

allows for search, retrieval, and view when necessary.

For additional background, see the notice of proposed rulemaking published on February 4, 2019 (84 FR 1419), and the system of records notice published on December 12, 2017 (82 FR 58477). The Department received no public comment on these documents.

#### List of Subjects in 22 CFR Part 171

Administrative practice and procedure; Freedom of Information; Privacy.

For the reasons stated in the preamble, 22 CFR part 171 is amended as follows:

#### PART 171—[AMENDED]

- 1. The authority citation continues to read as follows:

**Authority:** 22 U.S.C. 2651a; 5 U.S.C. 552, 552a; E.O. 12600 (52 FR 23781); Pub. L. 95–521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 101–505); 5 CFR part 2634.

- 2. Section 171.26 is amended by:

- a. In paragraph (a)(2)(iii), adding an entry to the list in alphabetical order, for “Email Archive Management Records, STATE–01”.

- b. In paragraphs (b)(1), (2), (3), (4), (5), (6) and (7), adding an entry to the lists in alphabetical order, for “Email Archive Management Records, STATE–01”.

**John C. Sullivan,**

*Senior Agency Official for Privacy, Deputy Assistant Secretary for Global Information Services, Bureau of Administration, U.S. Department of State.*

[FR Doc. 2020–04181 Filed 3–6–20; 8:45 am]

**BILLING CODE 4710–24–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9630]

RIN 1545–BK17

#### Use of Differential Income Stream as an Application of the Income Method and as a Consideration in Assessing the Best Method; Correcting Amendment

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains corrections to Treasury Decision TD 9630, which was published in the *Federal Register* on Tuesday, August

27, 2013. Treasury Decision 9630 contains final regulations that implement the use of the differential income stream as a consideration in assessing the best sharing arrangement and as a specified application of the income method.

**DATES:** This correction is effective on March 9, 2020 and is applicable on or after August 27, 2013.

**FOR FURTHER INFORMATION CONTACT:** Christopher J. Bello, Office of Associate Chief Counsel (International), (202) 317–3800 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

The final regulations (TD 9630) that are the subject of this correction are issued under section 1.482–7 of the Internal Revenue Code.

##### Need for Correction

As published August 27, 2013 (78 FR 52854), the final regulations (TD 9630) contain an error that needs to be corrected.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

##### Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

#### PART 1—INCOME TAXES

- 1. The authority citation for part 1 is amended by removing the sectional authority for § 1.482–7T to read in part as follows:

**Authority:** 26 U.S.C. 7805.

\* \* \* \* \*

**Martin V. Franks,**

*Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).*

[FR Doc. 2020–04485 Filed 3–6–20; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF JUSTICE

### 28 CFR Part 28

[Docket Number OAG–164; AG Order No. 4646–2020]

RIN 1105–AB56

#### DNA-Sample Collection From Immigration Detainees

**AGENCY:** Office of the Attorney General, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** The Department of Justice is amending regulations that require DNA-sample collection from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. The amendment removes a provision authorizing the Secretary of Homeland Security to exempt from the sample-collection requirement certain aliens from whom collection of DNA samples is not feasible because of operational exigencies or resource limitations. This restores the Attorney General’s plenary legal authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security, to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.

**DATES:** This rule is effective April 8, 2020.

**FOR FURTHER INFORMATION CONTACT:** David J. Karp, Senior Counsel, Office of Legal Policy, United States Department of Justice, Washington, DC, 202–514–3273.

**SUPPLEMENTARY INFORMATION:** This rule finalizes a proposed rule, DNA-Sample Collection from Immigration Detainees (OAG 164; RIN 1105–AB56) (published October 22, 2019, at 84 FR 56397), to amend regulations requiring DNA-sample collection from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. Specifically, the rule removes 28 CFR 28.12(b)(4), which authorizes the Secretary of Homeland Security to exempt certain detained aliens from the DNA-sample collection requirement. As a result, the rule restores the Attorney General’s plenary authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security (“DHS”), to collect DNA samples from such individuals.

#### Background and Purpose

The DNA Fingerprint Act of 2005, title X of Public Law 109–162, authorizes the Attorney General to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. See 34 U.S.C. 40702(a)(1)(A). The statute further authorizes the Attorney General to delegate the function of collecting DNA samples to other agencies, and to direct their discharge of this function, thereby empowering the Attorney

General to establish and administer a government-wide sample-collection program for persons in the covered classes. *See id.* In 2008, the Attorney General issued an implementing rule for 34 U.S.C. 40702(a)(1)(A) that amended 28 CFR 28.12. *See* 73 FR 74932 (Dec. 10, 2008).

The existing rule generally requires DNA-sample collection from individuals in these categories if they are fingerprinted. Consequently, Federal agencies now collect DNA samples from persons they take into custody as a regular identification measure in booking, on a par with fingerprinting and photographing. The rule requires DNA-sample collection both for persons arrested on Federal criminal charges and for non-United States persons in detention for immigration violations because DNA identification serves similar purposes and is of similar value in both contexts. *See* 28 CFR 28.12(b) (“Any agency of the United States that arrests or detains individuals . . . shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.”); 73 FR at 74933–34, 74938–39. The rule defines “non-United States persons” for this purpose to mean persons who are not U.S. citizens and who are not lawfully admitted for permanent residence as defined in the relevant regulation (8 CFR 1.1(p), which has since been redesignated 8 CFR 1.2). 28 CFR 28.12(b).

The rule allows exceptions to the sample-collection requirement with the approval of the Attorney General. 28 CFR 28.12(b) (third sentence); 73 FR at 74934. As currently formulated, the rule also recognizes specific exceptions with respect to four categories of aliens, as provided in paragraphs (1) through (4) of 28 CFR 28.12(b).

The first exception, appearing in § 28.12(b)(1), is for aliens lawfully in, or being processed for lawful admission to, the United States. This reflects that the rule’s objectives in relation to non-U.S. persons generally concern those implicated in illegal activity (including immigration violations) and not lawful visitors from other countries. *See* 73 FR at 74941.

The second exception, appearing in § 28.12(b)(2), is for aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings. The second exception overlaps with the first and its rationale is similar. Lawful entrants from other countries may be regarded as detained when, for example, they are briefly held up at airports during

routine processing or taken aside for secondary inspection. As with the first exception, when such entrants are not subject to further detention or proceedings, categorically requiring DNA-sample collection is not necessary to realize the rule’s objectives.

The third exception, appearing in § 28.12(b)(3), is for aliens held in connection with maritime interdiction, because collecting DNA samples in maritime interdiction situations may be unnecessary and practically difficult or impossible.

This rule does not affect these three exceptions because the considerations supporting them have not changed since the issuance of the original rule in 2008.

The fourth exception, appearing in § 28.12(b)(4), is for other aliens, with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations. This aspect of the current regulation is at odds with the treatment of all other Federal agencies, which may adopt exceptions to DNA-sample collection based on operational exigencies or resource limitations only with the Attorney General’s approval. *See* 28 CFR 28.12(b). Nevertheless, the rule granted the Secretary of Homeland Security authority to make exceptions for certain aliens, recognizing that it might not be feasible to implement the general policy of DNA-sample collection immediately in relation to the whole class of immigration detainees, including the hundreds of thousands of illegal entrants who are taken into custody near the southwest border of the United States each year.

Then-Secretary of Homeland Security Janet A. Napolitano advised in a March 22, 2010, letter to then-Attorney General Eric H. Holder, Jr., that categorical DNA collection from aliens in this class was not feasible, on the grounds described in § 28.12(b)(4). However, subsequent developments have resulted in fundamental changes in the cost and ease of DNA-sample collection. DNA-sample collection from persons taken into or held in custody is no longer a novelty. Rather, pursuant to the mandate of § 28.12(b), it is now carried out as a routine booking measure, parallel to fingerprinting, by Federal agencies on a government-wide basis. The established DNA-collection procedures applied to persons arrested or held on criminal charges can likewise be applied to persons apprehended for immigration violations.

Accordingly, this rule removes the exemption authority of the Secretary of

Homeland Security appearing in paragraph (b)(4) of § 28.12. The removal of that exemption authority does not preclude limitations and exceptions to the regulation’s requirement to collect DNA samples, because of operational exigencies, resource limitations, or other grounds. But all such limitations and exceptions, beyond those appearing expressly in the regulation’s remaining provisions, will require the approval of the Attorney General.

The Attorney General—exercising his plenary authority under the DNA Fingerprint Act of 2005 to authorize and direct DNA-sample collection by Federal agencies, and to permit limitations and exceptions thereto—will review DHS’s capacity to implement DNA-sample collection from non-U.S. person detainees as required by the regulation. The Department of Justice will work with DHS to develop and implement a plan for DHS to phase in that collection over a reasonable timeframe.

The situation parallels that presented by the initial implementation of DNA-sample collection by other Federal agencies pursuant to 28 CFR 28.12. The regulatory requirements were not understood or applied to impose impossible obligations on the agencies to immediately collect DNA samples from all persons in their custody covered by the rule. Rather, the Department of Justice worked with the various agencies to implement the regulation’s requirements in their operations without unnecessary delay, but in a manner consistent with the need to adjust policies and procedures, train personnel, establish necessary relationships with the Federal Bureau of Investigation (“FBI”) Laboratory regarding DNA-sample collection and analysis, and take other measures required for implementation.

Many considerations support the decision to repeal the § 28.12(b)(4) exception. As an initial observation, the original rulemaking recognized that distinguishing the treatment of criminal arrestees and immigration detainees with respect to DNA identification is largely artificial, in that most immigration detainees are held on the basis of conduct that is itself criminal. Aliens who are apprehended following illegal entry have likely committed crimes under the immigration laws, such as 8 U.S.C. 1325(a) and 1326, for which they can be prosecuted. “Hence, whether an alien in such circumstances is regarded as an arrestee or a (non-arrested) detainee may be a matter of characterization, and the aptness of one description or the other may shift over time, depending on the disposition or

decision of prosecutors concerning the handling of the case.” 73 FR at 74939. The practical difference between criminal arrestees and immigration detainees, for purposes of DNA-sample collection, has been further eroded through policies favoring increased prosecution for immigration violations.

The underlying legal and policy considerations support consistent DNA identification of individuals in the two classes. At the broadest level, “[t]he advent of DNA technology is one of the most significant scientific advancements of our era,” having an “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” *Maryland v. King*, 569 U.S. 435, 442 (2013) (quotation marks omitted). DNA analysis “provides a powerful tool for human identification,” which “help[s] to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused.” 73 FR at 74933. “[T]hrough DNA matching,” it enables “a vast class of crimes [to] be solved.” 73 FR at 74934. The need for consistent application of DNA identification measures may be particularly compelling “in relation to aliens who are illegally present in the United States and detained pending removal,” because “prompt DNA-sample collection could be essential to the detection and solution of crimes they may have committed or may commit in the United States . . . before the individual’s removal from the United States places him or her beyond the ready reach of the United States justice system.” 73 FR at 74934.

Regardless of whether individuals are deemed criminal arrestees or immigration detainees, the use of collected DNA samples is the same and has similar value. The DNA profiles the government derives from arrestee or detainee samples amount to sanitized “genetic fingerprints”—they can be used to identify an individual uniquely, but they do not disclose the individual’s traits, disorders, or dispositions. The profiles are searched against the Combined DNA Index System (CODIS), which includes DNA profiles derived from biological residues left at crime scenes—for example, the DNA of a rapist secured in a sexual assault examination kit, or the DNA of a murderer found on an item he left or touched in committing the crime. A match to CODIS identifies the arrestee or detainee as the source of the crime-scene DNA and likely perpetrator of the offense. Equally for criminal arrestees and immigration detainees, the operation of the DNA identification system thereby furthers the interests of justice and public safety without

compromising the interest in genetic privacy. *See King*, 569 U.S. at 442–46, 461–65; 73 FR at 74933, 74937–38.

For criminal arrestees and immigration detainees, the specific governmental interests supporting the use of the DNA technology are implicated in similar, if not identical, ways. One such interest is simply that of identification—“the need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody,” *King*, 569 U.S. at 449, which includes connecting the person “with his or her public persona, as reflected in records of his or her actions,” *id.* at 451. DNA is a “metric of identification” used to connect the individual to his “CODIS profile in outstanding cases,” which is functionally no different from the corresponding use of fingerprints, except for “the unparalleled accuracy DNA provides.” *King*, 569 U.S. at 451–52; *see* 73 FR at 74933–34, 74936–37.

A second governmental interest is the responsibility “law enforcement officers bear . . . for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee.” *King*, 569 U.S. at 452 (quotation marks and citation omitted); *see* 73 FR at 74934 (noting use of DNA information in ensuring proper security measures for detainees). For example, a match between the DNA profile of a person in custody and DNA left by the apparent perpetrator at the site of a murder is important information that officers and agencies responsible for the person’s custody should have, a consideration that applies equally whether the detention is premised on a criminal law violation or an immigration law violation.

Third, DNA identification informs the decision concerning continued detention or release, in the interest of ensuring that the individual will appear for future proceedings. In the criminal context this includes ensuring that an arrestee will appear for trial if released, and in the immigration context it includes ensuring that a detainee will appear for future proceedings relating to his immigration status if released. If DNA matching has shown or will show a connection between the person in custody and a crime for which he may be held to account if he has further contact with the justice system, the person’s incentive to flee must be considered in deciding whether to continue the detention pending further proceedings. *See King*, 569 U.S. at 452–53 (“A person who . . . knows he has yet to answer for some past crime may be more inclined to flee.”).

Fourth, DNA identification informs the decision concerning continued detention or release, and necessary conditions if release is granted, in the interest of public safety. *See King*, 569 U.S. at 453 (“an arrestee’s past conduct is essential to an assessment of the danger he poses to the public, and this will inform a . . . determination whether the individual should be released”); 73 FR at 74934 (DNA information “helps authorities to assess whether an individual may be released safely to the public . . . and to establish appropriate conditions for his release”). The results of DNA identification have the same significance for this purpose whether the person has been detained for criminal or immigration law reasons.

Fifth, DNA identification furthers the fundamental objectives of the criminal justice system, clearing innocent persons who might otherwise be wrongly suspected or accused by identifying the actual perpetrator, and helping to bring the guilty to justice. *See King*, 569 U.S. at 455–56; 73 FR at 74933–34. Here, too, it makes no difference whether the basis of the detention is suspected criminality or an immigration violation.

In this connection, consider the case of Raphael Resendez-Ramirez, the “Railway Killer,” who was executed in Texas in 2006. Resendez is believed to have committed numerous murders in the United States, including at least seven in the 1997–99 period, as well as additional murders in Mexico. Resendez was repeatedly taken into custody and repatriated to Mexico, including eight times between January 5, 1998 and June 1, 1999, and on earlier occasions going back to the 1970s. *See* U.S. Department of Justice, Office of the Inspector General, Special Report on the Raphael Resendez-Ramirez Case (March 20, 2000), <https://oig.justice.gov/special/0003> (“Resendez Report”).

Suppose it had been possible on any occasion when Resendez was apprehended to take a DNA sample from him and match it to DNA evidence derived from any of his murders. The officers responsible for his custody would have been put on notice of his dangerousness upon receipt of the information, and he would have been held in custody for criminal proceedings rather than being released, thereby saving the lives of the victims he claimed thereafter.

This rule’s removal of the authorized exception to DNA collection for certain detained aliens appearing in 28 CFR 28.12(b)(4) will help to ensure that future avoidable tragedies of this nature will in fact be avoided, and that DNA technology will be consistently utilized

to further public safety and the interests of justice in relation to immigration detainees, as has long been the case in relation to criminal arrestees, defendants, and convicts in the Federal jurisdiction.

In addition to removing § 28.12(b)(4), the rule updates a citation in § 28.12(b), replacing “8 CFR 1.1(p)” with “8 CFR 1.2.”

### Summary of Comments

The Department of Justice received over 41,000 comments on this rulemaking, most of which appear to derive from a website that solicited the submission of 40,000 comments (a number later increased to 50,000) and provided readers with suggested text. See American Civil Liberties Union, Forced DNA Collection, <https://action.aclu.org/petition/no-forced-dna-collection> (last visited Dec. 30, 2019). Comments were also received from other organizations and individuals. Having considered all comments, the Department of Justice has concluded that the amendments to the regulation in this rulemaking should be promulgated without change. The ensuing discussion summarizes the principal issues that were raised in the public comments.

### Supportive Comments

Some comments supported broadened DNA collection from immigration detainees as furthering public safety, and some stated that detainees who are not involved in criminal activities have nothing to fear from such collection. A comment further stated that the benefits of the initiative should be maximized by using Rapid DNA technology, which allows DNA collection and analysis, and immediate CODIS entry and searching, to be carried out at the booking station.

The Rapid DNA Act of 2017, Public Law 115–50, which provides the legal basis for use of the Rapid DNA technology in CODIS, is being implemented by the FBI, currently as a pilot program. See 34 U.S.C. 12591(a)(5), 12592(b)(2)(B), 40702(b); see also *King*, 569 U.S. at 460 (noting progress toward more rapid DNA analysis). Once the Rapid DNA technology is ready for general use, the benefits will be realized with respect to both criminal arrestees and immigration detainees.

### Nature of the Rulemaking

Many of the comments criticized this rulemaking as creating a new requirement of “forced” or involuntary DNA collection from migrants, including children over the age of 13 or even younger. Some of the comments

broadly characterized the class of aliens who would be subject to this allegedly new requirement, claiming, for example, that it encompasses all migrants entering the United States at legal ports of entry and taken into custody, or claiming that it includes lawful foreign visitors and immigrants as well as persons detained for immigration violations.

This rulemaking does not contain any new DNA-sample collection mandate. As discussed above, the existing DNA regulation—which implements 34 U.S.C. 40702(a)(1)(A), and which has been in effect since January 9, 2009—has always required DNA-sample collection from non-U.S. persons detained under Federal authority, in addition to persons arrested, facing charges, or convicted. See 28 CFR 28.12; 73 FR at 74932. This rulemaking only strikes paragraph (b)(4) in the regulation, which affects the allocation of authority between the Attorney General and the Secretary of Homeland Security to allow exceptions to the DNA-sample collection requirement for certain aliens.

Neither the existing regulation nor the amendment made by this rulemaking prescribes age criteria for DNA-sample collection. The regulation generally allows Federal agencies to limit the collection of DNA samples to persons whom the agency fingerprints. See 28 CFR 28.12(b). If an agency limits fingerprinting to detainees above a certain age, DNA-sample collection may be correspondingly limited.

Neither the existing regulation nor the amendment made by this rulemaking require DNA-sample collection from the broad classes of persons suggested by some commenters. The requirement is generally limited to individuals who are detained and fingerprinted, and, in addition, paragraphs (b)(1) and (b)(2) in the regulation generally exempt lawful foreign visitors and immigrants from the DNA-sample collection requirement. The classes of persons subject to the regulation’s DNA-sample collection requirement are further discussed below.

The commenters’ reference to DNA-sample collection under the regulation as being “forced,” involuntary, or nonconsensual establishes no difference from other booking information. It is not left to the discretion of arrestees and detainees whether fingerprints, photographs, and biographical information are taken in booking. The same is true of taking a cheek swab for DNA. There is little substance to concerns about the use of force in this context because persons taken into custody generally cooperate in

providing the required booking information—including fingerprints, photographs, and DNA samples—and because means other than the use of force normally suffice to secure cooperation in the rare instances involving recalcitrance. In relation to DNA-sample collection, in particular, 18 U.S.C. 3142(b), (c)(1)(A), makes cooperation in sample collection a mandatory condition of pretrial release, and 34 U.S.C. 40702(a)(5) makes refusal to cooperate in sample collection itself a criminal offense. Moreover, the Attorney General has issued directions to the U.S. Attorney’s Offices, relating to situations in which an agency brings an individual to court without having collected a DNA sample because of non-cooperation by the individual, which further reduce the possibility that “forced” collection will be needed in any case. See Memorandum from Attorney General Eric H. Holder, Jr., *DNA Sample Collection from Federal Arrestees and Detainees*, at 2–3 (Nov. 18, 2010) (Attorney General DNA Memorandum), available at [www.justice.gov/sites/default/files/ag/legacy/2010/11/19/ag-memo-dna-collection111810.pdf](http://www.justice.gov/sites/default/files/ag/legacy/2010/11/19/ag-memo-dna-collection111810.pdf).

### The Role of DHS

Some comments argued that the deletion of paragraph (b)(4) in 28 CFR 28.12 will sacrifice the unique expertise of DHS regarding its resources and operations in determining the scope of DNA-sample collection. However, as discussed above, the Attorney General will work with DHS, as he has done with other Federal agencies, in implementing the DNA-sample collection requirement of the regulation in a reasonable time frame and in a manner consistent with DHS’s capacities. The expertise of DHS is fully available to the Attorney General in this collaboration. Some comments asserted that broader DNA-sample collection from immigration detainees will overburden DHS’s already-strained resources. It should be understood that DNA-sample collection involves a modest expansion of booking procedures—taking a cheek swab for DNA in addition to the traditional biometrics of fingerprints and photographs. Since the existing regulation took effect in 2009, Federal agencies have successfully integrated this additional biometric into their standard booking procedures on a government-wide basis, without heavy budgetary impact or undue strain on their resources. The remaining major gap in implementation of the DNA Fingerprint Act of 2005 and the existing regulation is incomplete DNA-sample

collection by DHS components from non-U.S.-person detainees. The Attorney General will work with DHS, as he has done with other Federal agencies that have implemented the regulation's DNA-sample collection requirement with respect to persons in their custody, to ensure that any expansion of DNA-sample collection from non-U.S. persons in DHS's custody will be effected in an orderly manner consistent with DHS's capacities.

Some comments asserted that the change made by this rulemaking will immediately require DHS to collect DNA from all persons in its custody who have previously been exempted pursuant to paragraph (b)(4) of the existing regulation. This concern is not well founded because the Attorney General retains the authority to allow exceptions from and limitations to the DNA-sample collection requirement, *see* 28 CFR 28.12(b), and the Attorney General will work with DHS in implementing any expansion of DNA-sample collection in a reasonable time frame and in a manner consistent with DHS's capacities, as he has done with other Federal agencies.

Some comments suggested that DHS personnel, and U.S. Customs and Border Protection (CBP) agents in particular, are incompetent to collect DNA samples in an effective and safe manner. The comments also argued that U.S. Border Patrol agents should have made better use of other identification systems (including fingerprints) in the Resendez case, which is discussed above to illustrate the potential benefits of DNA identification measures.

The collection of cheek swabs for DNA from persons in custody, utilizing sample collection kits provided by the FBI, requires no extraordinary skills beyond the capacity of Federal agents, including CBP agents, who book persons in custody. The point is demonstrated by the numerous agencies throughout the Federal government that have collected DNA samples from persons in custody as a routine booking measure for many years. *See, e.g.,* Attorney General DNA Memorandum at 1–2 (noting that the “principal investigative agencies of the Department of Justice” had implemented DNA-sample collection as of 2010); *see also* U.S. Department of Defense, Instruction No. 5505.14 (Dec. 22, 2015) (reissuing Instruction of May 27, 2010) (directing DNA-sample collection in criminal investigations). The FBI will provide training assistance to CBP as needed, as it has done for other Federal agencies that have implemented DNA-sample collection.

The availability of fingerprint-based identification systems does not obviate the need for or value of DNA-sample collection. Many crimes can be solved or prevented through the use of DNA identification that cannot be solved or prevented through the use of fingerprints alone. *See* 73 FR at 74933–34. As discussed above, DNA identification measures, had they been available, could have saved the lives of victims of Resendez, who did not leave the fingerprints that ultimately led to his apprehension until a murder committed in December 1998, but who left DNA evidence in a number of his other crimes, including a murder and sexual assault committed in August 1997. *See* Resendez Report at Chapter IV.A, App'x E; *Resendiz v. State*, 112 SW3d 541, 543–44 (Tex. Crim. App. 2003); Holly K. Dunn, *Sole Survivor: The Inspiring True Story of Coming Face to Face with the Infamous Railroad Killer* 8, 39–40, 98, 139–46, 174–76 (2017); *DNA Tests Reportedly Link Suspect to Railway Killer Slayings*, CNN, July 20, 1999, <http://www.cnn.com/US/9907/20/railway.killings/>.

Some comments objected that CBP line agents will be vested with discretion regarding DNA-sample collection. The regulation and this rulemaking create no such discretion. To the extent that agents exercise discretion or judgment in deciding who to detain on immigration grounds, that affects who will have booking information taken incident to detention—a point that applies equally to all types of booking information, including fingerprints and photographs as well as DNA. This is not a reason to refrain from the lawful collection of fingerprints and photographs, and it is not a reason to refrain from the lawful collection of DNA samples.

Another comment asserted that the proposed rule was deficient because it did not take into account a letter of August 21, 2019, from U.S. Special Counsel Henry J. Kerner to the President. However, that letter contained nothing that calls into question the basis for the amendment made by this rulemaking. Rather, it criticized DHS for failing to implement DNA-sample collection as authorized by the DNA Fingerprint Act of 2005. When this rulemaking was undertaken, the Special Counsel released a public statement of support, stating that the rule “will bring more expeditious justice for victims and will help get criminals off the streets.” U.S. Office of Special Counsel, *Special Counsel Applauds Rule To Initiate DNA Collection from Undocumented*

*Criminal Detainees* (Oct. 2019), <https://osc.gov/News/Pages/20-01-Initiate-DNA-Collection.aspx>.

#### *Costs and Benefits*

Some comments argued that DNA-sample collection from immigration detainees will have adverse consequences because it will deter migration to the United States, and some comments argued that it will not realize expected benefits because it will not deter migration to the United States. The comments on both sides misconceive the nature and purposes of the DNA identification system. The DNA-sample-collection requirement of 28 CFR 28.12 for non-U.S.-person detainees was not adopted as a deterrent to immigration. As discussed above, it serves governmental interests paralleling those served by DNA-sample collection from arrestees, including identification of persons in custody, facilitating safe and secure custody, informing decisions concerning detention and release pending further proceedings, clearing the innocent, and bringing the guilty to justice. As with fingerprinting and photographing of detainees, there is no deterrent purpose, or likely deterrent effect, with respect to persons lawfully entering or remaining in the United States. Paragraphs (b)(1) and (b)(2) of the regulation, which this rulemaking does not change, generally exclude lawful foreign visitors and immigrants from the DNA-sample-collection requirement.

Some comments argued that there is no benefit to DNA sample collection from non-U.S.-person detainees because they are subject to fingerprinting and other (non-DNA) identification measures. The objection is specious because “DNA analysis offers a critical complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprints but leave biological residues at the crime scene.” 73 FR at 74933–34. Consequently, “there is a vast class of crimes that can be solved through DNA matching that could not be solved . . . if the biometric identification information collected from individuals were limited to fingerprints.” *Id.* at 74934.

Some comments asserted that DNA-sample collection from immigration detainees is unjustified because crime rates among immigrants generally, or among illegal immigrants in particular, are lower than those for citizens. Whatever may be assumed about the crime rate of persons subject to the regulation's DNA-sample collection requirement, it does not follow that DNA-sample collection from this class

is unjustified. The regulation does not attempt to divide arrestees and detainees into subclasses, and limit DNA collection to subclasses found to have a statistical probability of criminality above some threshold. Rather, paralleling the policy for fingerprinting and photographing, the regulation categorically requires DNA-sample collection from persons in the covered classes, which maximizes its value in promoting public safety and the other governmental interests supporting DNA-sample collection.

Some comments objected to the fiscal costs of expanded DNA-sample collection from immigration detainees, expressing concern that the detainees would bear the cost of DNA-sample collection, and pointing to cost estimates for certain potential expenditures in this rulemaking and other costs involved in the operation of the DNA identification system.

Arrestees and detainees subject to the regulation do not bear the cost of DNA-sample collection. As with the collection of other forms of booking information, including fingerprints and photographs, the cost is borne by the Federal government.

As discussed above, this rulemaking does not require DHS to expand DNA-sample collection. It reallocates authority from the Secretary of Homeland Security to the Attorney General with respect to adopting exceptions for certain aliens from the DNA-sample collection requirement. As such, it does not impose any costs. Future implementation decisions to collect DNA samples more broadly from non-U.S.-person detainees would entail certain costs, but that is equally true whether those decisions are made under the existing regulation or under the regulation as amended by this rulemaking.

A regulatory certification in this rulemaking, appearing below, discusses hypothetically costs that could result from future implementation decisions, including detailing projected costs on the assumption that collection of about 748,000 additional samples annually would be phased in over a 3-year period. The projected costs for DHS on this assumption, based on additional work hours, would be about \$5.1 million in that 3-year period. Actual costs will depend on future implementation decisions and, as noted above, the Attorney General would work with DHS to phase in any expanded DNA-sample collection in a reasonable timeframe and in a manner consistent with DHS's capacities. The regulatory certification also projects FBI costs for providing additional DNA-sample

collection kits on the same assumptions, which would include \$4,024,240 to collect 748,000 samples in a year. The comments note additional costs that would be borne by the FBI, rather than DHS, including postage to send the collected DNA samples to the FBI for analysis, the costs of storing and analyzing the samples, and the costs of operating the DNA database. The Department of Justice is cognizant of these potential costs and the FBI is prepared to expand its operations as needed for these purposes.

Some comments argued that DNA sample collection from immigration detainees will have little or no benefit because initial entrants to the United States cannot have previously committed crimes within the United States, so there could not be crime-scene DNA evidence that would match to their DNA profiles. However, the DNA-sample collection requirement for non-U.S.-person detainees is not limited to initial entrants. It includes as well immigration detainees who have previously been in the United States or who have had a continuing presence in the United States for some time. Nor is there any consistent means of determining reliably at the time an immigration detainee is booked that he has *not* been in the United States before and hence could not have committed a crime here in the past. Regardless of whether an immigration detainee, at the time he is booked, has previously committed a crime in the United States, the benefits of DNA-sample collection include the creation of a permanent DNA record that may match to DNA evidence from a later crime, if the detainee remains in or later reenters the United States and commits such a crime. The function of CODIS in this regard with respect to immigration detainees is the same as its function with respect to criminal arrestees, who may not have committed a crime solvable through DNA matching when initially booked but who may commit such crimes in the future. It also parallels the use of fingerprints, which may solve subsequent crimes through database matching to crime-scene evidence, regardless of whether there is an immediate hit upon the fingerprints' initial entry into the system.

Some comments asserted that funds expended for DNA-sample collection from immigration detainees would more productively be applied to other uses, such as analysis of backlogged rape kits, providing better services or amenities for immigration detainees, or eliminating the poverty that causes crime. Analysis of the perpetrator's DNA in a rape kit will not solve the

crime unless the perpetrator's DNA profile has been entered into CODIS. The effective operation of CODIS requires that the DNA database be well populated on both ends—DNA profiles of arrestees and detainees, and DNA profiles from crime-scene evidence. The Attorney General has committed to implementing any expansion of DNA-sample collection from immigration detainees in a manner consistent with DHS's capacities, which will ensure that there will be no diversion of funds necessary for the custody and care of immigration detainees. Diversion of the funding needed for the collection and use of biometric information from arrestees and detainees, such as fingerprints and DNA information, would not go far towards eliminating poverty or other social ills, but it would impair public safety and the effective operation of the justice system by depriving it of important information needed for these purposes.

Some comments asserted that DNA-sample collection from immigration detainees will stigmatize and vilify migrants and treat them as threats and criminals. There is no such purpose or effect. DNA-sample collection, like fingerprinting and photographing, is simply a biometric information collection measure serving legitimate law enforcement identification purposes. Nor is there any reason to believe that taking a cheek swab for DNA is stigmatizing in a way that taking other biometric information is not. See *King*, 569 U.S. at 464 (“a swab of this nature does not increase the indignity already attendant to normal incidents of arrest”).

A comment asserted that issuance of this final rule must be delayed pending the preparation of a federalism assessment, because expanding DNA collection from immigration detainees may indirectly affect some States' interaction with CODIS. However, this rulemaking only adjusts the allocation of authority within the Executive Branch of the Federal government regarding the exemption of certain aliens from the DNA-sample collection requirement. The Executive Order 13132 regulatory certification below accurately states that this rulemaking 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.

A comment suggested striking paragraph (b)(3) of 28 CFR 28.12, relating to maritime interdiction situations, on the ground that DNA-sample collection may now be feasible

in such situations using Rapid DNA technology. The recommendation is not addressed in the present rulemaking because the Rapid DNA technology is not yet ready for general use and because the comment did not persuasively establish that paragraph (b)(3) should be stricken, even if the Rapid DNA technology becomes widely available. Notwithstanding paragraph (b)(3), the Secretary of Homeland Security has authority to direct DNA-sample collection in maritime interdiction situations, should he deem that to be warranted. See 28 CFR 28.12(b).

#### Rights and Interests

Some comments asserted that collection of DNA samples from non-U.S.-person detainees in conformity with the regulation will adversely affect certain rights or interests of such persons. We address the comments according to the particular right or interest they allege that this rulemaking implicates.

**Privacy:** Comments relating to privacy rights often stated that DNA-sample collection will harm detainees by disclosing sensitive genetic information, through the storage of DNA information in insecure databases or in some other manner. The comments asserted that this will result in discrimination, immigration enforcement actions, and violence against the detainees and their relatives. These concerns are not well founded because the DNA information obtained from detainees is subject to the privacy and use restrictions of CODIS. The DNA samples are kept in secure storage by the FBI. See 73 FR at 74938. The DNA profiles are kept separately in a secure FBI database. Even if it were possible to gain unauthorized access to the DNA profile database, that database contains “[n]o personally identifiable information relating to the donor, such as name, date of birth, social security number, or criminal history record number” that would enable linking included DNA profiles to individuals. See FBI Laboratory, National DNA Index System (NDIS) Operational Procedures Manual, sec. 3.1.3 (Apr. 8, 2019), available at <https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf>. The authorized use of individuals’ DNA profiles in the database is matching to forensic (crime-scene) DNA profiles. The information is not used, and cannot be used, to discriminate against any person or class, to target individuals for immigration enforcement action for reasons other than CODIS matches implicating them in criminal activity, or to target individuals for violence. Some

comments’ projection of adverse effects on relatives of detainees may reflect misunderstandings of the nature of, and the policies regarding, “familial searching” and partial matches, a matter that was explained in the rulemaking for the existing regulation. See 73 FR at 74938.

**Fourth Amendment:** Some comments argued that categorically collecting DNA samples from immigration detainees violates the constitutional prohibition of unreasonable searches and seizures. As discussed above, however, DNA-sample collection from immigration detainees is, like fingerprinting, a reasonable search under the Fourth Amendment. This is so because the governmental interests served by such collection parallel those adequate to support DNA-sample collection from arrestees, and because the privacy protections and other safeguards of CODIS are equally applicable. The method of collection for DNA samples—a cheek swab—is a non-injurious and minor imposition. See *King*, 569 U.S. at 461, 463–64. The Supreme Court’s Fourth Amendment analysis in *King* is not a good-for-this-case-only analysis, limited to DNA identification programs that track the specific characteristics of the Maryland system at issue in that case. Rather, as courts have recognized, *King* provides a more generally applicable analysis. See, e.g., *Haskell v. Brown*, 317 F.Supp.3d 1095, 1103–11 (N.D. Cal. 2018) (rejecting argument that *King* does not apply with respect to arrestee in California because of differences between California law and Maryland law); *People v. Buza*, 413 P.3d 1132, 1139–45 (Cal. 2018) (same); *State v. Lancaster*, 373 P.3d 655, 660–61 (Colo. App. 2015) (rejecting argument that *King* does not apply with respect to arrestee in Colorado because of differences between Colorado law and Maryland law). *King*’s analysis likewise confirms the consistency of DNA-sample collection from non-U.S.-person detainees with the Fourth Amendment, as authorized by the statute and regulation, for the reasons discussed above.

**Fifth Amendment:** Some comments argued that DNA-sample collection from non-U.S.-person detainees in conformity with the regulation is inconsistent with the constitutional right against compelled self-incrimination. This objection is not well-founded because, like fingerprinting, photographing, and other “act[s] of exhibiting . . . physical characteristics,” DNA-sample collection is non-testimonial in character. *United States v. Hubbell*, 530 U.S. 27, 34–35 (2000); see *Pennsylvania v. Muniz*, 496 U.S. 582, 591–92 (1990); *Holt v. United*

*States*, 218 U.S. 245, 252–53 (1910); see also *Kammerling v. Lappin*, 553 F.3d 669, 686 (D.C. Cir. 2008) (“a DNA sample is not a testimonial communication subject to the protections of the Fifth Amendment”); *Wilson v. Collins*, 517 F.3d 421, 431 (6th Cir. 2008) (same); *United States v. Reynard*, 473 F.3d 1008, 1021 (9th Cir. 2007) (same); *United States v. Hook*, 471 F.3d 766, 773–74 (7th Cir. 2006) (same); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996) (same).

**Due Process:** Commenters who raised due process objections appeared to believe that a DNA sample cannot be collected from an arrestee or detainee without an adjudicatory or quasi-adjudicatory process, or some quantum of suspicion, regarding the individual’s involvement in criminal activity. However, the DNA Fingerprint Act of 2005 and its implementing regulation provide for the collection of DNA samples from persons in the relevant classes on a categorical basis, not dependent on an individualized assessment of dangerousness or propensity for crime. Since questions of individual criminal propensity are “not material to the . . . statutory scheme” as implemented by the regulation, there is no valid due process objection to the system’s operation. *Connecticut Dep’t of Public Safety v. Doe*, 538 U.S. 1, 7–8 (2003).

**Presumption of Innocence:** The presumption of innocence is the principle that a person cannot be convicted for a crime except upon proof through evidence presented at trial. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). DNA-sample collection does not conflict with this principle because it does not relate to the trial process and does not convict or punish anyone for anything. Nor does it presuppose or imply that a person from whom DNA is collected is a criminal. Rather, like fingerprinting and photographing, it is a biometric identification measure that is justified when the standards for arrest or detention are satisfied. See 73 FR at 74936–37, 74938–39.

**Equal Protection:** Some comments asserted that DNA-sample collection from immigration detainees in conformity with the regulation constitutes invidious discrimination based on national origin or alienage, or that it is objectionable because racial and ethnic minorities are overrepresented in DNA databases and collecting DNA samples from immigration detainees will aggravate the disproportion. However, the regulation neutrally requires DNA-sample collection from non-U.S.-person detainees without regard to national



origin, race, or other demographic characteristics. Regarding alienage, aliens are necessarily treated differently from citizens in some respects, because aliens do not have the unqualified right of citizens to enter and remain in the United States. Hence, aliens may be detained for reasons relating to their eligibility to enter or stay in the country, and identification information, such as fingerprints and photographs, may lawfully be taken incident to the detention. The point applies equally to DNA-sample collection. The ethnic and racial proportions in the DNA databases parallel the representation of demographic groups among the persons from whom DNA samples are collected, just as the ethnic and racial proportions in the fingerprint databases parallel the representation of demographic groups among the persons from whom fingerprints are collected. "The resulting proportions in either case provide no reason to refrain from taking biometric information" from individuals in any demographic group. 73 FR at 74937. Rather, consistent with Congress's purposes in the DNA Fingerprint Act of 2005, and the purposes of its implementing regulation, a uniform policy of DNA-sample collection provides valuable information "whose use for law enforcement identification purposes will help to protect individuals in all racial, ethnic, and other demographic groups from criminal victimization." *Id.*

**Cruel and Unusual Punishment:** Another comment asserted that DNA-sample collection is cruel and unusual punishment. However, DNA-sample collection from arrestees and detainees as required by the regulation is not cruel and unusual punishment under the Eighth Amendment because it is not punishment at all. It is a non-punitive biometric identification measure, like fingerprinting and photographing. As noted above, taking a cheek swab for DNA is a non-injurious and minor imposition. See *King*, 569 U.S. at 461, 463–64.

**Prolonged Detention:** Some comments asserted that DNA-sample collection from immigration detainees will result in their being quarantined while in custody, because they will not be housed with the general detainee population until CODIS searches of their DNA profiles are carried out, and that DNA-sample collection from immigration detainees will prolong their detention, because they will not be released until CODIS searches of their DNA profiles are carried out. No such policies or practices have been adopted by the Federal agencies that have for many years collected DNA samples from

persons in their custody, however, and none are expected with respect to immigration detainees from whom DNA samples may be collected by DHS.

**Effect on Innocent Persons:** Some comments argued that DNA-sample collection will wrongly implicate innocent persons in crimes because, for example, a person's DNA left at the scene of a crime he did not commit may be mistaken for DNA from the perpetrator. But fingerprint identification may likewise implicate an innocent person in a crime committed by another because he left fingerprints at the scene of the crime. The possibility of such mishaps does not warrant eschewing the use of either fingerprints or DNA, but rather is outweighed by the great value of biometric identification information, including fingerprints and DNA, in bringing the guilty to justice and in clearing the innocent by identifying the actual perpetrator. Moreover, both fingerprint and DNA matches are not taken as conclusive evidence of guilt. Rather, they are used as investigative leads, and the need remains to establish guilt by proof beyond a reasonable doubt. There were also comments opposing expanded DNA collection on the view that enlarging the DNA database will impair its operation and increase the likelihood of false matches. However, the DNA database maintained by the FBI is constantly expanding through the flow of additional profiles from DNA samples collected by Federal, State, and local agencies. The design of the DNA identification system is sufficiently discriminating that an increase in the number of profiles "does not create a risk to the innocent of the sort that concerns these commenters, just as the increase in the number of fingerprints in criminal justice databases does not create a significant risk of innocent persons being implicated in crimes." 73 FR at 74937.

**Effects on Citizens:** Some comments argued that DNA samples should not be collected from immigration detainees because citizens may be detained on the mistaken assumption that they are aliens without lawful immigration status. In such a case, the citizen may be subjected to the normal booking procedure, including fingerprinting and photographing. The possibility of such mishaps does not warrant eschewing the fingerprinting and photographing of immigration detainees, however, and the same point applies to collecting DNA samples. See 73 FR at 74938–39.

**Medical Privacy and Ethics:** Some comments asserted that DNA-sample collection in conformity with 28 CFR 28.12 violates medical privacy laws and

medical ethics standards requiring informed consent. These comments are not well-founded because collection of DNA information from arrestees and detainees and its use in CODIS are not measures of medical diagnosis or treatment. They are law enforcement identification measures, comparable to fingerprints and photographs taken in booking, whose collection is not contingent on whether the person from whom they are collected wishes to provide them. The legal standards and design of CODIS provide other adequate assurances against compromises of genetic privacy, as discussed above.

#### *International Law and Experience*

Some comments argued that DNA samples should not be collected from immigration detainees based on international law and experience in other countries. We address the comments according to the particular concerns they express.

**Refugee Convention:** Some comments asserted that DNA-sample collection from immigration detainees would violate an international convention's strictures against punishing or denying admission to refugees. The claim of treaty violations is groundless because DNA-sample collection, like fingerprinting and photographing, does not punish anyone for anything and does not prevent anyone from lawfully entering the United States.

**Foreign Misuse of DNA:** Some comments objected to DNA-sample collection based on misuse of biometric information databases, including DNA information, in other countries. However, misuse of biometric information databases by foreign governments is irrelevant to the United States' collection and use of DNA information in conformity with the legal standards and design of CODIS, which adequately protect against misuse of such information.

**S. and Marper v. United Kingdom:** Some comments argued against DNA-sample collection based on the decision of the European Court of Human Rights in *S. and Marper v. United Kingdom*, 48 Eur. Ct. H.R. 50 (2008). The decision in *Marper* overruled well-reasoned United Kingdom precedent upholding the retention of fingerprint and DNA records and required the United Kingdom to adopt more restrictive policies regarding the retention of such records. *Marper* is irrelevant to the subject of this rulemaking because it concerned the retention of fingerprint and DNA information, not the question whether and from whom fingerprint and DNA information can be collected in the first place. It is also not germane to the



interpretation of U.S. law, but rather is contrary to the laws of the United States, which impose no comparable restrictions on the retention of criminal history records, including fingerprint and DNA records.

#### *Decriminalizing Immigration*

*Violations:* Some comments argued against DNA-sample collection from immigration detainees based on a recommendation under United Nations auspices to decriminalize immigration violations. This recommendation is irrelevant to the subject of this rulemaking because DNA-sample collection from immigration detainees does not criminalize any immigration violation. Also, 28 CFR 28.12(b) generally requires DNA-sample collection from non-U.S.-person detainees, regardless of whether the immigration violations for which they are detained are crimes or only civil violations.

*Interpol Requests:* Some comments objected that foreign governments may seek DNA information, through Interpol requests, for oppressive purposes. One could say just as well that foreign governments may seek through Interpol other types of information, such as fingerprints and photographs, for oppressive purposes. The United States does not comply with such requests if it believes that they are made for oppressive or improper purposes. The possibility of such requests does not imply that DNA samples should not be collected from immigration detainees or others, just as it does not imply that fingerprints and photographs should not be collected from immigration detainees or others.

#### *Affected Classes*

Some comments objected that this rulemaking is not sufficiently clear about what persons are subject to DNA-sample collection. Some even claimed that it is unclear whether lawful permanent resident aliens are included in the DNA-sample collection requirement for non-U.S.-person detainees, though the regulation explicitly says that they are not. *See* 28 CFR 28.12(b). These comments are not well founded because the existing regulation, 28 CFR 28.12, identifies the classes subject to DNA-sample collection. The only change made by this rulemaking is an adjustment in the allocation of authority between the Attorney General and the Secretary of Homeland Security to adopt exceptions from the DNA-sample collection requirement with respect to certain aliens.

Some comments objected to the potential collection of DNA samples

from asylum-seekers, some of whom will ultimately be found eligible for admission to the United States, and asked why such persons are not categorically excluded from the DNA-sample collection requirement by paragraph (b)(1) of the regulation, which exempts “[a]liens lawfully in, or being processed for lawful admission to, the United States.” 28 CFR 28.12(b)(1). Paragraphs (b)(1) and (b)(2) generally exclude lawful foreign visitors and immigrants from the DNA-sample collection requirement. They do not exclude detained aliens whose legal eligibility to enter or stay in the United States remains to be determined in future proceedings. Such aliens fully implicate the governmental interests supporting DNA-sample collection, including identification of persons in custody, the interest in safe and secure custody for detained persons, and informing decisions concerning release or detention pending further proceedings. *See King*, 569 U.S. at 450–56.

Some commenters claimed that DNA-sample collection from immigration detainees would lead to mass surveillance or surveillance of the whole population. Collection of DNA samples from immigration detainees would not lead to collection of DNA samples from the whole population, just as collection of fingerprints from such persons has not led to the collection of fingerprints from the whole population. Collecting DNA samples from persons within the scope of the rule would serve governmental interests going beyond those applicable to the general population, including identification of persons in custody, the interest in safe and secure custody for detained persons, and informing decisions concerning release or detention pending further proceedings. The use of DNA information collected from arrestees and detainees that is entered into CODIS is matching to forensic (crime-scene) DNA profiles. The information is not used, and cannot be used, for “surveillance.”

Some comments objected that DNA samples will be collected from individuals whose underlying offenses are too minor to warrant DNA-sample collection, or whose detention is based on civil immigration violations, such as visa overstays, rather than any criminal activity. Again, this rulemaking only reallocates authority within the Executive Branch to recognize exemptions from the existing DNA-sample collection requirement. The existing regulation does not limit DNA-sample collection to persons whose underlying offenses exceed some threshold of seriousness, but rather

parallels the categorical approach of fingerprinting all arrestees and detainees in the affected classes, which maximizes its value in solving crimes and furthering the other governmental interests supporting DNA-sample collection. *See* 73 FR at 74937. There is also no valid objection based on the fact that detainees may be held on the basis of civil immigration violations rather than suspected criminal activity. As discussed above, the governmental interests supporting DNA-sample collection from such persons parallel those supporting DNA-sample collection from criminal arrestees, and they equally enjoy the protection of the legal standards and design of CODIS in safeguarding their privacy and precluding misuse of the information.

#### *Proposed Changes in the DNA Identification System*

Some of the commenters complained that this rulemaking is unclear about matters of DNA identification procedure, such as storage of, access to, and retention, disposal, and expungement of DNA samples and profiles. In some instances, the comments proposed specific measures, such as disposing of DNA samples once a profile has been derived, and disposing of DNA profiles if there is not an immediate hit in CODIS.

The matters these comments raise are fully and adequately addressed in the existing legal standards and design of CODIS, which are beyond the scope of this rulemaking and are not changed in any manner by this rulemaking. The specific new measures proposed in the comments are not well founded and would undermine the system. For example, there are legitimate reasons for retaining DNA samples after the profiles have been derived. *See* 73 FR at 74938. Likewise, the functions of CODIS are not limited to determining, when an arrestee or detainee’s profile is initially searched against CODIS, whether he is the source of DNA found at the scene of a past crime. CODIS’s functions, parallel to those of the fingerprint databases, also include creating a permanent DNA record for the individual, to which a match may result if he later commits a murder, rape, or other crime and DNA from that offense is searched against CODIS. The latter critical function would be lost if DNA profiles were expunged whenever there is not a hit upon their initial entry into CODIS.

Some comments criticized DHS’s use of DNA testing to confirm or rule out family relationships in other contexts, where such relationships may bear on individuals’ eligibility to enter or remain in the United States. The

referenced uses of DNA testing by DHS have nothing to do with 28 CFR 28.12 and this rulemaking, which concern a different type of analysis and use of DNA information that is unrelated to ascertaining family relationships, *i.e.*, the use of DNA information in CODIS for law enforcement identification purposes. Consequently, these comments' criticisms of unrelated uses of DNA testing for different purposes are irrelevant to this rulemaking.

#### *The Comment Period*

Some comments criticized the 20-day period provided for public comment in this rulemaking, stating that it provided inadequate notice and opportunity for comment, and inadequate time for consultation and planning with DHS.

A 20-day comment period was deemed adequate because the change effected by this rulemaking is limited. The rulemaking affects only the allocation of authority within the Executive Branch of the Federal government regarding the exemption of certain aliens from the regulation's DNA-sample collection requirement. Specifically, by removing paragraph (b)(4) of 28 CFR 28.12, the rulemaking vests fully in the Attorney General authority that was previously shared between the Attorney General and the Secretary of Homeland Security. As discussed above, this does not create any new DNA-sample collection requirement. That requirement has been present in the existing rule since it took effect on January 9, 2009, including the requirement to collect DNA samples from non-U.S. persons detained under Federal authority. *See* 28 CFR 28.12(b). Public comments were solicited and received when the existing regulation was issued. *See* 73 FR at 74936–41.

The volume and substance of the comments received on the current rulemaking confirm that the 20-day comment period was adequate. The comments received do not indicate that interested members of the public lacked sufficient notice or an adequate opportunity to express their views regarding this rulemaking. Nor do the comments indicate that commenters could have provided significant additional input or information affecting this rulemaking had the comment period been longer.

Some commenters mistakenly believed that the 20-day comment period was unlawful, on the view that 5 U.S.C. 553(c)–(d) requires a public comment period of at least 30 days. The cited statutory provision, however, requires that the effectiveness of a rule be delayed for 30 days after its publication, a requirement that is

complied with in this final rule. The provision does not concern the duration of public comment periods.

The objection concerning inadequate time for consultation and planning with DHS misunderstands the collaboration between the Department of Justice and DHS. That collaboration is ongoing and will continue after the issuance of this final rule, just as the Department of Justice continued to work with other Federal agencies on implementation of the existing regulation after it took effect on January 9, 2009.

#### **Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation would not have a significant economic impact on a substantial number of small entities because it concerns Federal agencies' collection of DNA samples from certain aliens.

#### **Executive Orders 12866, 13563, and 13771—Regulatory Planning and Review**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and Executive Order 13563, "Improving Regulation and Regulatory Review." The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f).

This rule strikes paragraph (b)(4) of 28 CFR 28.12, which authorizes the Secretary of Homeland Security to exempt certain aliens from DNA-sample collection based on operational exigencies or resource limitations. Following the change, the decision regarding limitations and exceptions to DNA-sample collection from persons in the affected class will be fully vested in the Attorney General.

This rulemaking is not subject to the requirements of Executive Order 13771 because any future costs of DNA-sample collection following this change in decision-making authority will be the same as the costs of DNA-sample collection pursuant to the existing regulation, subject to whatever limitations or exceptions the decision-maker chooses to allow. In other words, while future implementation decisions under 28 CFR 28.12 to collect DNA more broadly may entail costs, these costs could equally be realized under the current text of the regulation and do not result from this rulemaking's change in the regulation. Fully vesting the authority regarding limitations and

exceptions to the regulation's DNA-sample collection requirement in the Attorney General does not determine whether or to what extent limitations or exceptions will be adopted, and does not dictate any time frame for implementation of DNA-sample collection with respect to aliens in the affected class. The Attorney General will work with DHS, as he has done with other Federal agencies that have heretofore implemented DNA collection from persons in their custody, to ensure that any expansion of DNA-sample collection from such aliens will be effected in an orderly manner consistent with DHS's capacities.

For example, if DNA-sample collection were implemented in full with respect to aliens in the category implicated by 28 CFR 28.12(b)(4), pursuant either to the Secretary of Homeland Security's direction under the current text of the regulation, or the Attorney General's direction following the amendment of the regulation by this rulemaking, there would be the same implementation costs. The Department of Justice assumes in analyzing these costs that any such expansion of DNA-sample collection would be phased in over the first three years and that DHS would utilize the Electronic Data Capture Project (EDCP). EDCP is a project designed to improve efficiencies by reducing the number of duplicate DNA samples collected by Federal agencies and by eliminating the manual collection of biographical data and inked fingerprints at the time of booking, by utilizing the information already electronically collected at the time of booking. This capability is estimated to reduce the time of DNA collection from approximately 15 minutes to less than 5 minutes. To obtain the EDCP technology, integrate it into their booking software, and create a training program for their staff, DHS would incur a total one-time cost of \$500,000.

Approximately 743,000 people fell into the category implicated by 28 CFR 28.12(b)(4) in a recent 12-month period, which is equivalent to approximately 755,000 samples, once repeated samples (due to rejection of initial samples) are considered. DHS submitted nearly 7,000 samples in FY2018. Therefore, assuming the population subject to DNA-sample collection under the rule remains at this level, DHS would be expected to submit an additional 748,000 samples annually.

Utilizing EDCP, DHS would require approximately 20,778 additional work hours in the first year, 41,556 hours in the second year, and 62,333 hours in the third year to collect the additional samples. Using average compensation

for CBP employees stationed along the southern border, the total cost to DHS with the EDCP software would be about \$5.1 million in the first three years. If future implementation decisions or changes in the volume of apprehensions ultimately resulted in annual submission of a number of additional DNA samples less than or greater than 748,000, required work hours and resulting costs would be reduced or increased correspondingly.

The FBI would also need to provide additional DNA-sample collection kits, at a per-kit cost of \$5.38, in sufficient numbers to collect samples at the volumes described above. For example, assuming a 3-year phase-in period with an additional third of the eligible population added in each successive year, the additional sample-collection kit costs to the FBI would be \$1,341,413 to collect 249,333 samples in the first year, \$2,682,827 to collect 498,667 samples in the second year, and \$4,024,240 to collect 748,000 samples in the third year. The FBI will provide to DHS, without charge, the same services that it provides to other Federal agencies that collect DNA samples, including assistance with regard to training, DNA-sample collection kits, postage to return the collected samples, analysis of samples, inclusion in CODIS, and handling resulting matches.

#### Executive Order 13132—Federalism

This regulation 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 Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

#### Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### 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, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### List of Subjects in 28 CFR Part 28

Crime, Information, Law enforcement, Prisoners, Prisons, Probation and Parole, Records.

Accordingly, for the reasons stated in the preamble, part 28 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

#### PART 28—DNA IDENTIFICATION SYSTEM

- 1. The authority citation for part 28 is revised to read as follows:

**Authority:** 28 U.S.C. 509, 510; 34 U.S.C. 12592, 40702, 40703; 10 U.S.C. 1565; 18 U.S.C. 3600A; Public Law 106–546, 114 Stat. 2726; Public Law 107–56, 115 Stat. 272; Public Law 108–405, 118 Stat. 2260; Public Law 109–162, 119 Stat. 2960; Public Law 109–248, 120 Stat. 587; Public Law 115–50, 131 Stat. 1001.

#### § 28.12 [Amended]

- 2. Amend § 28.12:
  - a. In paragraph (b) introductory text, remove “1.1(p)” and add in its place “1.2”.
  - b. In paragraph (b)(2), remove “;” and add in its place “; or”.
  - c. In paragraph (b)(3), remove “; or” and add in its place “.”.
  - d. Remove paragraph (b)(4).

Dated: February 26, 2020.

**William P. Barr,**  
*Attorney General.*

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#### DEPARTMENT OF HOMELAND SECURITY

#### Coast Guard

#### 33 CFR Part 105

[Docket No. USCG–2017–0711]

RIN 1625–AC47

#### TWIC—Reader Requirements; Delay of Effective Date

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is delaying the effective date for three categories of facilities affected by the final rule entitled, “Transportation Worker Identification Credential (TWIC)—Reader Requirements,” published in the **Federal Register** on August 23, 2016. These three categories are: Facilities that handle certain dangerous cargoes in bulk, but do not transfer these cargoes to or from a vessel; facilities that handle certain dangerous cargoes in bulk, and do transfer these cargoes to or from a vessel; and facilities that receive vessels carrying certain dangerous cargoes in bulk, but do not, during that vessel-to-facility interface, transfer these bulk cargoes to or from those vessels. The Coast Guard is delaying the effective date for these categories of facilities by 3 years. Specifically, this rule will delay the implementation of the TWIC Reader rule for 370 of the 525 affected Risk Group A facilities by 3 years, while the remaining 155 facilities (which are all facilities that receive large passenger vessels), as well as 1 vessel, will have to implement the final rule requirements within 30 days after the effective date of this rule.

**DATES:** This final rule is effective May 8, 2020.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are included under docket number USCG–2017–0711 and available at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information about this document, call or email LCDR Kevin McDonald, Coast Guard CG–FAC–2; telephone 202–372–1120; email [Kevin.J.Mcdonald2@uscg.mil](mailto:Kevin.J.Mcdonald2@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

#### Table of Contents for Preamble

- I. Abbreviations
- II. Basis and Purpose, and Regulatory History
- III. Executive Summary
- IV. Discussion of Comments and Developments
  - A. Confusion Relating to the Difference Between “CDC Facilities” and “Facilities That Handle CDC in Bulk”