the evidence and if satisfied that the carrier is capable of meeting the MOU’s terms and conditions. The evidence that a carrier may submit under (b) above is found in paragraph 4.11 of the old MOU. The three kinds of evidence set forth in paragraph 4.11 of the old MOU are included in paragraph 4.9 of the revised MOU, and an additional kind of evidence has been added (see paragraph 4.9 (2)): “Evidence that the carrier operates efficient and effective boarding gate checks to deter boarding pass swaps and to verify that all passengers’ documents, including transit passengers, have been examined.”

16. A new paragraph 4.10 is added. It contains an explanation of the effective dates of the MOU’s terms (see also the **DATES** section of this document).

17. Paragraph 4.13 of the revised MOU (paragraph 4.11 of the old MOU) has been modified to apply to signatory carriers performing below the APL. These carriers are eligible for automatic 25% fines reduction as signatory carriers, provided that they are otherwise in compliance with the MOU; CBP may suspend or terminate the MOU if it deems that the carrier’s continued performance below the APL is not justified or that INA section 273 violations are excessive.

#### **V. Effective Dates**

CBP will commence applying the revised performance levels explained in this document for all carriers, signatory to the MOU and non-signatory, on April 23, 2010. Although a carrier may submit a signed revised MOU any time after February 22, 2010, CBP will begin accepting (as explained in this document) signed revised MOU’s on April 23, 2010. All terms of the MOU (except for performance levels) will take effect for the carrier that submitted the MOU on the date of acceptance by CBP. CBP will discontinue automatic processing of reduced fines based on the expired MOU practice on April 23, 2010.

Dated: December 29, 2009.

**Jayson P. Ahern,**

*Acting Commissioner, Customs and Border Protection.*

#### **Appendix A—Customs and Border Protection INA Section 273(e) Fines Mitigation Memorandum of Understanding**

This voluntary Memorandum of Understanding (MOU) is made between \_\_\_\_\_ (hereafter referred to as the “Carrier”) and the U.S. Customs and Border Protection (hereafter referred to as “CBP”). The purpose of this MOU is to identify the responsibilities of each party to improve the performance of the Carrier with respect to its duty under section 273 of the Immigration and Nationality Act (INA) to prevent the transport of improperly documented aliens to the United States. Based on the Carrier’s Performance Level (PL) in comparison to the Acceptable Performance Level (APL) or Second APL (APL2) set by CBP, and based upon compliance with the other stipulations outlined in the MOU, CBP may refund, reduce, or waive a part of the Carrier’s administrative penalties under section 273 of the INA. The MOU cannot, by law, exempt the Carrier from liability for civil penalties. Although taking the steps set forth below will not relieve the Carrier of liability from penalties, the extent to which the Carrier has complied with this MOU will be considered as a factor in cases where CBP may reduce, refund, or waive a fine. It is understood and agreed by the parties that this MOU is not intended to be legally enforceable by either party. No claims, liabilities, or rights shall arise from or with respect to this MOU except as provided for in the INA or the Code of Federal Regulations (CFRs). Nothing in this MOU relieves the Carrier of any responsibilities with respect to United States laws, the INA, or the CFRs. This document, once jointly endorsed (i.e., signed by the carrier and accepted by CBP upon the signature of the appropriate CBP official), will serve as a working agreement to be utilized for all fines cases relating to section 273 of the INA, and reflects the mutual understanding of the Carrier and CBP. CBP will commence applying the APL and APL2 set forth in this MOU (sections 4.6 and 4.7) on April 23, 2010, regardless of the date the MOU is accepted by CBP (section 4.10). Acceptance occurs upon the signature of the CBP Director, Fines, Penalties and Forfeitures (FP&F) Division, Office of Field Operations (OFO) (sections 4.9 and 4.10). All other terms of the MOU, including automatic processing of fines reduction, take effect on the date CBP accepts the MOU. The MOU shall be a valid working document for an indefinite period, subject to the MOU’s terms relating to cancellation by either party. The Carrier’s compliance with the MOU shall be evaluated periodically. CBP will notify the Carrier in writing of its PL and the applicable APL for each rating period. Accordingly, the Carrier agrees to begin prompt and complete implementation of all of the terms listed in this MOU. With 15 days written notice, either party may terminate this MOU, for any reason, including CBP’s termination of this

MOU for the Carrier's failure to abide by its terms. Termination for failure to abide by the MOU's terms may be Carrier-wide or limited to one or more of a Carrier's port(s) of embarkation. Any subsequent fines will be imposed for the full penalty amount.

### Memorandum of Understanding

#### 1. Introduction

1.1 The Director, FP&F Division, OFO, shall exercise oversight regarding the Carrier's compliance with this MOU.

1.2 The Carrier agrees to begin implementation of the provisions set forth below immediately upon acceptance of the MOU by CBP, as outlined in this MOU (section 4.10).

1.3 The Carrier agrees to permit CBP to monitor its compliance with the terms of this MOU. The Carrier shall permit CBP to conduct an inspection of the Carrier's document screening procedures at ports of embarkation before arrival in the United States, to determine compliance with the procedures listed in this MOU, to the extent permitted by competent local authorities responsible for port access and security. If necessary, the carrier agrees to use its good offices to obtain this permission.

1.4 The Carrier agrees to designate a coordinator to be the contact point for all issues arising from the implementation of this MOU. The Carrier shall provide CBP with the coordinator's name, title, mailing address, telephone and facsimile number, and email address. If the contact information for the carrier should change, the carrier agrees to promptly notify CBP of the changes.

1.5 The Carrier shall require that all of its employees, including its representatives and contract staff, follow the provisions of this MOU, and comply with all requirements of the INA. The Carrier further agrees to cooperate with CBP in an open two-way exchange of pertinent information.

#### 2. Prompt Payment

2.1 CBP agrees to authorize a reduction in penalty amount based on compliance with this MOU only if the Carrier has a satisfactory payment record with CBP for all administrative fines, liquidated damages, and user fees. This includes interest and penalties that have been imposed by either a formal order or final decision, except cases on appeal. The carrier agrees to present a satisfactory payment record of its user fee account prior to its applying to become signatory to the MOU.

2.2 The Carrier agrees to promptly pay all administrative fines, liquidated damages, and user fees. This includes interest and penalties that are imposed by a formal order or a final decision during the time this MOU is in effect, except cases on appeal. Prompt payment for the purposes of this MOU means payments made within 30 days from the date of billing.

2.3 CBP shall periodically review the Carrier's record of prompt payment for administrative fines, liquidated damages, and user fees including interest and penalties. Failure to make prompt payment will result in the loss of benefits under the MOU.

2.4 The Carrier agrees to select a person from its organization as a contact point for

the CBP FP&F Office for the resolution of payment issues. The Carrier shall provide FP&F with the contact person's name, title, address, telephone and facsimile number, and email address and will report promptly to CBP any changes in this information.

#### 3. Carrier Agreement

3.1 The Carrier shall refuse to knowingly carry any improperly documented passenger.

3.2 The Carrier agrees to verify that trained personnel examine and screen all passengers' travel documents to confirm that the passenger is properly documented for the purpose of his/her travel to the United States and to confirm, to the best of their ability, that the passport, visa (if one is required), or other travel documents presented are valid and unexpired, and that the passenger, and any accompanying passenger named in the passport, is the apparent rightful holder of the document.

3.3 The Carrier agrees to conduct additional document checks at the boarding gate, to verify that all passengers, including transit passengers, are in possession of their own proper boarding pass and travel documents as they board the aircraft, and to identify any fraudulent documents.

3.4 The Carrier is responsible for screening all passengers boarding their aircraft, regardless of who was the issuing agent for the ticket or what flight number exists on the tickets.

3.5 The Carrier agrees to permit CBP officers, Department of State (DOS) Consular officials, or other U.S. Government (USG) officials to screen passengers' travel documents before or after the Carrier has screened those passengers for boarding, to the extent permitted by the competent local authorities responsible for port access and security. If necessary, the carrier agrees to use its good offices to obtain this permission.

3.6 In cases involving suspected fraud, the Carrier shall assess the adequacy of the documents presented, question the individual(s) or take other appropriate steps to corroborate the identity of the passengers, such as requesting secondary identification or contacting CBP for advice and assistance.

3.7 Following notification by CBP, or its representative, about a particular passenger or passengers, the carrier shall refuse to knowingly transport any such individual determined by a CBP official not to be in possession of proper documentation to enter or pass through the United States.

Transporting any improperly documented passenger so identified may result in a civil penalty. At locations where there is no CBP presence, carriers may contact the Regional Carrier Liaison Group, request local DOS Consular officials or other USG officials to examine and advise on authenticity of passenger documentation. DOS Consular officials and other USG officials will act in an advisory capacity only.

3.8 Where the Carrier has refused to board a passenger based on a suspicion of fraud or other lack of proper documentation, the Carrier agrees to make every effort to notify other carriers at that port of embarkation about that passenger, to the extent permitted by competent local authorities responsible for port access and

security. If necessary, the carrier agrees to use its good offices to obtain this permission.

3.9 The Carrier agrees to provide CBP-required information regarding the date and number of improperly documented aliens intercepted by the Carrier at the port(s) of embarkation.

3.10 The Carrier shall maintain a reasonable level of security designed to prevent passengers from circumventing any Carrier document checks. The Carrier shall also maintain an adequate level of security designed to prevent stowaways from boarding the Carrier's aircraft or vessel.

3.11 The Carrier agrees to participate in CBP training programs and utilize CBP Carrier Information Guides and other information provided by CBP to assist the Carrier in determining documentary requirements and detecting fraud.

3.12 The Carrier agrees to make CBP Carrier Information Guides and other information provided by CBP readily available for use by Carrier personnel at every port of embarkation.

3.13 The Carrier agrees to make appropriate use of technological aids in screening documents including ultra violet lights, magnification devices, or other equipment identified by CBP to screen documents.

3.14 The Carrier agrees to expeditiously respond to requests from the appropriate CBP official(s) for information pertaining to the identity, itinerary, and seating arrangements of individual passengers. The Carrier also agrees to provide manifests and other information, required to identify passengers, information and evidence regarding the identity and method of concealment of a stowaway, and information regarding any organized alien smuggling activity.

3.15 Upon arrival at a CBP port of entry (POE) and prior to inspection, the Carrier agrees to notify CBP personnel at the POE of any unusual circumstances, incidents, or problems at the port of embarkation involving the transportation of improperly documented aliens to the United States.

3.16 The Carrier will comply with the electronic submission of manifests. The provisions setting forth requirements applicable to carriers regarding the electronic transmission of arrival manifests covering passengers and crew members under section 231 of the INA are set forth in 19 CFR 4.7b (passengers and crew members onboard vessels) and in 19 CFR 122.49a (passengers onboard aircraft) and 122.49b (crew members onboard aircraft). The carrier will also comply with the provisions setting forth requirements applicable to commercial carriers regarding the electronic transmission of departure manifests covering passengers and crewmembers under section 231 of the INA which are set forth in 19 CFR 4.64 (passengers and crew members onboard vessels) and in 19 CFR 122.75a (passengers onboard aircraft) and 122.75b (crew members onboard aircraft).

3.17 The Carrier agrees to notify the Director, FP&F Division, in writing, if it is unable to comply with any section of the MOU because of local law or local competent authority. The Carrier shall list the specific section of the MOU with which it is unable

to comply and, to be in compliance with the MOU, shall notify CBP within ten (10) days after becoming cognizant of this prohibition to comply. Further, in such instances the Carrier shall propose alternative means for meeting the objective sought by the paragraph in question. For instance, where review of foreign boarding procedures cannot be performed by CBP personnel, the Carrier could provide that an audit of its operation be performed by local authorities or by private auditors.

#### 4. CBP Agreement

4.1 The Director, FP&F Division, Office of Field Operations, will serve as a coordinator for all fines issues arising from the implementation of this MOU. The Director, Alien Smuggling Interdiction (ASI), will serve as coordinator for all ASI issues arising from this MOU. The Director, Fraud Document Analysis Unit (FDAU) and the Carrier Liaison Program (CLP), and the Director, Passenger Programs, Immigration Advisory Program (IAP), as appropriate, will coordinate all CBP training, airline liaison officer, and on-site airport interdiction issues arising from this MOU. CBP shall provide the carrier with these offices' coordinator's names, addresses, telephone and facsimile numbers, and email addresses.

4.2 CBP agrees to publish a Carrier Information Guide to be used by Carrier personnel at all ports of embarkation prior to boarding passengers destined to the United States. The Carrier Information Guide will function as a resource to assist Carrier personnel in determining proper documentary requirements and detecting fraud.

4.3 CBP agrees to develop a formal, continuing training program to assist carriers in their screening of passengers. Carriers may provide input to CBP concerning specific training needs that they have identified. Initial and refresher training, as necessary, will be conducted by CBP or Carrier representatives trained by CBP.

4.4 To the extent possible, CBP, DOS Consular officials, or other USG personnel will consult, support, and assist the Carrier's efforts to screen passengers prior to boarding.

4.5 CBP shall determine each Carrier's Performance Level (PL), based on statistical analysis of the Carrier's performance, as a means of evaluating whether the Carrier has successfully screened all of its passengers in accordance with 8 CFR 273.3 and this MOU. The PL is determined by taking the number of each Carrier's violations of section 273 of the INA for a fiscal year and dividing this by the number of documented nonimmigrants transported by the Carrier and multiplying the result by 1,000. Documented nonimmigrants are those that are subject to the Arrival/Departure Record (CBP Form I-94 or I-94W) requirement, either to submit one upon arrival at a U.S. port or to have an electronic equivalent and corresponding admission record created at time of arrival based on information submitted electronically prior to travel.

4.6 CBP shall establish an Acceptable Performance Level (APL), based on statistical analysis of the performance of all carriers, as a means of evaluating whether the Carrier has

successfully screened all of its passengers in accordance with 8 CFR 273.3 and this MOU. The APL shall be determined by taking the total number of all carrier violations of section 273 of the INA for a fiscal year (normally the fiscal year previous to the year the APL is calculated) and dividing this by the total number of documented nonimmigrants (as described in paragraph 4.5 above) transported by all carriers for that same fiscal year and multiplying the result by 1,000. CBP will then evaluate the result of that calculation and either adopt it or adjust it to achieve what it deems to be the optimum measure that encourages carriers to improve their screening operations with a reasonably challenging and reasonably attainable performance target.

4.7 CBP shall establish a Second Acceptable Performance Level (APL2), based on statistical analysis of the performance of all carriers operating at or better than the APL, as a means of further evaluating carrier success in screening its passengers in accordance with 8 CFR 273.3 and this MOU. Using carrier statistics for only those carriers which are at or better than the APL, the APL2 shall be determined by taking the total number of these carrier violations of section 273 of the INA for a fiscal year (normally the fiscal year previous to the year the APL2 is calculated) and dividing by the total number of documented nonimmigrants (as described in paragraph 4.5 above) transported by these carriers for that same year and multiplying the result by 1,000. CBP will then evaluate the result of that calculation and either adopt it or adjust it to achieve what it deems to be the optimum measure that encourages carriers to improve their screening operations with a reasonably challenging and reasonably attainable performance target.

4.8 The PL, APL, and APL2 may be recalculated periodically (including yearly) as deemed necessary by CBP, based on Carrier performance during the previous period(s).

4.9 The Director, FP&F Division, will review the signed MOU submitted by any carrier seeking to participate in the automatic fines reduction process under this MOU regardless of whether that carrier's PL meets or exceeds the APL at the time of submission. The Director will consider evidence submitted by the carrier that demonstrates that the carrier has taken extensive measures to prevent the transport of improperly documented passengers to the United States. This evidence may include, but is not limited to, the following: (1) Information regarding the Carrier's training program, including participation of the Carrier's personnel in any CBP, DOS, or other training programs and the number of employees trained; (2) evidence that the carrier operates efficient and effective boarding gate checks to deter boarding pass swaps and to verify that all passengers' documents, including transit passengers, have been examined; (3) information regarding the date and number of improperly documented aliens intercepted by the Carrier at the port(s) of embarkation, including, but not limited to, the aliens' name, date of birth, passport nationality, passport number or other travel document information, and reason boarding was

refused, if otherwise permitted under local law; and (4) other evidence, including screening procedure enhancements, technological or otherwise, to demonstrate the Carrier's good faith efforts to properly screen passengers destined to the United States. If the Director is satisfied with the carrier's evidence, and is otherwise satisfied that the carrier is capable of meeting the terms and conditions contained in this MOU, CBP will accept the carrier's signed MOU, such acceptance evidenced by the Director's signature (section 4.10).

4.10 CBP will commence applying the APL and APL2 set forth in this MOU (sections 4.6 and 4.7) on April 23, 2010 regardless of the date the MOU is accepted by CBP. All other terms of the MOU, including automatic processing of fines reduction, take effect on the date CBP accepts the MOU. Acceptance occurs upon the signature of the Director, FP&F Division.

4.11 Carriers whose PL is at or better than the APL are eligible to receive an automatic 25 percent reduction, if signatory to and in compliance with this MOU, on fines imposed under section 273 of the INA for periods determined by CBP.

4.12 Carriers whose PL is at or better than the APL2 are eligible to receive an automatic 50 percent reduction, if signatory to and in compliance with this MOU, on fines imposed under section 273 of the INA for periods determined by CBP.

4.13 Carriers whose PL is below the APL are eligible to receive an automatic 25 percent reduction, if signatory to and in compliance with this MOU, on fines imposed under section 273 of the INA for periods determined by CBP, provided that CBP may terminate the MOU if it deems that the carrier's performance below the APL is not justified in the circumstances or that violations of section 273 of the INA are excessive.

4.14 The Carrier may defend against imposition of, or seek a waiver or further reduction of, an administrative fine if the case is timely defended pursuant to 8 CFR part 280, in response to the Form I-79, Notice of Intent to Fine, and the Carrier establishes that further mitigating or extenuating circumstances existed at the time of the violation that warrant the relief sought.

Dated: \_\_\_\_\_

(Carrier Representative's Signature)

(Title)

(Carrier Name)

Dated: \_\_\_\_\_  
Director, FP&F Division, OFO  
Customs and Border Protection.

[FR Doc. 2010-3243 Filed 2-19-10; 8:45 am]

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5376-N-07]

### Rent Schedule—Low Rent Housing

AGENCY: Office of the Chief Information Officer, HUD