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DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

8 CFR Parts 103 and 214

[DHS Docket No. ICEB-2008-0004]

RIN 1653-AA54

Adjusting Program Fees and Establishing Procedures for Out-of-Cycle Review and Recertification of Schools Certified by the Student and Exchange Visitor Program To Enroll F and/or M Nonimmigrant Students

AGENCY: U.S. Immigration and Customs Enforcement, DHS.

ACTION: Final rule.

SUMMARY: This rule adjusts the Student and Exchange Visitor Program (SEVP) school certification petition fees and the application fees for nonimmigrants seeking to become academic (F visa) or vocational (M visa) students, or exchange visitors (J visa). The rule sets the following fees: \$1,700 for a school certification petition and \$655 for each site visit for certification; and \$200 for each F or M student. This rule also sets a \$180 fee for most J exchange visitors; however, the \$35 fee for each J exchange visitor seeking admission as an au pair, camp counselor, or summer work/travel program participant will remain the same. All fee payments addressed in this final rule must be made in the amounts established by this rule beginning October 27, 2008.

The rule also establishes procedures for the oversight and recertification of schools attended by F and/or M students, establishes procedures for schools to submit recertification petitions, adds a provision allowing a school to voluntarily withdraw from its certification, and clarifies procedures for school operation with regard to F

and M students during recertification and following a denial of recertification or a withdrawal of certification. Finally, the rule removes obsolete provisions used prior to implementation of the Student and Exchange Visitor Information System (SEVIS).

DATES: This final rule is effective October 27, 2008.

FOR FURTHER INFORMATION CONTACT:

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Table of Abbreviations and Acronyms

- ADIS Arrival and Departure Information System
- CBP U.S. Customs and Border Protection
- CCD Consular Consolidated Database
- CEU Compliance Enforcement Unit
- CFO Chief Financial Officer
- CFR Code of Federal Regulations
- CLAIMS Computer Linked Application Information Management System
- DHS Department of Homeland Security
- DMV Department of motor vehicles
- DoS Department of State
- DSO Designated school official
- EBSVERA Enhanced Border Security and Visa Entry Reform Act of 2002, Public Law 107-173; May 14, 2002
- FASAB Federal Accounting Standards Advisory Board
- FDMS Federal Docket Management System
- FIN Functional identification number
- FR Federal Register
- FTTTF Foreign Terrorist Task Tracking Force
- HSPD-2 Homeland Security Presidential Directive—2
- IBIS Interagency Border Inspection System
- ICE U.S. Immigration and Customs Enforcement
- IEFA Immigration Examinations Fee Account
- IIRIRA Illegal Immigration Reform and Immigrant Responsibility Act of 1996
- INA Immigration and Nationality Act of 1952
- INS Immigration and Naturalization Service
- IRFA Initial Regulatory Flexibility Analysis
- NAFSA Association of International Educators
- NAICS North American Industry Classification System
- NIV Nonimmigrant Visa
- NOIW Notice of Intent to Withdraw
- NPRM Notice of Proposed Rulemaking
- NSEERS National Security Entry Exit Registration System
- OMB Office of Management and Budget
- OPT Optional practical training
- PDSO Principal designated school official
- PIA Privacy Information Assessment
- RFA Regulatory Flexibility Act
- RO Responsible officer
- RTI Real-time interface

SAVE Systematic Alien Verification for Entitlements
 SBA Small Business Administration
 SCB School Certification Branch
 SEVIS Student and Exchange Visitor Information System
 SEVP Student and Exchange Visitor Program
 SFFAS FASAB Statement of Federal Financial Accounting Standard No. 4: Managerial Cost Accounting Concepts and Standards for the Federal Government
 UAM User Application Model
 UMRA Unfunded Mandates Reform Act of 1995
 USA PATRIOT Act Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001
 USCIS U.S. Citizenship and Immigration Services
 US-VISIT United States Visitor and Immigrant Status Indicator Technology
 VIS Verification Information System

I. Background

On April 21, 2008, the Department of Homeland Security (DHS), through U.S. Immigration and Customs Enforcement (ICE), Student and Exchange Visitor Program (SEVP), published a notice of proposed rulemaking (NPRM) to amend the fees charged by SEVP and to establish a school certification program. 73 FR 21260. This final rule implements those changes and other legal requirements by amending DHS regulations governing certification, oversight and recertification of schools by SEVP for attendance by F and/or M students. The rule establishes procedures for schools to submit recertification petitions, adds a provision allowing a school to voluntarily withdraw from its existing certification, clarifies procedures for school operations with regard to F and M visa students during recertification and following a withdrawal of certification, and removes obsolete provisions used prior to implementation of the Student and Exchange Visitor Information System (SEVIS). SEVP administers SEVIS as a Web-enabled database that provides current information on F, M and J nonimmigrants in the United States.

The rule also adjusts the SEVP school certification fee and student application fees (Form I-901 SEVIS fee) to reflect existing program operating costs, program requirements, and planned program enhancements. These fee adjustments are driven by two factors: (1) The need to comply with statutory and regulatory requirements that SEVP review its fee structure every two years to ensure that the cost of the services that are provided are fully captured by fees assessed on those receiving the services; and (2) the need to enhance

SEVP capability to meet current program requirements and to achieve its mission goals in support of homeland security and countering immigration fraud.

Once promulgated, the rule will allow SEVP to fully fund activities and institute critical near-term program and system enhancements in a manner that fairly allocates cost among the F, M and J visa categories, and acknowledges defined performance goals. These enhancements include implementation of the next generation SEVIS (*i.e.*, SEVIS II), increased enforcement capability, expansion of school liaison activity, and establishment of a school recertification process.

SEVP makes these changes under a series of statutory authorities, including, but not limited to the following immigration and homeland security laws: sections 101(a)(15)(F)(i), 101(a)(15)(M)(i) and 101(a)(15)(J) of the Immigration and Nationality Act of 1952 (INA), as amended; section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Div. C, 110 Stat. 3009-546 (September 30, 1996); the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56, 115 Stat. 272 (October 26, 2001; USA PATRIOT Act); and the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA), Public Law 107-173, 116 Stat. 543 (May 14, 2002), codified at 8 U.S.C. 1762. These laws govern the admission of foreign nationals into the United States in nonimmigrant status to attend academic, language and vocational schools, and to participate in foreign exchange visitor programs. They require that DHS collect certain information about F and M students and J exchange visitors at ports of entry. They also establish certification and recertification requirements for schools seeking approval for school attendance by F and/or M students.

DHS's authority to assess fees arises under IIRIRA sections 641(e)(1), 641(e)(4)(A) and 641(g)(2), as amended. In addition, section 286(m) of the INA permits the Secretary of Homeland Security to collect fees at a level that ensures recovery of the full costs of providing adjudication services, including the costs of providing similar services without charge to asylum applicants and certain other immigrants. All fees collected by ICE pursuant to this final rule are deposited as offsetting receipts into the Immigration Examinations Fee Account (IEFA) and remain available to the Secretary until

expended for the purposes of the program. IIRIRA section 641(e)(4)(B). The fee assessments and collections implemented under this final rule are consistent with Office of Management and Budget (OMB) Circular A-25, User Charges (revised). *See* 58 FR 38142 (July 15, 1993). Section 6 of OMB Circular A-25 defines "full cost" to include all direct and indirect cost to any part of the federal government for providing a good, resource, or service. The fees implemented under this final rule also are consistent with OMB Circular A-11, Preparation, Submission and Execution of the Budget, section 31.12 (July 2, 2007), which directs agencies to develop user charge estimates based on the full cost recovery policy set forth in OMB Circular A-25.

Further, this rule complies with the Federal Accounting Standards Advisory Board (FASAB) Statement of Federal Financial Accounting Standards (SFFAS) No 4: Managerial Cost Accounting Concepts and Standards for the Federal Government (July 31, 1995), which provides federal government standards regarding managerial cost accounting and full cost recovery. The Chief Financial Officers Act of 1990 (CFO Act), 31 U.S.C. 901-903, requires each agency's Chief Financial Officer (CFO) to "review, on a biennial basis, the fees, royalties, rents and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect cost incurred by it in providing those services and things of value." 31 U.S.C. 902(a)(8). This final rule is consistent with these federal sector financial and accounting laws, rules and standards, and reflects fee collection recommendations made by the CFO. As such, the rule increases funding that supports current SEVP operations; provides funding for new initiatives critical to improving the program; funds operations to comply with statutory requirements to implement school recertification; and reflects the implementation of specific cost allocation methods to segment program costs to the appropriate fee, either F and M students, J exchange visitors, or schools, to ensure compliance with the federal sector legal framework for fee setting.

This final rule amends the SEVP school certification petition fees and the application fees for nonimmigrants seeking to become academic (F visa) or vocational (M visa) students, or exchange visitors (J visa). The rule also implements mandatory review of fees collected by SEVP. It sets the fee for submitting a school certification petition at \$1,700 and the fee for each

site visit at \$655. It sets the fee for each F or M student at \$200. The rule sets the fee for certain J exchange visitors at \$180 and maintains the fee for exchange visitors seeking admission as au pairs, camp counselors, and summer work/travel program participants at \$35. All fee payments addressed in this final rule must be made in the amounts established by this rule beginning October 27, 2008.

The rule also establishes procedures for oversight and recertification of schools with F and/or M students. This includes procedures for schools to submit recertification petitions as well as procedures to allow a school to voluntarily withdraw from an existing certification. The rule further clarifies procedures for school operation with regard to F and M students during recertification and following a denial of recertification or a withdrawal of certification. Finally, the rule removes obsolete provisions used prior to implementation of SEVIS.

II. Public Comments on the Proposed Rule

The 60-day comment period for this rulemaking action concluded on June 20, 2008; although SEVP allowed posting of late-filed comments through June 27, 2008. The proposed rule identified several alternative means for submitting comments. SEVP converted all comments submitted, regardless of means chosen for submission, to electronic format where they may be viewed electronically through the Federal Docket Management System (FDMS) at <http://www.regulations.gov> (use DHS docket number ICEB-2008-0004 when searching). SEVP received 61 written comments to FDMS.

In addition, in the weeks following the publication of the proposed rule, the SEVP Director and key staff, led in several instances by the Assistant Secretary for U.S. Immigration and Customs Enforcement, launched a nationwide tour of educational institutions to engage the public in a "town hall" format to encourage open dialogue, public comments and understanding about the proposed rule. SEVP opened the forums to the public at large, and specifically invited officials from every SEVP-certified school and exchange visitor program sponsors from a listing provided to SEVP by the Department of State (DoS). SEVP posted the transcripts of those forums on the public docket for this rulemaking at www.regulations.gov.

SEVP further extended outreach to the public through the home page of the SEVP Web site, <http://www.ice.gov/sevis>. The site included related press

releases, "frequently asked questions" (FAQs), links to documents and access to FDMS for comment submission. Although not an official method of comment submission, SEVP received some rule-related input through its policy guidance "help" e-mail address, SEVIS.Source@dhs.gov. In these instances, SEVP asked submitters to comply with docket submission criteria, but also added all substantive issues related to the proposed rule raised in those e-mails to the FDMS docket.

This final rule considered all comments received during the comment period and has responded to those comments in this final rule. Below is a summary of changes to the final rule text made in response to public comment:

1. The proposed text for 8 CFR 103.7(b)(1) related to the Form I-290B has been removed.

2. The proposed text for 8 CFR 103.7(b)(1) related to the Form I-901 has been amended slightly to clarify fees for J visa holders by listing the J-visa categories first and then the fees, and by specifically listing the government sponsored program visa categories exempt from these fees.

3. The proposed text for 8 CFR 214.3(g)(1) *Student Records* is amended by adding after the first sentence the following text: "Student information not required for entry in SEVIS may be kept in the school's student system of records, but must be accessible to DSOs."

4. The proposed text for 8 CFR 214.3(g)(1)(ii) is amended by adding a parenthetical clarification regarding the recordation of legal name changes as follows: "Identification of the student, to include name while in attendance (record any legal name change), date and place of birth, country of citizenship, school's student identification number."

5. The proposed text for 8 CFR 214.3(g)(1)(xi), requiring schools to maintain record of nonimmigrant students' "date of last entry into the United States; most recent Form I-94 number and date of issue," has been deleted.

6. The proposed text for 8 CFR 214.3(g)(2)(iii)(D) *Adjustment to the program completion date* is amended by adding examples in parenthesis to read: "Any factors that influence the student's progress toward program completion (e.g., deferred attendance, authorized drop below, program extension) must be reflected by making an adjustment updating the program completion date."

7. The proposed text for 8 CFR 214.3(h)(2) *Recertification* is amended by adding after the first sentence,

"There is no recertification petition fee."

8. The proposed text for 8 CFR 214.4(a)(1) is amended to add the sentence, "No fee is required with appeals related to SEVP certification."

9. The proposed text for 8 CFR 214.4(a)(2)(xix) is amended to include only those changes that represent a "material change to the scope of the institution offerings" as follows: "Failure of a DSO to notify SEVP of material changes, such as changes to the school's name, address, or curricular changes that represent material change to the scope of institution offerings (e.g., addition of a program, class or course for which the school is issuing Forms I-20, but which does not have Form I-17 approval), as required by 8 CFR 214.3(f)(1)."

10. The proposed text of 8 CFR 214.4(h) is amended by adding the last sentence, "No fee is required with appeals related to denial of SEVP recertification or withdrawal of SEVP certification."

11. The proposed text of 8 CFR 214.13 is expanded to include paragraph (b)(1). This allows a slight technical correction—the addition of the G-7 category.

A. General Comments

Comments submitted to the docket for this rulemaking were distributed relatively evenly among various issues, with concerns about the potential impact of the increased I-901 SEVIS fee on student and exchange visitor participation in F, M and J programs and questions about adjustments to student reporting requirements receiving the greatest number of comments.

1. Support for the Rule

Some comments affirmed the purpose and scope of the rule, acknowledging the need to remove DHS authorization to enroll F and/or M students from noncompliant schools, and supporting increased interaction and communication among federal agencies through the development of SEVIS II and expanded SEVP liaison activity. One commenter, in particular, applauded U.S. government policy related to assessing fees for the cost of government programs and opined that all costs associated with international students' presence in the United States should be paid by students rather than by U.S. taxpayers. SEVP agrees with and appreciates these expressions of support for the program and, in this final rule, seeks to fulfill its legal requirements to fully capture the costs associated with carrying out government responsibilities

under the SEVP program through appropriate fee assessments.

2. Opposition to the Rule

A number of comments were not relevant to the substance of the proposed rule; in particular those questioning the government's basis for establishing and continuing SEVP overall and criticizing the rule for not addressing or solving immigration issues in general. One comment, in particular, questions the logic of focusing U.S. government attention and public resources on foreign students and researchers as opposed to other immigrant and nonimmigrant groups.

Other comments noted recent increases in fees for nonimmigrants by the Department of State (DoS) for visa processing and by U.S. Citizenship and Immigration Services (USCIS) for benefit applications, and asked if the fees could be better coordinated and phased-in. These comments suggested changes in substantive federal laws, USCIS regulations and processes for implementing the immigration laws by USCIS, U.S. Customs and Border Protection (CBP) and other agencies.

Several comments criticized the Department's law enforcement programs for lack of collection of adequate law enforcement data related to criminal behavior. One comment, in particular, asked that SEVP further illuminate the scale of the problems that this regulation purports to address and provide additional information as to how many uninvestigated leads related to nonimmigrant student and exchange visitor activities resulted in criminal conduct, how many institutions are complying with SEVP requirements, and what percentage of foreign students are represented by these institutions.

Finally, an advocacy group, endorsed by four commenters, questioned the efficacy of U.S. international education policy and its intersection with national immigration policy; concluding that SEVIS is an example of government regulation "for extraneous purposes," developed in the absence of comprehensive U.S. international education policy.

All of these comments are beyond the scope of this rulemaking. The final rule does not address comments seeking changes in statutes, regulations, policy or processes unrelated to or not addressed by the proposed rule. It also does not respond to requests for changes in procedures of other DHS components or other agencies, or the resolution of any other issues not within the scope of the rulemaking.

Several individual commenters observed that the language in the

preamble to the proposed rule regarding terrorist threats to the United States overstated the actual terrorist threat of a relatively small segment of the total population that visits the United States. They believe that such language has been a deterrent to foreign nonimmigrant participation with schools and exchange visitor programs. Some commenters, including two advocacy groups, feel that the "message" that foreign nationals will perceive from the rule will be that the United States is "unwelcoming."

SEVP strongly supports international education. Most non-immigrant students have positive experiences while in the United States, and the goodwill engendered by all that the United States has to offer will encourage mutually beneficial international relations. SEVP, by ensuring students' legitimacy, both reduces potential terrorist threats and decreases the risk of discrimination in the larger community, contributing to a safe environment for students and exchange visitors when they attend programs in the United States.

As discussed in the proposed rule, and in sources such as *The 9/11 Commission Report*, a strong immigration policy, including the ability of the U.S. government to know whether nonimmigrant visitors have overstayed the term of their admission to the United States, is critical to safeguarding the homeland. See 72 FR at 21266. The National Commission on Terrorist Attacks upon the United States (the 9/11 Commission), in its seminal report, noted:

Looking back, we can see that the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism—inevitably shaped al Qaeda planning and opportunities * * * had the immigration system set a higher bar for determining whether individuals are who or what they claim to be—and ensur[ed] routine consequences for violations—it could potentially have excluded, removed, or come into further contact with several hijackers who did not appear to meet the terms for admitting short-term visitors.¹

SEVP strives to administer SEVIS and the information collection and reporting requirements mandated by statute for F and M students and J exchange visitors in a manner that best serves the requirements of the law, supports the missions of DHS and the Department of State, and facilitates the ability of foreign students and exchange visitors to come to the United States. The fees

implemented under this final rule will support SEVP's efforts in continuing to improve all of these purposes.

3. Technical Corrections to the Proposed Rule

SEVP identified three required technical corrections to the proposed rule. SEVP discovered that Table 1: *Summary of Requirements by Organization and Program Category*, in the section addressing Program Expenses, the expenses for SEVIS II for 2009 and reflecting the change of \$25,100 are in error (carried over from a previous calculation). The entry of \$25,100 is corrected to \$25,600. The correct entry was used for determining the totals of the Program Expenses section, so the totals remain unchanged.

Also, SEVP discovered that Table 12: *FY 2009 SEVP Program Fees*, line 4, in the proposed rule preamble, contained a typographical error by stating "190" for the I-901 SEVIS fee for most J-1 exchange visitors. The proposed rule included and discussed the correct "180" figure at several points in the document, including the proposed rule text, and no commenter expressed confusion over this proposed dollar amount.

The proposed text of 8 CFR 214.13 did not include the G-7 visa category, as required by law. SEVP expanded the final rule text to include paragraph (b)(1), which corrects this oversight by adding the G-7 category. This inclusion does not substantially change the intent of the proposed rule but reflects a well-established and nondiscretionary legal requirement.

B. Adjustment of SEVP Fees

1. Frequency of Fee Review and Scale of Fee Increase

An individual commenter asked how frequently the SEVP community should expect future fee adjustments. In the same vein, an advocacy group commented that the rule asserts DHS authority to revisit the fee every two years, describing this authority and the possible frequency of fee review as "drastic and sweeping." Another comment suggested that a more business-like approach, sensitive to consumers, would have been to raise fees incrementally.

As stated in the NPRM, this is the first adjustment of fees based upon actual operational costs to the program implemented by SEVP since 2002. Due to the lapse in time and significant increase in operating costs for the program, SEVP had to propose, and now implement, a substantial fee increase to cover the actual operating costs of the

¹ The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004) (9/11 Commission Report).

program. ICE is required by law and Executive Order to review these fees on a biennial basis. 31 U.S.C. 902(a)(8). SEVP will continue to review its fees every two years and make future fee adjustments, as necessary, at more regular intervals consistent with the biennial review and in line with the commenters' suggestions.

2. Economies in Efficiency

Two individuals commented, without providing specific examples, that efficiencies in SEVP and DHS operations, as well as at DoS, could eliminate the need for fee increases. Similarly, one commenter observed that the Departments have not yet delivered promised efficiencies and should do so before raising fees.

SEVP is unable to respond to these comments because they are vague and fail to identify a means of achieving the supposed efficiencies. They also do not identify the Departments' alleged promised efficiencies. SEVP endorses streamlining and promoting efficiencies in its operations. This is one reason for creating the SEVIS II system, which will provide for more efficient processing and sharing of student data. SEVP disagrees that there remain significant unrecognized efficiencies attainable under the current program with the current fee levels. As described in the proposed rule, these adjusted fees are based on expanding program operating needs; including a need for the SEVIS II system and additional enforcement and liaison personnel to address the existing and expanding SEVP caseload. They are based on legal requirements, including the recertification program required by EBSVERA (8 U.S.C. 1762) and Homeland Security Presidential Directive-2 (HSPD-2) and are not susceptible to overall reduction or elimination by the program through leveraging additional efficiencies.

3. Fee Increase for F, M, and J Nonimmigrants

The largest volume of comments on the proposed rule voiced concern that the increase in the I-901 SEVIS fee would adversely affect U.S. competitiveness in the international market for foreign student enrollment and exchange visitor participation. Some commenters expanded this concern to emphasize the importance of foreign student enrollment and exchange visitor participation to the U.S. culture and economy. These comments, including a comment from a major advocacy group, suggested that SEVP seek alternative public funding sources. Some of the comments in this area asked if SEVP could decrease the

burden on students by having the student fee paid incrementally, part before and part after visa issuance, to minimize the loss to those that do not receive visas.

SEVP fully appreciates the importance of foreign student and exchange visitor enrollment to the U.S. culture and economy, and is firmly committed to lawful visitation of foreign nationals for this purpose. This is reflected in recent enrollment data, which indicate that enrollment of F, M and J nonimmigrants at higher education institutions is at a historic high and does not indicate any demonstrable variance in overall U.S. market share in relation to other countries.²

SEVP also observes that the comments neither cited to nor provided a published study or other data supporting the suggestion that an increase in government fees charged to international students adversely affects their decision to choose the United States for academic or vocational study, or exchange visits. SEVP, likewise, has been unable to locate such a study. The program thus has no objective basis for concluding that international students choose or reject attending education institutions in the United States based on government fees which, generally, are a very small portion of the overall costs of attending these programs.

Rather, SEVP research reveals that the fees currently required for all incoming F-1 students equates to similar fees charged in other countries.³ An analysis of twelve countries (Australia, Canada, China, France, Germany, India, Japan, Russia, South Africa, Saudi Arabia, South Korea, and the United Kingdom) shows that the average student visa fee is \$126.58. The composite U.S. cost, after the effective date of this rule, will be \$330, which includes a visa processing fee of \$130 and the \$200 I-901 SEVIS fee. This fee is neither the most expensive nor the least expensive when compared with these twelve countries. In fact, Australia, cited by most commenters as the singular competitor of U.S. market share, currently charges nonimmigrant students a total of \$450. The table below lists the fees charged by the twelve countries researched in the SEVP analysis.

STUDENT FEES IN OTHER COUNTRIES

Country	Costs
Australia	\$450.00
Canada	125.00
China	205.00
France	78.00
Germany	95.00
India	161.00
Japan	Free
Russia	\$131.00
Saudi Arabia	Free
South Africa	37.00
South Korea	45.00
United Kingdom ⁴	192.00

There is also no objective evidence that this fee is the sole, or even the most important, criterion that a student might consider while weighing educational options. The increased I-901 SEVIS fee represents less than 1% of the average cost of yearly expenses for students in a four-year program, an amount that could easily be overshadowed by changes in international currency fluctuations or changes in school tuition amounts in foreign countries.

Perhaps more importantly, the United States features types of education, such as community colleges and focused vocational educational programs of study that are unique in the world. The United States offers courses of study, specializations in content, and programs that cannot be found anywhere else. Noted research facilities, the majority of which continue to be dominated by American entities, provide opportunities for advanced research and collaboration among an increasingly international community of scholars. Given the many variables that go into a decision to study abroad, and the lack of validated data on this issue, there is no basis to conclude that United States government fees ultimately persuade a student or exchange visitor not to attend a school in this country. SEVP, consequently, cannot conclude at this time that an increase in the I-901 SEVIS fee is directly or even indirectly related to a decrease in U.S. competitiveness for international students and exchange visitors.

But even if a rise in the cost to F and M students and J exchange visitors were to cause a reduction in the demand by foreign students or exchange visitors for U.S. educational or exchange opportunities, that point would not alter this rulemaking. Current law requires

² <http://opendoors.iienetwork.org/page/113974>.

³ SEVP has placed these research materials in the FDMS docket for this rulemaking.

⁴ On January 30, 2008, the Home Office of the United Kingdom (UK), the UK equivalent to DHS, announced a new SEVP-like program for students and exchange visitors that will likely include additional fees. See http://www.ukba.homeoffice.gov/managing_borders/managing_immigration/a_points-based_system.

that DHS and DoS recoup the full costs of administering the programs that manage F, M and J nonimmigrants from those who benefit from it. DHS may not reduce its fees based on a desire to attract a greater number of aliens to the program.

With respect to the suggestion of some commenters that students pay SEVP fees incrementally, SEVP cannot implement such a payment system at this time due to the additional administrative burden and development costs such an incremental payment system would place on the program, but will continue to study the idea.

C. Enhancements

1. Issues/Concerns Before SEVIS II

One commenter observed that DHS, including SEVP, tends to institute new requirements for schools and students before either data systems or program policy have been sufficiently developed to support them and that, subsequently, an inordinate amount of effort is expended on "work-around" procedures and data fixes. The observer sought assurance that SEVP will have a concrete plan to avoid premature deployment of SEVIS II and to augment policy and helpdesk staffing to support anticipated need for problem resolution. Another comment asked how SEVIS users will transition from SEVIS I to SEVIS II and how new functionalities in SEVIS II will be introduced.

SEVP is committed to providing the planning and support necessary to make SEVIS II implementation a success. SEVP has already started to engage with its stakeholders and expects to continue to engage in a major outreach initiative for the SEVIS II rollout, including but not limited to, meetings, brochures, e-newsletters, and Web site postings.

A commenter suggested that, with SEVIS II a year and a half from activation, it would be very helpful if SEVP would establish a Web-based ability for students to self-report. SEVP acknowledges the value of such an innovation and will take the consideration under advisement.

A commenter requested that schools be given the ability in SEVIS to print-out draft Forms I-17 for review prior to submission. It is not likely such an enhancement will be made to SEVIS I, but SEVP will maintain the request as a suggested system requirement for SEVIS II.

A commenter reported instances of erroneous data appearing in the CBP port of entry data systems when compared with SEVIS information on the applicable J-1 exchange visitors that was verified to be correct. This

comment is outside the scope of this rule.

A commenter noted instances when students' visa and passport numbers were identical in SEVIS. Data fixes were requested but were not completed. SEVP appreciates comments regarding its systems and will note and investigate to determine whether a data fix can be made to resolve such a problem.

A commenter noted degraded responsiveness in SEVIS during peak times during the recent optional practical training (OPT) validation. SEVP acknowledges that response time can be adversely affected by circumstances beyond its control.

2. SEVIS II

Commenters included SEVP stakeholders who had participated in SEVIS II development meetings held by SEVP in Washington D.C. last summer, at which they identified several requested system requirements for SEVIS II. They commended SEVP on the inclusion of all user communities in SEVIS II development.

Two commenters questioned whether SEVIS II becoming "paperless," as proposed, is a realistic expectation and whether this paperless process is a move away from faxing. SEVIS II is certainly a move away from faxing. SEVP anticipates that, with improved access to data systems, and with the incorporation of electronic signature capability and availability of biometric information coming in the near future, U.S. government processes related to F, M and J nonimmigrants will become paperless. For example, in SEVIS II the DSO will electronically sign the equivalent to the Form I-20, Certificate of Eligibility for Nonimmigrant Student Status. SEVIS II will be paperless in implementing its processes but will also have the ability to generate paper forms. As needs are identified by State and local governments and the private sector, SEVP will consider modifying the format and content of paper Forms I-20 to better serve their processes.

Another commenter asked how SEVIS II paperless processes will interact with the requirements of the Real ID Act of 2005. We understand that students and exchange visitors are likely to need paper documentation of their F, M or J status in the United States to obtain driver's licenses, establish bank accounts and other similar activities. As discussed above, SEVIS II will allow for the generation of paper forms as needed by students and exchange visitors. As the States move forward developing their processes for verifying documents presented by individuals seeking REAL ID-compliant driver's licenses or

identification cards as required under the REAL ID Act⁵ and DHS REAL ID regulations, DHS will work with the States to ensure that DMVs are able to verify the immigration status of foreign students and exchange visitors through DHS's Systematic Alien Verification for Entitlements program (SAVE).⁶

A commenter asked how a Form I-20 generated out of SEVIS II for identification purposes will meet State DMV and/or Social Security Administration (SSA) requirements that necessitate the form having a port of entry stamp. This comment points to a training problem and not a SEVIS II data system concern. While some port of entry officials stamp Forms I-20 as a courtesy, there is no requirement for them to do so. A related misconception is the expectation that Forms I-94, Arrival/Departure Record, will be stamped. Forms I-94 should be stamped when their issuance is related to entry into the United States. Forms I-94 issued in conjunction with approval of a benefit are not stamped. SEVP continues to conduct outreach among government agencies to correct areas of misinformation like these that negatively impact nonimmigrants.

Two commenters asked if Form I-290, Notice of Appeal or Motion, and USCIS Form I-134, Affidavit of Support Information, were being incorporated in the transition to paperless processes.

The Form I-290 will be entirely paperless. SEVP, with USCIS, is in the process of deciding whether the Form I-134 will be included in the paperless process.

A commenter asked if the elimination of paper Forms I-20 will extend to border commuter students. The answer is yes, the elimination of paper Forms I-20 will extend to border commuter students.

3. Improved SEVIS and SEVIS II Capabilities

A few commenters asked about SEVP's efforts to improve SEVIS interface and interoperability with other government databases, in general. SEVP recognizes that the value of SEVIS to the United States, its citizens and the nonimmigrants it tracks is multiplied by increasing appropriate access to all potential, legitimate users. Since the inception of SEVP, the program has entered into agreements and developed

⁵ See Pub. L. 109-13, 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. 30301 note), also 73 FR 5271 (Jan. 29, 2008), codified at 6 CFR part 37.

⁶ The SAVE Program allows Federal, State and local government benefit-granting agencies, as well as licensing bureaus, to check the immigration status of non-citizens and citizen applicants requesting benefits or entitlements.

interfaces with several governmental agencies. SEVIS currently interfaces with: Foreign Terrorist Task Tracking Force (FTTTF), U.S. Bank I-901, United States Visitor and Immigrant Status Indicator Technology (US-VISIT), CBP Arrival & Departure Information System (ADIS), USCIS Computer Linked Application Information Management System (CLAIMS), DoS Nonimmigrant Visa, and DoS Consular Consolidated Database (CCD). SEVP, through the U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Information Officer, is currently brokering agreements for SEVIS II to interface with: *Pay.gov*—I-17, ICE—Business Compliance Enforcement—National Security Entry Exit Registration System (NSEERS), CBP Interagency Border Inspection System (IBIS), User Application Module (UAM)—single sign-on, Non-Immigrant Visa Interface (NIV) and the USCIS Verification Information System (VIS). The developing interface between SEVIS and VIS, the database of the SAVE program, will be a significant benefit. This interface alone will significantly relieve problem areas for nonimmigrants interacting with SSA and the State DMVs, or seeking authorized employment.

Two commenters asked if SEVIS II would ameliorate tracking problems USCIS seems to have in keeping up with student benefit petitions.

SEVP has an active partnership with USCIS and both agencies are strongly committed to developing the best possible interface between their tracking systems, SEVIS and CLAIMS. SEVP acknowledges room for improvement, but significant progress has been made.

A commenter observed that a lot of unnecessary enforcement actions are occurring because DHS and other government data systems do not adequately share information and interfaces do not always send the intended data. As discussed above, SEVP is fully aware of the importance of effective interfacing and places a high priority on improving and increasing interfaces with SEVIS II. The fees implemented by this final rule will, in part, be used to address these interfacing issues. In recognition of the current situation, SEVP has a staff member that serves as a full-time liaison with the ICE Compliance Enforcement Unit (CEU). When data anomalies are identified or there are indications that a student may have violated status, this individual is the first responder. Through search of the relevant data systems and telephone consultations with school officials, most of these concerns are resolved through a desk

audit, requiring no further action. CEU investigators are assigned to follow up with that small number of situations that the liaison is unable to explain. Of these, greater than 70% result in finding substantive issues that warrant investigation. Again, SEVP will use a portion of the fees collected from this final rule to improve this system.

Commenters asked about their capability to extract information from SEVIS II, especially to support the Open Door census.

Enhancing the ability of SEVIS users to extract and use information from SEVIS was one of the biggest reasons SEVP sought SEVIS II, and will be a key purpose for which SEVP uses fees assessed by this rule. The new system will provide users additional history information on individuals and will vastly improve reporting and search functionality.

Several commenters asked about the impact of SEVIS II on J exchange visitor programs. An advocacy group suggested that J program interests have not been met in SEVIS development.

SEVP does not concur. Officials from DoS have had an active role in SEVIS development. Since the inception of SEVIS through SEVIS release 5.10, released in August 2008, 99 system upgrades (approximately one third of all system upgrades in that period) have been directed towards meeting exchange visitor program needs. Of these, twenty-five percent of the upgrades dealt directly with refining the redesignation process. Regarding SEVIS II, of the more than 1,300 functional requirements that were developed from stakeholder input, including input from the DoS and exchange visitor program sponsors, approximately 416 are exclusively for use by the exchange visitor community. Among the remaining system requirements, approximately fifty percent are shared commonly by the F, M and J visa categories. Academic representatives from the exchange visitor program sponsors were involved from the beginning of SEVIS II development and some of these individuals made particular note of the significant improvements they had observed and of the high level of interagency cooperation. As is reflected in the transcripts on the docket for this rulemaking, senior leadership and staff from DoS participated both during the development meetings that collected SEVIS II requirements and during the recent town hall meetings. While the specific needs of F, M and J schools and programs may differ, it has been a priority for SEVIS program developers to ensure that new capabilities are available to all SEVIS users. This rule,

and the fees collected pursuant to the rule, will enhance the exchange visitor programs as well as F and M programs.

One commenter cited the significant cost to his school in modifying data systems to interface and support batch-feeding of data to SEVIS. He raised concern that SEVIS II would pass a similar, uncompensated cost on to schools and exchange visitor program sponsors.

SEVIS II is being designed to be fully compatible with SEVIS I and consistent with industry standards. All data currently in SEVIS will be migrated by SEVP into SEVIS II. Further, while changes in data requirements are a natural part of program evolution, there are very few added fields beyond those already in SEVIS. (Adding new fields, historically, has been the biggest recurring problem with batch interfaces.) As discussed in the proposed rule, SEVIS II enhancements are a key part of these fee increases, which are calculated to include conversion costs. Consequently, SEVP anticipates that any added costs to SEVIS users for conversion to SEVIS II will be negligible.

A commenter voiced concern that schools which rely on the feeding of data to SEVIS by batch do not have the flexibility that real-time interface (RTI) reliant schools have in responding to SEVP changes. The commenter noted that batch users must often use RTI procedures to be able to meet SEVP requirements. The commenter asked that SEVP be mindful of this in initiating changes.

SEVP will do so. Batch providers were invited to attend SEVIS II development workshops, at which they voiced concerns and provided insights into the amelioration of these concerns.

4. SEVIS II and Biometrics

Commenters asked about SEVIS II's use of biometrics.

SEVIS II, scheduled for deployment in October 2009, will include a data field to record a biometric identifier (*i.e.*, functional identification number: FIN) for nonimmigrant records. SEVIS II will, however, have no functions related to the acquisition or storage of biometric information. SEVP will have access to biometric information, as needed, and will incorporate the use of biometrics in its tracking processes. The costs related to these processes are included in the fees assessed by the rule.

Commenters also asked for a description of how a biometric identifier will impact recordkeeping processes and management.

The biometric identifier will be "person-centric," meaning that it will

remain with the person for life whenever they seek entry into the United States or seek immigration related benefits. The SEVIS identifier is a record of a particular period of time that an individual has been in F, M or J status. The biometric identifier will tie all SEVIS identifiers to an individual. This will enable government, school officials or exchange visitor program sponsors to see all pertinent information on a nonimmigrant in deciding whether or not to grant benefits or accept that individual for enrollment. For example, if a student is terminated at one school and chooses to seek reinstatement "by travel," the CBP inspector will see the previous termination and assess the situation in more depth than for a normal "initial" student arriving for entry into the United States. A biometric identification will streamline all government systems. Currently these systems identify individuals through inconsistencies in personal identification information (e.g., name, birth date, address). These fields are subject to mistakes, such as entry errors and variations in spelling, and are often difficult to match from one system to another. By having access to the common biometric identifier, government users can bypass less reliable search fields and can readily identify and correct data mistakes. As discussed in the proposed rule, funding these types of enhancements are part of the purpose of these increased fee assessments.

A commenter asked if the biometric identifier and its ability to connect an individual's SEVIS records will have any impact on the payment of the I-901 SEVIS fee when a student decides to reinstate by travel.

The answer is no. If a student is out of status and seeks to return to status by leaving the United States and re-entering, he or she must pay the I-901 SEVIS fee.

5. Additional CEU personnel

A commenter questioned the legal authority of using the I-901 SEVIS fee to support hiring of enforcement officers, suggesting they should be funded by appropriated monies.

As was discussed in the proposed rule, 8 U.S.C. 1372(e)(4)(A), (g)(2), 8 U.S.C. 1372(e)(4)(B) and 8 U.S.C. 1356(m) provide the Secretary with authority to establish, revise, collect, retain and expend fees to operate SEVP. This authority provides that fees be set at a level that will ensure recovery of the full costs of providing all services for the program. The full cost concept addresses the activities associated with the continuum of providing services

under the program, from accepting applications, to developing policy, to enforcement of program regulations and associated laws. Full cost includes the direct and indirect costs to any part of the federal government of providing a good, resource, or service and these costs include, but are not limited to, an appropriate share of direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement; physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment; the management and supervisory costs; and the costs of enforcement, collection, research, establishment of standards, and regulation. See OMB Circular A-25, User Charges (revised), section 6(d)(1). As such, "enforcement costs" are part of a continuum of program services and are to be considered as part of the full cost of program services chargeable as user fees.

In addition, SEVP currently funds only 79 CEU personnel. ICE is spending much more than 79 agent full-time hours investigating school and student issues. There are hundreds of issues and cases that arise in SEVIS and in the student and academic institution area. Those are categorized by high, medium and low risk cases. Currently, the 79 positions SEVP funds do not cover all of the cases identified as the high risk cases, much less all cases. The additional 155 positions funded by this rule are meant to close this gap.

A commenter questioned whether the increased funding for CEU personnel would result in the hiring of employees with greater specialized knowledge and training, observing that some investigators seem to have very little knowledge of school and/or student requirements.

SEVP does intend to use this increased funding to hire additional CEU personnel and to support specialized training for CEU personnel related to SEVP-certified schools, DoS exchange visitor sponsors and F, M and J nonimmigrants. Federal law enforcement officers receive extensive, standardized training at the Federal Law Enforcement Training Facility (FLETC) in Glynco, Georgia. SEVP continues to work with the appropriate authorities within ICE and at FLETC to provide training content for this curriculum. SEVP also intends to hire liaisons whose duties will include collateral support of CEU investigators. This should further help CEU personnel understand school and exchange visitor

sponsor, as well as student and exchange visitor requirements.

6. School liaison activity

One commenter nominated a person to become an SEVP liaison. SEVP does not accept nominations for SEVP liaison positions, but urges interested individuals to monitor www.usajobs.opm.gov for vacancy announcements related to these and other SEVP positions.

More than one commenter noted a general lack of knowledge in both DHS and DoS about the structure of higher education, particularly the unique needs of research facilities and the critical importance of not impeding foreign scholar participation in their programs. These commenters cited examples of misunderstanding about the applicability of accreditation to research facilities seeking redesignation or recertification and at least one comment pointed to a research institute that is having difficulty becoming accredited because there are no qualified U.S. candidates for enrollment and accreditation requires that the program be previously in operation. (Redesignation by DoS requires accreditation. SEVP certification requires the program to have been previously in operation.) Hope was raised that the SEVP liaisons would overcome this knowledge shortcoming.

SEVP appreciates these observations and will follow-up with the commenters. A "provisional certification" status is under consideration by SEVP but will not be implemented with this rule due to the additional cost and administrative burden related to establishing such a program.

A commenter asked if SEVP liaisons would be able to assist schools and students in determining the status of benefit applications pending with USCIS. SEVP is taking this suggestion under consideration and will discuss it with USCIS representatives.

An advocacy group and a concurring commenter feel the need for liaisons is created by SEVIS requirements being "cumbersome and complicated."

SEVP disagrees and notes that no such comments were received in the nationwide town hall meetings. To the contrary, the introduction of liaison support was received enthusiastically. As discussed in the proposed rule, liaison activity will be much more than mere troubleshooting, but will also provide timely information regarding program enhancements, support CEU activities and offer greater feedback to SEVP on positive and negative user comments and suggestions. Simply

making SEVIS more user friendly, which is a key goal of SEVIS II, would not eliminate the need for liaisons.

D. Full Cost Information

1. Further reduced fee of \$35 for au pairs, camp counselors, and summer work travel

One commenter asked why the \$35 fee for au pairs, camp counselors, and summer work/travel programs was not included in the funding increase.

Congress established the \$35 fee for au pairs, camp counselors and summer work/travel program participants by law and did not provide a similar set fee for other categories of the J-visa for exchange visitors. 8 U.S.C. 1372(e)(4)(A). This indicates a strong Congressional intent that the fee for au pairs, camp counselors and summer work/travel programs remain set at \$35. Thus, SEVP did not adjust that fee.

2. Impacts on applicant groups

Several commenters voiced concern about the negative impact of the increased fee on all F, M and J nonimmigrants, but particularly on students and exchange visitors in short-term status or individuals with limited means (e.g., teachers and high school students; those from poor countries; language study). Commenters asked if SEVP could establish a lower fee for particular groups through regulation suggesting, for example, a tiered fee of \$35 for exchange visitor programs currently identified and for F/M programs of study six months or less in duration; \$200 fee for F/M programs more than six months; \$180 for exchange visitor programs other than government sponsored. In a similar request other comments, including those from two major advocacy groups, expressed support for the SEVP initiative furthering the institution of a short-term visa category. In fact, over 250 participants at a May 28, 2008, town hall forum at the NAFSA national conference were supportive of this idea.

SEVP cannot establish a lower fee as requested. As discussed above and in the proposed rule in relation to OMB Circular A-25, User Charges (revised), applicable laws, regulations and directives prohibit SEVP from establishing fees below program costs. Any preference given by SEVP to a select group would result in a penalty to the participants at large. By allowing a select group the same benefit as others in the population at a fee below cost, the fee for the majority of the population must increase in order to fully cover program costs. SEVP has reviewed its program costs for processing students in

short-term status versus those in long-term status and can find no basis for charging a lower fee for students on short-term status. The government would also incur additional administrative costs associated with separate processing of these fees. Accordingly, and as was discussed in the town hall meetings, SEVP is constrained at this time to charge a single set fee for each individual group.

A commenter noted that most scholarships and assistance given to students of limited means is directed to costs after the student enters the United States and that, consequently, the various government fees can pose an insurmountable burden on a student since they are levied before entry and, generally, not compensated.

Although SEVP appreciates identification of this problem, government agencies must collect fees at the time services are provided. We welcome further input from students and schools at SEVIS.Source@dhs.gov as to how they handle this situation.

One commenter questioned the timing for implementation of the rule.

SEVP timed implementation of the final rule for October 1, 2008, the beginning of fiscal year 2009. This is the date when the student enrollment is completed for the largest population; therefore, the fewest number of students will be involved in initiation of the new fee levels. By implementing the fee for the beginning of the government fiscal year, SEVP is able to better simplify and reduce costs related to government accounting. Further, as noted in the NPRM and this final rule, SEVP has been underfunded for many years since the program has not implemented a fee increase for several years. By implementing the fees at the start of SEVP's fiscal year, the program funding will be better aligned with its budgetary and operational needs for the full fiscal year and thus allow SEVP to better serve its constituents.

3. Certification fee

A commenter noted that it was unclear in the proposed text for 8 CFR 214.3(h)(2) whether or not schools must submit a fee for recertification.

SEVP appreciates the observation and has clarified the text accordingly, inserting final rule text at 8 CFR 214.4(a)(1) and 8 CFR 214.4(h) that expressly provides that no fee is required with appeals related to SEVP certification, recertification or withdrawal of SEVP certification.

Two commenters, including a high school administrator, suggested that the increased SEVP certification fee may be a disincentive to small schools to seek

certification and cited the cultural value of international students in these settings. SEVP appreciates and agrees with the observation of the cultural value of having international students in all settings. SEVP does not have the authority, however, to identify and designate specific groups of schools for a lower fee because its costs are not lower for small schools. SEVP welcomes any additional suggestions for potentially decreasing burdens on small businesses.

4. Site-visit fee

A commenter from an SEVP-certified school observed that the \$655 site visit fee would cut into its programming funds.

The site-visit fee pertains only to initial SEVP certification (or initial events, such as approving a new location or campus). Should a school require an on-site review as a part of an out-of-cycle review or recertification, the expense of that visit will be borne by SEVP as part of its compliance funding. Accordingly, SEVP anticipates that the site visit fee will have minimal impact on programming funds for certified schools.

5. Inclusion of enforcement costs

A professional association and an advocacy group comment that fee assessments should be limited to visa application costs, and that costs related to national security and anti-fraud are benefits to the public that should be borne by appropriated, taxpayer funds. Another advocacy group commented that, beyond visa application costs, SEVP legal authorities allow for data collection, but not for assessment of enforcement costs.

SEVP agrees in part and disagrees in part with these comments. SEVP agrees that agency fees cannot be charged based upon perceived furthering of public policy goals if those fees are unrelated to a specific service provided by the agency to an identifiable recipient. If, however, the agency does confer a specific benefit upon an identifiable beneficiary, then the fact that the service may incidentally confer a benefit upon the general public as well does not preclude assessing a user fee. *See, e.g., Seafarers International Union of North America v. United States Coast Guard*, 81 F.3d 179, 184 (DC Cir. 1996) (interpreting Coast Guard user fees established under the Independent Offices Appropriations Act); quoting *Engine Manufacturers Ass'n v. EPA*, 20 F.3d 1177, 1180 (DC Cir. 1994).

The direct benefits of the SEVP program inure to F and M students and J exchange visitors. The benefit

conferred is admission into and lawful presence in the United States, which permits F and M students, and J exchange visitors to receive academic, vocational and exchange opportunities and experiences not enjoyed by the public-at-large. SEVP enforcement activities create public confidence and consistency within the program which perpetuates and enables these visa categories for the direct benefit of F and M students, and J exchange visitors. Homeland security and anti-fraud benefits are incidental public benefits of the program. These incidental public benefits do not diminish SEVP's authority to assess fees against identifiable beneficiaries.

In addition, as discussed above, 8 U.S.C. 1372 and 8 U.S.C. 1356(m), authorize a full range of SEVP program activities and collection of fees related thereto, and not merely data collection. Use of the I-901 SEVIS fee to fund the activities of additional enforcement officers to perform these activities is thus authorized under 8 U.S.C. 1372(e)(4)(A), (g)(2), 8 U.S.C. 1372(e)(4)(B) and 8 U.S.C. 1356(m). Pursuant to OMB Circular A-25, User Fees (revised), Section 6(d)(1), "enforcement costs" are part of a continuum of program services that must be included as part of the full cost of program services when assessing user fees. Accordingly, inclusion of these costs within the full cost of the program is appropriate and congruent with the full cost concept as outlined in federal cost accounting guidance, federal policy for user charges and legal precedent.

Another advocacy group commented that charging J visa holders for enforcement costs of DHS is redundant, since DoS has its own compliance unit, and "beyond the mandate of the rule."

SEVP does not concur. DHS is mandated by the INA to enforce immigration law for all nonimmigrants and has done so historically for all nonimmigrant populations, including the J visa category. The compliance unit at DoS reviews DoS designated sponsors for their statutory and regulatory compliance—not the immigration-related violations of exchange visitors. The law enforcement programs of DHS and DoS are separate and distinct, not redundant.

E. Certification, Out-of-Cycle Review, and Recertification Requirements

1. Form I-17

A few participants in the town hall meetings had questions about submitting updates to school information. Individuals should address additional questions about submitting

these updates to SEVIS.source@dhs.gov. As stated at the forums and as presented at numerous conferences over the last several months, it is important that school updates be timely. Updates to this information are the single most beneficial step most schools can take to prepare for recertification.

2. Notices and communications

Two comments, respectively, questioned whether electronic notices and communications meet due process requirements and whether schools would need to obtain software to transmit electronic signatures.

Various laws, rules and regulations govern the use of electronic systems in relation to the provision of government services, and permit and encourage government agencies to use electronic notices. As such, these processes have been found to satisfy due process requirements. SEVP, as a program, and SEVIS, as a Web-based data platform, are inherently reliant on electronic communication. For this reason, notices and alerts are sent to multiple addressees, as listed on the school's Form I-17. Capability to submit electronic signatures will be a SEVIS II design feature.

3. Recordkeeping, retention and reporting requirements—Student Record Requirements

Several commenters, including three advocacy groups, opposed the proposed text on recordkeeping, retention and reporting as establishing new and unnecessary requirements.

SEVP has deleted rule text in response to these comments. Specifically, SEVP proposed a new requirement at 8 CFR 214.3(g)(1)(xi) that the DSOs enter "date of last entry into the United States; most recent Form I-94 number and date of issue," into SEVIS, items which are normally entered through SEVIS interface with the CBP ADIS database. This interface is not yet fully reliable and many DSOs have found that inputting this arrival information, like keeping copies of Forms I-20, can be useful in helping students expedite benefit applications. Keeping this information is not required, however, and the final rule deletes proposed 8 CFR 214.3(g)(1)(xi). Other SEVIS entries in the regulatory text are not new, but have been clarified with this rule.

One commenter suggested that, because SEVIS is the only tracking system of its kind, it is subject to misuse and overuse.

SEVP does not concur and views the proper use of SEVIS very differently. SEVP is obligated to U.S. taxpayers to

maximize the effective utilization of the data it collects. SEVP thus seeks every opportunity to share SEVIS data with appropriate, authorized users not only for law enforcement purposes, but also to facilitate validation of benefit eligibility. This sharing benefits F, M and J nonimmigrants by providing more efficient delivery of benefits from various agencies of the federal government.

An individual commented that SEVP needs to make better use of the data it has in SEVIS.

While the comment did not provide sufficient detail to prompt a response, SEVP concurs and is committed to developing data-driven management and compliance processes.

A commenter asked whether records review procedures require hard copy. Not necessarily; records review will be of the system that is in place at the school, electronic or hard copy.

A commenter asked for clarification that the "unabridged academic history of the student at the institution" refers to the institution's primary student recordkeeping system, not a duplication of that system. Several commenters presumed that SEVP was proposing duplication of records. SEVP has edited the final rule text in response to these comments. The proposed text for 8 CFR 214.3(g)(1) *Student Records* is amended by adding, after the first sentence: "Student information not required for entry in SEVIS may be kept in the school's student system of records, but must be accessible to DSOs." This clarification should eliminate any unintended presumption about duplication of records.

Several commenters also questioned why DHS needed the information introduced in 8 CFR 214.3(g)(1)(iv) and thought SEVP was trying to do the job of the schools. As many commenters noted, the items introduced in 8 CFR 214.3(g)(1)(iv) are already included in the recordkeeping processes and systems of most bona fide institutions, and many institutions go well beyond these requirements. SEVP has identified these as minimums that a bona fide school should maintain in order to set a standard for compliance. The absence of effective recordkeeping is a strong indicator that an institution is not suited for SEVP certification (*i.e.*, DSOs must be able to explain how they obtain this information, which is essential to determining that a student is maintaining status).

A commenter noted that their school records policy did not require transcripts with as much information as required by this rule for transcripts received from a transfer-out school (*e.g.*,

course numbers and credits are required but grades are not).

SEVP responds that the institution must be able to demonstrate how it determined that the student was eligible and met its requirements for transfer to their institution. This may not be as extensive as the records required by the institution that conferred the credits.

One privacy advocate voiced privacy concerns with respect to DHS access to student records.

SEVP is diligent in its compliance with individual privacy protections. Examination of student records as part of an institution's audit is done solely in support of that audit. Record access is strictly limited to appropriate authorized users. SEVP policy on privacy issues is codified in the SEVP Privacy Information Assessment (PIA), available on its Web site.

Several comments questioned the need for extending the student records retention requirement from one to three years.

SEVP responds that this is necessary to support the two-year recertification cycle and is consistent with the current exchange visitor program standard. Most schools and many states have much more stringent records retention schedules.

Similarly, a commenter asked how the extended records retention requirement will be implemented.

The requirement begins with implementation of this rule and is not retroactive (*i.e.*, if a school's records were reviewed on that day, the reviewer could not require records from further back than the current requirement of one year).

A comment noted the need for improved entry and exit data in SEVIS and observed that the rule makes no mention of this in the recordkeeping section.

SEVP strongly concurs on the importance of this information. This information is received from other DHS agencies and points to a recognized need to improve the SEVIS interface with their systems, which is a key goal of SEVIS II, as funded by this final rule.

An advocacy group suggested that the rule unnecessarily broadens records access beyond SEVP to include DHS.

The statutes authorizing this rule and establishing DHS, including 8 U.S.C. 1372 and the Homeland Security Act of 2002, Public Law 107-296 (November 25, 2002), section 102(b), permit the Secretary of Homeland Security, in his discretion, to exercise these authorities utilizing the various DHS resources at his disposal. Moreover, blocking records access to other components of DHS would run directly counter to the

lessons our Nation learned after 9/11. *See, e.g., The 9/11 Commission Report* at pp. 416-19.

An advocacy group and a commenter stated that the proposed text at 8 CFR 214.3(g)(2)(ii)(E), requiring a school to respond to a notification request by DHS, is overly broad and that the existing regulation limits such a request to SEVIS.

SEVP does not concur. The replacement of "SEVIS" in this text updates the context of the existing regulation. Since the current text was approved (67 FR 76256, December 11, 2002), DHS instituted SEVP to administer SEVIS. SEVIS, being a database, can only distribute notification requests from SEVP. However, SEVP exists to support the DHS enforcement agencies in tracking F, M and J nonimmigrants. SEVP investigatory activities are limited and, as warranted, result in a hand-off to more extensive investigation by other DHS agencies, highlighting the transition from internal compliance related activities to law enforcement activities that can only be rendered by those immigration officers so authorized. The text, consistent also with 8 CFR 214.3(g)(1), facilitates cooperation between SEVP-certified schools and DHS. Notification requests from these agencies may come outside of SEVIS. Just as SEVP is limited in its information collection by law, these enforcement agencies have laws restricting their information collection. Any request for information from these agencies will be governed by the laws that apply to them respectively.

An advocacy group commented that the use of the term "student," rather than "students," to describe reporting requirements limits DHS to requiring reports on just individuals, not groups.

SEVP does not concur. As is consistent with SEVP past practice, the term "student" is expansive of individual students and/or larger populations of students depending on the nature of the reporting request.

An advocacy group questions DHS and SEVP authority to conduct validation studies.

SEVP does not concur. On-going validation of certified schools is inherent in the out-of-cycle and recertification processes. Validation studies are one of many administrative tools that SEVP uses to ensure that issues are identified and corrected before they become problems. SEVIS data are examined through a variety of filters to determine whether issues exist across and among schools. Only when data cannot be verified through existing information does SEVP ask schools to

validate information, reducing the burden on their reporting. SEVIS II will enhance this capability for SEVP, further eliminating the burden on schools.

A commenter asked for clarification of proposed text in 214.3(g)(2)(iii)(D), regarding factors impacting the adjustment of program completion dates.

SEVP has changed the rule text in response to this comment by adding examples in parentheses. The proposed text for 8 CFR 214.3(g)(2)(iii)(D) *Adjustment to the program completion date* is amended and clarified to read: "Any factors that influence the student's progress toward program completion (*e.g.*, deferred attendance, authorized drop below, program extension) must be reflected by making an adjustment updating the program completion date." This clarification should resolve any misunderstanding regarding factors impacting the adjustment of program completion dates.

A commenter suggested that CFR text giving records and information access to DHS representatives be limited to ICE representatives, since they are specifically tasked with student tracking and compliance.

SEVP disagrees. While this reflects the current practice, agencies and tasking within DHS are subject to realignment at the Secretary's discretion. SEVP appreciates the suggestion, but concludes that "DHS" appropriately encompasses all possibilities and reflects the legal authorities underpinning the program and the operation of the DHS.

4. SEVIS Data Integrity

A few commenters asked about possible future innovations enabling F, M and J nonimmigrants to access SEVIS data.

SEVP appreciates the comment and will explore these possibilities.

Several commenters asked if, as interfaces with other data systems and SEVIS increase and become more reliable, mistakes from other systems couldn't be corrected electronically by DSOs (*e.g.*, Form I-94 errors with CBP and SAVE errors, as they affect Social Security and DMV applications). The current priority with systems interfaces is on accurate and complete data sharing. It is reasonable to assume that upgrading data integrity along the lines of the comments will be considered and is one of the reasons for the fee increases implemented by this rule.

5. Certification

An advocacy group and a commenter supported the requirement of accreditation for SEVP certification.

SEVP acknowledges the value of accreditation as an indicator of institution bona fides and compliance, but also has excellent experience with many non-accredited schools. For non-accredited schools, the SEVP School Certification Branch has instituted and continually refines measures of school bona fides "in lieu" of accreditation.

A commenter requested amplification of the "basic competencies for DSOs" that the site visit seeks to promote.

SEVP responds that unlike the majority of schools already certified in SEVIS that have extensive experience and knowledge with enrolling F and/or M nonimmigrants, schools seeking initial SEVP certification today lack a similar background. In compliance with SEVP requirements and support of these students, however, these schools must be held to the same standard as all other SEVP-certified schools. In recognition of this, SEVP views the on-site visit for initial certification as an outreach instrument, an opportunity for intensive training and familiarization. While details of this outreach are evolving, they include but are not limited to the following topics: maneuvering in SEVIS; becoming aware of pertinent regulations and where to find them; complying with recordkeeping, retention and reporting requirements; Internet resources; and contingency planning. These are potential uses for the fees generated by this rule.

Three comments requested that SEVP better define what a campus is and what is required of schools when a campus is added (*e.g.*, when is a fee required).

SEVP agrees with the comments but does not intend to make this clarification in this rule. SEVP, in the meantime, provides individualized guidance to schools on this issue. SEVP intends to propose a rule amending 8 CFR 214.3 to be in place when recertification begins and anticipates addressing this issue in more detail in that rulemaking.

6. Recertification

A commenter asked how SEVP will determine the order in which schools will become eligible for recertification.

A few factors that come into consideration in determining the order in which schools will become eligible for recertification include, but are not limited to: the amount of time since the school's previous certification; the anticipated processing time for the school (*e.g.*, non-accredited schools take

longer than accredited schools); whether the school is of special interest, either by type of school or compliance questions; and the anticipated School Certification Branch (SCB) workload. The order of processing will be chosen to create a balanced workload.

A commenter asked if recertification could be every five years, instead of every two years.

SEVP cannot implement this proposal because two-year certification is mandated under EBSVERA and HSPD-2. With out-of-cycle review on-going and continuous from the time of initial certification forward, the frequency of recertification should be less of a concern to schools. SEVP intends that noncompliance be identified as soon as possible after its occurrence and appropriate action be taken immediately. As the proposed rule describes, recertification is an affirmation of performance, not the reopening of a school's file for the first time.

An advocacy group commented that institutions should not be charged for enforcement costs related to certification and recertification. SEVP notes, as was presented in the proposed rule, fees charged to institutions for certification and certification site visits are not used for enforcement costs. As described in the NPRM, these costs are covered by other fees.

One comment asked about the reasoning for reviewing DSO compliance even when a DSO is no longer employed by the school. SEVP responds that an employer (*i.e.*, school) is responsible for oversight of all of its employees and the consequences of their actions. Termination of employment, in and of itself, does not absolve the employer of that responsibility.

A commenter asked for more detail about text stating that institutions must have adequate qualified personnel to perform DSO responsibilities.

SEVP has decided to leave this as an area of institutional discretion for the moment. Larger schools have asked if the limit of ten DSOs at a campus could be increased and/or if an associate DSO position, with no advisory role but ability to enter data, couldn't be established. SEVP is actively considering both of these recommendations. Some schools have appointed senior management, whose primary functions do not relate to providing service to students, as DSOs. SEVP discourages this practice. Smaller schools have, on occasion, appointed only one DSO. This makes full-time and continuous adequate service of foreign students nearly impossible.

A commenter asked what will be the focus of recertification.

Recertification will focus primarily on how well a school updates records on school information and student records. For schools that are not accredited, bona fides will need to be reconfirmed with documentation "in lieu of accreditation." SEVP will develop and send schools guidance on the submission of petitions along with their notification that entering the six-month period of eligibility to submit a recertification petition.

A commenter asked if SEVP-certified schools for public school (grades 9–12) and private school (grades kindergarten–12) in a district or system could file for recertification with a single petition.

SEVP responds that, yes, these schools may file for recertification with a single petition.

A commenter asked if an institution with more than one SEVIS identifier (*i.e.*, a number for the main campus and each other campus) could file for recertification with a single petition.

SEVP responds that, yes, this is permitted.

Commenters were unclear about the distinction between on-site visits and on-site reviews.

As stated during the town hall meetings, few schools would receive an on-site review during SEVP recertification. On-site review in recertification is distinguished from an on-site visit given during initial certification. The purposes of an on-site visit include confirmation of a school's eligibility for SEVP certification, promoting basic competencies for DSOs, and providing outreach to better familiarize the school with the roles and responsibilities that come with the benefit of SEVP certification. The purpose of an on-site review is, generally, to address compliance. While a few random on-site reviews may be conducted to maintain a performance baseline for all schools and to explore potential performance benchmarks, the primary reason an on-site review is conducted is to resolve questions or concerns about school performance. Optional visits to schools by SEVP personnel prior to the implementation of the liaison program will be available within SEVP resource constraints and by invitation from the school. To offset operational limitations in providing these visits, comprehensive resources on recertification will be provided on the SEVP Web site.

A few comments included questions on fees related to on-site visits and on-site reviews.

For initial SEVP certification petitions, a petition fee (\$1,700) is required for each institution and an on-site visit fee (\$655) is required for each campus. School systems (limited to public schools grades 9–12, private schools grades K–12) require a petition fee and a single on-site visit fee. SEVP-certified institutions that have a change of ownership must pay a petition fee. SEVP-certified institutions seeking approval for change of location must pay an on-site visit fee. SEVP-certified institutions seeking approval for a new campus must pay an on-site visit fee. No fee is charged of institutions either petitioning for recertification or selected to receive an on-site review.

One comment asked how accreditation might be a factor in determining selection of a school for on-site review. To the extent that accreditation provides an impartial affirmation of school bona fides and performance, it is less likely that an accredited school will receive an on-site review.

7. Out-of-Cycle Review

A few individual commenters and an advocacy group felt out-of-cycle review, as presented in the proposed rule, is too broad.

SEVP disagrees. At the simplest level, out-of-cycle review is nothing more than maintaining the data integrity of SEVIS, and describes a process that exists with all data systems. Changes are reviewed for accuracy and reasonableness. Most out-of-cycle reviews constitute nothing more than a desk audit conducted from the SEVP offices. For example, a routine update changing a zip code may result in SEVP asking other schools impacted by the change to update their information. This sort of audit is not invasive; rather, it is responsible.

An advocacy group commented that audits of schools for other than changes to SEVIS information identified as material should be delayed until recertification.

SEVP, again, does not concur. Compliance management requires resolution of anomalies in performance when they are identified and before potential problems escalate.

A commenter voiced concern about unscheduled and large data requests of schools from SEVP (e.g., the validation study and OPT updating).

SEVP regrets the difficulties placed on schools by these requests and appreciates the patience and understanding of SEVIS users in explaining the obstacles they impose. As a maturing program, SEVP is committed to improving the administration of future requests and

minimizing their frequency. SEVIS users should realize that their outstanding responsiveness on these requests is noted by key decision makers. Additionally, as SEVIS II is developed and implemented, SEVP looks forward to improved capability to validate SEVIS information through alternative means.

An individual commented that out-of-cycle review is a waste of SEVP and school time for compliant schools. SEVP is required to perform these out-of-cycle reviews for due diligence. SEVP's review also allows the program to monitor changes outside of the control of SEVP or the schools (for example, the zip code change referenced above).

One comment suggested that text describing the events that trigger out-of-cycle review should be qualified with "may."

SEVP does not occur with this comment. Introduction of this text into the CFR only formalizes what has been published in the SEVIS User Manual and reviewed by SEVP for years. It clarifies language currently found at 8 CFR 214.3(e)(3) and parallels the explicitness that has to date only been found in operational instructions. Specifically, it identifies that SEVP conducts a desk review of each of these changes, determines what additional information is required, requests that information and then adjudicates the petition update. This is not an elective process that could be characterized by "may," but a prescriptive process directed by current regulation. With many of these changes, a cursory review is adequate and little or no direct follow-up with the school is needed; the out-of-cycle review has been transparent to the school.

An individual commented that the time period should be extended from 10 to 30 days.

SEVP does not agree. Schools are required to keep school information in SEVIS current at all times. A request for an update of this information should require nothing more than a few moments of review and submission. Because this relates to SEVP-certified schools, supporting documentation requested pertains only to changes since certification. Presuming changes are submitted to SEVP timely, authorizing documentation for the changes should be readily available.

8. Designated School Officials

A commenter questioned whether all DSOs must be knowledgeable of regulations.

Yes, the individual certifies to knowledge of SEVP regulations when they sign the Form I-17 accepting

appointment to become a DSO. SEVP is considering future personnel alignment (e.g., positions with limited data entry access to accommodate school administrative processes) and will likely adjust knowledge and training needs accordingly to sustain role-related SEVIS responsibilities.

A commenter questioned the expectation that an individual be knowledgeable of regulatory requirements and SEVIS operation when first appointed as a DSO.

When first appointed as DSOs, individuals should have a basic knowledge of SEVP regulatory requirements and SEVIS operations. As a practical matter SEVP does not expect an entry level DSO to have detailed regulatory knowledge but the individual should be able to identify pertinent regulations and demonstrate where they can be found. SEVP has and is developing resources to assist new DSOs in getting up to speed as quickly as possible. PDSOs should anticipate the need for mentoring newly appointed DSOs to assist in bringing them up to an acceptable standard as quickly as possible.

A commenter asked what documentation must be submitted when a new DSO is appointed and who must sign the documentation.

SEVP responds that in addition to submitting the identification of newly appointed DSOs in SEVIS, the principal designated school official (PDSO) of an SEVP-certified institution must submit copies of the school's Form I-17 with the PDSO and new appointee signatures, as well as be able to provide documentation certifying that the new individual is a U.S. citizen or lawful permanent resident to SEVP.

A commenter recommended establishment of an alternate PDSO position.

SEVP appreciates this recommendation and is considering it as one of many recommendations in the realignment of personnel with SEVIS roles and SEVP responsibilities.

A commenter asked for clarification of the need for DSOs at locations other than the main campus.

If students can complete a program of study solely at the alternate location, that location is a campus and must meet DSO requirements. If students receive part of their program of study at an alternate location, but must receive the remainder at another campus that meets DSO requirements, this alternate location is a satellite facility and does not require DSOs. The underlying purpose of this regulation is to ensure proper monitoring of student activity and to provide counsel to students. If a

school is uncertain of their need for DSOs, they should contact SEVP. Note that DSOs can serve on multiple campuses, as long as the institution can assure that DSO responsibilities are being met at each campus.

9. Denial or Withdrawal of SEVP Certification or Recertification Procedures

A commenter suggested that the text citing reasons for withdrawal of SEVP certification be expanded to include a "pattern" of such behavior, not limited to a single violation.

It is unclear, based on the comment, what would constitute a pattern and what threshold of violation would be permissible. SEVP believes the suggestion opens the regulation to ambiguity, and chooses to retain the proposed text.

A commenter noted that, as used in the proposed rule at 8 CFR 214.4(a)(2)(xix), the term "curriculum" was too broad and did not convey the intended meaning.

SEVP appreciates the recommendation and has modified the text accordingly with an explanatory parenthetical. Specifically, the proposed text for 8 CFR 214.4(a)(2)(xix) is amended to read as follows: "Failure of a DSO to notify SEVP of material changes, such as changes to the school's name, address, or curricular changes that represent material change to the scope of institution offerings (*e.g.*, addition of a program, class or course for which the school is issuing Forms I-20, but which does not have Form I-17 approval), as required by 8 CFR 214.3(f)(1)." Addition of this text clarifies the aspects of curriculum change that must be reported.

10. Regulatory Flexibility Act

An individual commented that the I-901 SEVIS fee will be a deterrent to foreign student/exchange visitor participation and, subsequently, will place a strain on small to mid-sized educational institutions.

As is discussed above and in more detail in the Regulatory Flexibility Act section below, SEVP does not concur that the I-901 SEVIS fee will be a deterrent to foreign student/exchange visitor participation, nor does SEVP see a disproportionate impact on smaller schools.

III. Statutory and Regulatory Requirements

A. Regulatory Flexibility Act

DHS is amending regulations governing SEVP found in 8 CFR parts 103 and 214 to adjust the school

certification fee and the application fee for nonimmigrants seeking to become academic (F visa) or vocational (M visa) students, or exchange visitors (J visa). The final rule will increase the fees for submitting a SEVP school certification petition to \$1,700, plus \$655 for each site visit; set the fee for each F or M student at \$200; set the fee for most J exchange visitors at \$180; and maintains the fee for J exchange visitors seeking admission as au pairs, camp counselors, and summer work/travel program participants at \$35. In addition, this final rule will establish procedures for recertification of schools with F and/or M students. The rule will become effective October 1, 2008.

DHS recognizes that the final rule will result in economic impacts on F, M, and J nonimmigrants, as well as programs and schools seeking to become SEVP-certified or recertified. In this section of the final rule we will focus only on the economic impact of the regulation on small entities, as defined and required by the Regulatory Flexibility Act.⁷ In addition, we will address significant comments submitted by the public on the economic analysis and the Initial Regulatory Flexibility Analysis (IRFA)⁸ which accompanied the proposed rule. DHS has determined that the final rule amending the initial SEVP school certification fee and establishing procedures for recertification of schools with F and/or M students will not have a significant impact on a substantial number of small entities; therefore, a Final Regulatory Flexibility Analysis was not necessary. The factual basis for certification is presented in the following analysis of the economic effects of the final rule.

Currently, the fee for schools seeking initial certification is \$230, plus a \$350 fee for each campus receiving a site visit. These fees have not changed since 2002, prior to the reorganization of the INS into DHS. Both the processes and costs for adjudicating school petitions for initial certification have changed substantially since that time. SEVP is statutorily required to regularly review the fee level to ensure that the cost of services provided by the program are fully captured by fees assessed on those

receiving the services.⁹ The increased fee schedule set by this rule will recover the full cost of SEVP operations with fee-generated revenue, and align fees with currently planned costs and processes that have been redesigned and refined as the program has expanded over the years. Moreover, SEVP examined three alternatives to the rule, which are detailed in the economic analysis to the proposed rule, all of which were rejected because they did not accomplish stated goals of the regulation.

Accordingly, the final rule will increase the initial certification fee for schools seeking to admit F and/or M students to \$1700, plus an additional fee of \$655 per site visit. In addition, the final rule will set procedures by which SEVP-certified schools are recertified every two years. The cost burden to the schools associated with recertification entail the time and effort associated with filing the petition rather than direct monetary outlays. It is important to note that schools applying for SEVP certification and recertification are making a voluntary decision based on their desire to admit nonimmigrant students into their program. Likewise, schools that have already been SEVP-certified, but have no F and/or M students and no concrete plans to enroll any have little incentive to recertify. As such, the compliance requirements of this rule only affect those schools wishing to become SEVP-certified, or those that wish to maintain their approval to admit nonimmigrant students, by undergoing recertification.

SEVP conducted an analysis of the potential impact of the increased certification fee using data drawn from SEVIS in May 2007. All SEVP-certified schools self-report average enrollment and average tuition costs for students. Therefore, SEVP did not need to use publicly available information or use sampling to gather data on the finances of the type of schools applying for certification. The reported number of F and/or M students and the tuition costs per F and/or M student were used to estimate annual total tuition income. The tuition cost per student was determined by the data in the school's Form I-17, Petition for Approval of School for Attendance by Nonimmigrant Student, available in SEVIS.

While tuition revenue may underestimate the actual school revenue, this is the best information available. It is the most significant source of income for most schools and

⁷ According to the RFA, a small entity may be (1) a small business, defined as any independently owned and operated business not dominant in its field; (2) a small not-for-profit organization; or (3) a small governmental jurisdiction, defined as a locality with a population of less than 50,000 persons.

⁸ "Regulatory Flexibility Act Analysis: Impact on Small Schools of the Change in Fees for Certification and Institution of Recertification by the Student and Exchange Visitor Program."

⁹ As mandated by 31 U.S.C. 902(a)(8); OMB Circular A-25.

is a reasonable approach to measuring the impact of this fee rule.

As detailed in the economic analysis and IRFA to the proposed rule, SEVP developed a profile of schools applying for certification for the last three years using current SEVIS enrollment data. Based on this developed profile, SEVP projects that 700 new schools will certify annually. Of these, we expect about 575, or approximately 82% of the schools seeking certification in the future to be small schools by U.S. Small Business Administration (SBA) standards.¹⁰ SBA's size standard for all schools, except flight schools and public high schools, is \$6 million or less in annual receipts. The SBA small business definition for flight schools is \$21.5 million or less in annual receipts. The analysis uses the definition of a small government jurisdiction as defined in the Regulatory Flexibility Analysis (RFA) to determine the small entity threshold of public high schools. Size classifications of SEVP-certified public school districts were determined using the figures from the National Center for Education Statistics on the Department of Education Web site. Schools in districts serving populations of 50,000 or less were designated as small schools for the purposes of this analysis.

Of the 575 small schools expected to apply for certification, only 47 are expected to have a compliance impact of 1% or more. That is, the certification fee is 1% or more of the total earnings of the school, as calculated by the tuition collected from F and/or M students. The 47 small schools comprise about 7% of all schools expected to certify annually, and about 8% of all small schools expected to certify annually. Table 1 provides the projected number of small schools at each level of impact.

TABLE 1—PROJECTED NUMBER OF SMALL SCHOOLS EXPECTED TO CERTIFY BY LEVEL OF IMPACT

Level of impact	Projected number of small schools
Under 0.5%	469
0.5% to under 1%	59
1% to under 2%	29
2% to under 3%	7
3% to under 4%	1
4% to under 5%	5
5% to under 6%	1
6% to under 7%	2

¹⁰ SBA's small business size standards are matched to industries described in the North American Industry Classification System (NAICS). All types of SEVP-certified schools are described in the NAICS codes for the Educational Sector (611).

TABLE 1—PROJECTED NUMBER OF SMALL SCHOOLS EXPECTED TO CERTIFY BY LEVEL OF IMPACT—Continued

Level of impact	Projected number of small schools
7% to under 8%	0
10% to under 11%	0
12% to under 13%	1
23% to under 24%	1

As evidenced from the table above, the overwhelming majority, approximately 91.8%, of small schools expected to apply for certification will have compliance costs of less than 1% of their annual earnings. Furthermore, only 18 schools (about 3% of small school certification applicants) will have impact costs of 2% or more, and only 11 schools (about 2%) will have impact costs of 3% or more. Only 5 small schools (about 0.9%) are expected to have compliance impacts of 5% or more of their annual earnings.

Public Comments on the Economic Analysis and IRFA to the Proposed Rule

The RFA requires agencies to address all significant public comments raised in regard to the expected economic impact of the regulation. SEVP received two comments directly referencing the economic impacts of the rule. One commenter expressed concern over the increase in the I-901 SEVIS fee, stating that the increased fee coupled with immigration laws would result in decreased enrollment among small to mid-sized educational institutions in the United States. While SEVP recognizes that the increased nonimmigrant student application fee will place an additional cost burden on those students wishing to study in the United States, we do not believe it will result in significant decreases in enrollment among U.S. small to mid-size educational institutions. Prior to implementing this rule, SEVP compared the new fee schedule for nonimmigrant students with that of our top 12 global competitors and discovered that the new fees would place the United States firmly in the upper-middle of this group. Furthermore, SEVP is under statutory requirement to regularly review and adjust fees collected so as to capture the true operating costs of the program. Another commenter expressed concern over the increase in the certification fee, and stated the increase is a disincentive for schools, especially small schools, to seek certification. Based on our review of current SEVP-certification schools, especially those

classified as small entities, we have found that a significantly larger number of the schools certified since 2004 were small schools. In addition, we anticipate that the overwhelming majority (over 90%) of potential small schools applying for certification in the future will have compliance costs of 1% or less of the annual tuition earnings collected from nonimmigrant students. As such, we believe the increased school certification fee will not prove to be a major disincentive for those schools wishing to admit nonimmigrant students.

We did not receive public comments in opposition of our belief that the rule will not cause a significant economic impact to a substantial number of affected businesses, as stated in the analysis accompanying the proposed rule. In light of public comments received, combined with our analysis of the expected compliance costs impacts of certification, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) requires certain actions to be taken by an agency before “promulgation of any rule that includes any federal mandate that may result in the expenditure by State, Local and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year.” 2 U.S.C. 1532(a). This rulemaking is not a “Federal mandate,” as defined for UMRA purposes, 2 U.S.C. 658(6), as the payment of an SEVP certification fee by individuals, Local governments or other private sector entities is (to the extent it could be termed an enforceable duty) one that arises from participation in a voluntary federal program (*i.e.*, applying for status as F-1, F-3, M-1, or M-3 students or as J-1 exchange visitor in the United States or seeking approval from the United States for attendance by certain aliens seeking status as F-1, F-3, M-1 students). 2 U.S.C. 658(7)(A)(ii). Therefore, no actions were deemed necessary under the provisions of the UMRA.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking is not a major rule, as defined by 5 U.S.C. 804, for purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121. This rulemaking would not result in an annual effect on the economy of more than \$100 million;

a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866: Regulatory Review

This proposed rule is not considered by DHS to be an economically significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review, since it would not have an annual effect on the U.S. economy of \$100 million. The implementation of this proposed rule would provide ICE with additional fee revenue of \$58.538 million in FY 2009 and \$62.581 million in FY 2010. It is, however, a significant rulemaking under the Executive order and therefore has been reviewed by OMB.

E. Executive Order 13132: Federalism

This rulemaking would not have substantial direct effects on the States, or on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. Consequently, DHS has determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement, in accordance with section 6 of Executive Order 13132.

F. Executive Order 12988: Civil Justice Reform

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

G. Paperwork Reduction Act

All Departments are required to submit to OMB for review and approval, any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995), 44 U.S.C. 3501, *et seq.* Schools will be using SEVIS to petition for recertification. The recertification process requires schools to input data into SEVIS, print the Form I-17 and sign the form. The electronic data captured for the Form I-17 have been previously approved for use by OMB as one component of the data captured in SEVIS. The OMB Control Number for this collection is 1615-0066 (changed to 1653-0038). With the implementation of SEVIS under 67 FR 60107 (September 25, 2002), most schools enrolled in SEVIS were petitioning for DHS recertification, rather than initial

certification (*i.e.*, enrolling F or M nonimmigrant students for the first time). The workload for both certification and recertification was included under OMB 1615-0066.

The changes to the fees require changes to SEVIS and the I-901 software to reflect the updated fee amounts, as these systems generate the pertinent petition and application forms. SEVP would submit a revision to OMB with respect to any changes to existing information collection approvals.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

■ Accordingly, Chapter I of Title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

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

■ 2. Section 103.7(b)(1) is amended by revising the entries for Forms I-17, I-290B, and I-901 in the listing of fees, to read as follows:

§ 103.7 Fees.

	*	*	*	*	*
(b)	*	*	*		
(1)	*	*	*		
	*	*	*	*	*

Form I-17. For filing a petition for school certification—\$1,700, plus a site visit fee of \$655 for each location listed on the form.

* * * * *

Form I-901. For remittance of the I-901 SEVIS fee for F and M students—\$200. For remittance of the I-901 SEVIS fee for certain J exchange visitors—\$180. For remittance of the I-901 SEVIS fee for J-1 au pairs, camp counselors, and participants in a summer work/travel program—\$35. There is no I-901 SEVIS fee remittance obligation for J exchange

visitors in federally-funded programs with a program identifier designation prefix that begins with G-1, G-2, G-3 or G-7.

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PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1186a, 1187, 1221, 1281, 1282, 1301-1305, 1356, 1372, 1379, 1731-32; section 643, Public Law 104-208, 110 Stat. 3009-708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively, 8 CFR part 2.

■ 4. Section 214.3 is amended by:

- a. Revising paragraph (a)(1);
- b. Adding paragraph (a)(3);
- c. Revising the first sentence in paragraph (b) introductory text;
- d. Revising the first sentence in paragraph (c);
- e. Revising paragraphs (d), (e), and (f);
- f. Revising paragraph (g)(1);
- g. Removing paragraph (g)(2);
- h. Redesignating paragraphs (g)(3) and (g)(4) as paragraphs (g)(2) and (g)(3) respectively;
- i. Revising newly designated paragraph (g)(2) heading, and by revising newly designated paragraphs (g)(2)(i), (g)(2)(ii) introductory text, (g)(2)(ii)(E), and (g)(2)(iii)(C);
- j. Adding paragraph (g)(2)(iii)(D);
- k. Revising paragraph (h);
- l. Revising paragraph (i);
- m. Revising the introductory text of paragraph (k);
- n. Revising paragraph (l)(1)(ii);
- o. Revising paragraph (l)(2).

The revisions and additions read as follows:

§ 214.3 Approval of schools for enrollment of F and M nonimmigrants.

(a) * * *

(1) *General.* A school or school system seeking initial or continued authorization for attendance by nonimmigrant students under sections 101(a)(15)(F)(i) or 101(a)(15)(M)(i) of the Act, or both, must file a petition for certification or recertification with SEVP, using the Student and Exchange Visitor Information System (SEVIS), in accordance with the procedures at paragraph (h) of this section. The petition must state whether the school or school system is seeking certification or recertification for attendance of nonimmigrant students under section

101(a)(15)(F)(i) or 101(a)(15)(M)(i) of the Act or both. The petition must identify by name and address each location of the school that is included in the petition for certification or recertification, specifically including any physical location in which a nonimmigrant can attend classes through the school (*i.e.*, campus, extension campuses, satellite campuses, etc.).

(i) *School systems.* A school system, as used in this section, means public school (grades 9–12) or private school (grades kindergarten–12). A petition by a school system must include a list of the names and addresses of those schools included in the petition with the supporting documents.

(ii) *Submission requirements.* Certification and recertification petitions require that a complete Form I–17, Petition for Approval of School for Attendance by Nonimmigrant Student, including supplements A and B and bearing original signatures, be included with the school's submission of supporting documentation. In submitting the Form I–17, a school certifies that the designated school officials (DSOs) signing the form have read and understand DHS regulations relating to: Nonimmigrant students at 8 CFR 214.1, 214.2(f), and/or 214.2(m); change of nonimmigrant classification for students at 8 CFR 248; school certification and recertification under this section; withdrawal of school certification under this section and 8 CFR 214.4; that both the school and its DSOs intend to comply with these regulations at all times; and that, to the best of its knowledge, the school is eligible for SEVP certification. Willful misstatements may constitute perjury (18 U.S.C. 1621).

* * * * *

(3) *Eligibility.* (i) The petitioner, to be eligible for certification, must establish at the time of filing that it:

(A) Is a bona fide school;

(B) Is an established institution of learning or other recognized place of study;

(C) Possesses the necessary facilities, personnel, and finances to conduct instruction in recognized courses; and

(D) Is, in fact, engaged in instruction in those courses.

(ii) The petitioner, to be eligible for recertification, must establish at the time of filing that it:

(A) Remains eligible for certification in accordance with paragraph (a)(3)(i) of this section;

(B) Has complied during its previous period of certification or recertification with recordkeeping, retention, and

reporting requirements and all other requirements of paragraphs (g), (j), (k), and (l) of this section.

(b) * * * Institutions petitioning for certification or recertification must submit certain supporting documents as follows, pursuant to sections 101(a)(15)(F) and (M) of the Act. * * *

(c) * * * If the petitioner is a vocational, business, or language school, or American institution of research recognized as such by the Secretary of Homeland Security, it must submit evidence that its courses of study are accepted as fulfilling the requirements for the attainment of an educational, professional, or vocational objective, and are not avocational or recreational in character. * * *

(d) *Interview of petitioner.* The petitioner or an authorized representative of the petitioner may be required to appear in person before or be interviewed by telephone by a DHS representative prior to the adjudication of a petition for certification or recertification. The interview will be conducted under oath.

(e) *Notices to schools related to certification or recertification petitions or to out-of-cycle review—(1) General.* All notices from SEVP to schools or school systems related to school certification, recertification, or out-of-cycle review (including, but not limited to, notices related to the collection of evidence, testimony, and appearance pertaining to petitions for recertification encompassing compliance with the recordkeeping, retention and reporting, and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section, as well as to eligibility) will be served in accordance with the procedures at 8 CFR 103.2(b)(1), (4)–(16), (18) and (19), with the exception that all procedures will be conducted by SEVP, the SEVP Director, and the Assistant Secretary, ICE, as appropriate, and except as provided in this section. All such notices will be served (*i.e.*, generated and transmitted) through SEVIS and/or by e-mail. The date of service is the date of transmission of the e-mail notice. DSOs must maintain current contact information, including current e-mail addresses, at all times. Failure of a school to receive SEVP notices due to inaccurate DSO e-mail addresses in SEVIS or blockages of the school's e-mail system caused by spam filters is not grounds for appeal of a denial or withdrawal. The term “in writing” means either a paper copy bearing original signatures or an electronic copy bearing electronic signatures.

(2) *SEVP approval notification and SEVIS updating by certified schools.*

SEVP will notify the petitioner by updating SEVIS to reflect approval of the petition and by e-mail upon approval of a certification or recertification petition. The certification or recertification is valid only for the type of program and nonimmigrant classification specified in the certification or recertification approval notice. The certification must be recertified every two years and may be subject to out-of-cycle review at any time. Approval may be withdrawn in accordance with 8 CFR 214.4.

(3) *Modifications to Form I–17 while a school is SEVP-certified.* Any modification made by an SEVP-certified school on the Form I–17 at any time after certification and for the duration of a school's authorization to enroll F and/or M students must be reported to SEVP and will be processed by SEVP in accordance with the provisions of paragraphs (f)(1), (g)(2) and (h)(3)(i) of this section.

(4) *Notice of Intent to Withdraw (NOIW) SEVP certification—(i) Automatic withdrawal.* SEVP will serve the school with an NOIW 30 days prior to a school's SEVP certification expiration date if the school has not submitted to SEVP a completed recertification petition, in accordance with paragraph (h)(2) of this section. The school will be automatically withdrawn immediately, in accordance with 8 CFR 214.4(a)(3), if it has not submitted a completed recertification petition by the school's certification expiration date.

(ii) *Withdrawal on notice.* SEVP will serve a Withdrawal on Notice, in accordance with 8 CFR 214.4(b), if SEVP determines that a school reviewed out-of-cycle has failed to sustain eligibility or has failed to comply with the recordkeeping, retention, reporting and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section. When a school fails to file an answer to an NOIW within the 30-day period, SEVP will withdraw the school's certification and notify the DSOs of the decision, in accordance with 8 CFR 214.4(d). Such withdrawal of certification may not be appealed.

(5) *Notice of Denial.* A Notice of Denial will be served to a school when SEVP denies a petition for initial certification or recertification. The notice will address appeals options. Schools denied recertification must comply with 8 CFR 214.4(i).

(6) *Notice of Automatic Withdrawal.* Schools that relinquish SEVP certification for any of the reasons cited in 8 CFR 214.4(a)(3) will be served a Notice of Automatic Withdrawal.

(7) *Notice of Withdrawal.* A school found to be ineligible for continued SEVP certification as a result of an out-of-cycle review will receive a Notice of Withdrawal. Schools withdrawn must comply with 8 CFR 214.4(i).

(8) *Notice of SEVIS Access*

Termination Date. The Notice of SEVIS Access Termination Date gives the official date for the school's denial or withdrawal to be final and SEVIS access to be terminated. In most situations, SEVP will not determine a SEVIS access termination date for that school until the appeals process has concluded and the initial denial or withdrawal has been upheld, in accordance with 8 CFR 214.4(i)(3). The school will no longer be able to access SEVIS and SEVP will automatically terminate any remaining Active SEVIS records for that school on that date.

(f) *Adjudication of a petition for SEVP certification or recertification—(1)*

Approval. The school is required to immediately report through SEVIS any change to its school information upon approval of a petition for SEVP certification or recertification. Modification to school information listed in paragraph (h)(3) of this section will require a determination of continued eligibility for certification. The certification or recertification is valid only for the type of program and student specified in the approval notice. The certification may be withdrawn in accordance with the provisions of 8 CFR 214.4, is subject to review at any time, and will be reviewed every two years.

(2) *Denial.* The petitioner will be notified of the reasons for the denial and appeal rights, in accordance with the provisions of 8 CFR part 103 and 8 CFR 214.4, if SEVP denies a petition for certification or recertification.

(g) * * *

(1) *Student records.* An SEVP-certified school must keep records containing certain specific information and documents relating to each F-1 or M-1 student to whom it has issued a Form I-20, while the student is attending the school and until the school notifies SEVP, in accordance with the requirements of paragraphs (g)(1) and (2) of this section, that the student is not pursuing a full course of study. Student information not required for entry in SEVIS may be kept in the school's student system of records, but must be accessible to DSOs. The school must keep a record of having complied with the reporting requirements for at least three years after the student is no longer pursuing a full course of study. The school must maintain records on the student in accordance with paragraphs (g)(1) and (2) of this section

if a school recommends reinstatement for a student who is out of status. The school must maintain records on the student for three years from the date of the denial if the reinstatement is denied. The DSO must make the information and documents required by this paragraph available, including academic transcripts, and must furnish them to DHS representatives upon request. Schools must maintain and be able to provide an academic transcript or other routinely maintained student records that reflect the total, unabridged academic history of the student at the institution, in accordance with paragraph (g)(1)(iv) of this section. All courses must be recorded in the academic period in which the course was taken and graded. The information and documents that the school must keep on each student are as follows:

- (i) Identification of the school, to include name and full address.
- (ii) Identification of the student, to include name while in attendance (record any legal name change), date and place of birth, country of citizenship, and school's student identification number.
- (iii) Current address where the student and his or her dependents physically reside. In the event the student or his or her dependents cannot receive mail at such physical residence, the school must provide a mailing address in SEVIS. If the mailing address and the physical address are not the same, the school must maintain a record of both mailing and physical addresses and provide the physical location of residence of the student and his or her dependents to DHS upon request.
- (iv) Record of coursework. Identify the student's degree program and field of study. For each course, give the periods of enrollment, course identification code and course title; the number of credits or contact hours, and the grade; the number of credits or clock hours, and for credit hour courses the credit unit; the term unit (semester hour, quarter hour, etc.). Include the date of withdrawal if the student withdrew from a course. Show the grade point average for each session or term. Show the cumulative credits or clock hours and cumulative grade point average. Narrative evaluation will be accepted in lieu of grades when the school uses no other type of grading.

(v) Record of transfer credit or clock hours accepted. Type of hours, course identification, grades.

(vi) Academic status. Include the effective date or period if suspended, dismissed, placed on probation, or withdrawn.

(vii) Whether the student has been certified for practical training, and the beginning and end dates of certification.

(viii) Statement of graduation (if applicable). Title of degree or credential received, date conferred, program of study or major.

(ix) Termination date and reason.

(x) The documents referred to in paragraph (k) of this section.

Note to paragraph (g)(1): A DHS officer may request any or all of the data in paragraphs (g)(1)(i) through (x) of this section on any individual student or class of students upon notice. This notice will be in writing if requested by the school. The school will have three work days to respond to any request for information concerning an individual student, and ten work days to respond to any request for information concerning a class of students. The school will respond orally on the same day the request for information is made if DHS requests information on a student who is being held in custody, and DHS will provide a written notification that the request was made after the fact, if the school so desires. DHS will first attempt to gain information concerning a class of students from DHS record systems.

(2) *Reporting changes in student and school information.* (i) Schools must update SEVIS with the current information within 21 days of a change in any of the information contained in paragraphs (f)(1) and (h)(3) of this section.

(ii) Schools are also required to report within 21 days any change of the information contained in paragraph (g)(1) or the occurrence of the following events:

* * * * *

(E) Any other notification request not covered by paragraph (g)(1) of this section made by DHS with respect to the current status of the student.

(iii) * * *

(C) *The start date of the student's next session, term, semester, trimester, or quarter.* For initial students, the start date is the "program start date" or "report date." (These terms are used interchangeably.) The DSO may choose a reasonable date to accommodate a student's need to be in attendance for required activities at the school prior to the actual start of classes when determining the report date on the Form I-20. Such required activities may include, but are not limited to, research projects and orientation sessions. The DSO may not, however, indicate a report date more than 30 days prior to the start of classes. The next session start date is the start of classes for continuing students.

(D) *Adjustment to the program completion date.* Any factors that influence the student's progress toward

program completion (e.g., deferred attendance, authorized drop below, program extension) must be reflected by making an adjustment updating the program completion date.

* * * * *

(h) *SEVP certification, recertification, out-of-cycle review, and oversight of schools.*

(1) *Certification.* A school seeking SEVP certification for attendance by nonimmigrants under section 101(a)(15)(F)(i) or 101(a)(15)(m)(i) of the Act must use SEVIS to file an electronic petition (which compiles the data for the Form I-17) and must submit the nonrefundable certification petition fee on-line.

(i) *Filing a petition.* The school must access the SEVP Web site at <http://www.ice.gov/sevis> to file a certification petition in SEVIS. The school will be issued a temporary ID and password in order to access SEVIS to complete and submit an electronic Form I-17. The school must submit the proper nonrefundable certification petition fee as provided in 8 CFR 103.7(b)(1).

(ii) *Site visit, petition adjudication and school notification.* SEVP will conduct a site visit for each petitioning school and its additional schools or campuses. SEVP will contact the school to arrange the site visit. The school must comply with and complete the visit within 30 days after the date SEVP contacts the school to arrange the visit, or the petition for certification will be denied as abandoned. DSOs and school officials that have signed the school's Form I-17 petition must be able to demonstrate to DHS representatives how they obtain access to the regulations cited in the certification as part of the site visit. Paper or electronic access is acceptable. DSOs must be able to extract pertinent citations within the regulations related to their requirements and responsibilities. SEVP will serve a notice of approval and SEVIS will be updated to reflect the school's certification if SEVP approves the school's certification petition.

(iii) *Certification denial.* SEVP will serve a notice of denial in accordance with paragraph (f)(2) of this section if a school's petition for certification is denied.

(2) *Recertification.* Schools are required to file a completed petition for SEVP recertification before the school's certification expiration date, which is two years from the date of their previous SEVP certification or recertification expiration date, except for the first recertification cycle after publication of the recertification rule. There is no recertification petition fee. SEVP will

review a petitioning school's compliance with the recordkeeping, retention and reporting, and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section, as well as continued eligibility for certification, pursuant to paragraph (a)(3) of this section.

(i) *Filing of petition for recertification.* Schools must submit a completed Form I-17 (including supplements A and B) using SEVIS, and submit a paper copy of the Form I-17 bearing original signatures of all officials. SEVP will notify all DSOs of a previously certified school 180 days prior to the school's certification expiration date that the school may submit a petition for recertification. A school may file its recertification petition at any time after receipt of this notification. A school must submit a complete recertification petition package, as outlined in the submission guidelines, by its certification expiration date. SEVP will send a notice of confirmation of complete filing or rejection to the school upon receipt of any filing of a petition for recertification.

(A) Notice of confirmation assures a school of uninterrupted access to SEVIS while SEVP adjudicates the school's petition for recertification. A school that has complied with the petition submission requirements will continue to have SEVIS access after its certification expiration date while the adjudication for recertification is pending. The school is required to comply with all regulatory recordkeeping, retention and reporting, and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section during the period the petition is pending.

(B) Notice of rejection informs a school that it must take prompt corrective action in regard to its recertification petition prior to its certification expiration date to ensure that its SEVIS access will not be terminated and its petition for recertification will be accepted for adjudication.

(ii) *Consequence of failure to petition.* SEVP will serve an NOIW to the school 30 days prior to a school's certification expiration date. SEVP will no longer accept a petition for recertification from the school and will immediately withdraw the school's certification if the school does not petition for recertification, abandons its petition, or does not submit a complete recertification petition package by the certification expiration date, in accordance with the automatic withdrawal criteria in 8 CFR 214.4(a)(3).

The school must comply with 8 CFR 214.4(i) upon withdrawal.

(iii) *School recertification process—*
(A) *General.* School recertification reaffirms the petitioning school's eligibility for SEVP certification and the school's compliance with recordkeeping, retention, reporting and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section since its previous certification.

(B) *Compliance.* Assessment by SEVP of a school petitioning for recertification will focus primarily on overall school compliance, but may also include examination of individual DSO compliance as data and circumstances warrant. Past performance of these individuals, whether or not they continue to serve as principal designated school officials (PDSOs) or DSOs, will be considered in any petition for recertification of the school.

(C) *On-site review for recertification.* All schools are subject to on-site review, at the discretion of SEVP, in conjunction with recertification. The school must comply with and complete an on-site review within 30 days of the notification by a DHS representative of a school that it has been selected for an on-site review for recertification, or the petition for recertification will be denied as abandoned, resulting in the school's withdrawal from SEVIS.

(iv) *Recertification approval.* SEVP will serve a notice of approval if a school's petition for recertification is approved. The date of the subsequent recertification review will be two years after the school's certification expiration date from this petition cycle.

(v) *Recertification denial.* SEVP will serve a notice of denial if a school's petition for recertification is denied, in accordance with 8 CFR 103.3(a)(1)(i).

(vi) *Adjustment of certification expiration date.* Schools eligible for recertification before March 25, 2009 will, at a minimum, have their certification expiration date extended to March 25, 2009. SEVP may extend the certification expiration date beyond this date during the first cycle of recertification.

(3) *Out-of-cycle review and oversight of SEVP-certified schools.* (i) SEVP will determine if out-of-cycle review is required upon receipt in SEVIS of any changes from an SEVP-certified school to its Form I-17 information. The Form I-17 information that requires out-of-cycle review when changed includes:

(A) Approval for attendance of students (F/M/both);

(B) Name of school system; name of main campus;

(C) Mailing address of the school;

(D) Location of the school;

(E) School type;
 (F) Public/private school indicator;
 (G) Private school owner name;
 (H) The school is engaged in;
 (I) The school operates under the following Federal, State, Local or other authorization;

(J) The school has been approved by the following national, regional, or state accrediting association or agency;

(K) Areas of study;

(L) Degrees available from the school;

(M) If the school is engaged in elementary or secondary education;

(N) If the school is engaged in higher education;

(O) If the school is engaged in vocational or technical education;

(P) If the school is engaged in English language training;

(Q) Adding or deleting campuses;

(R) Campus name;

(S) Campus mailing address; and

(T) Campus location address.

(ii) SEVP may request a school to electronically update all Form I-17 fields in SEVIS and provide SEVP with documentation supporting the update. The school must complete such updates in SEVIS and submit the supporting documentation to SEVP within 10 business days of the request from SEVP.

(iii) SEVP may review a school's certification at any time to verify the school's compliance with the recordkeeping, retention, reporting and other requirements of paragraphs (f), (g), (j), (k), and (l) of this section to verify the school's continued eligibility for SEVP certification pursuant to paragraph (a)(3) of this section. SEVP may initiate remedial action with the school, as appropriate, and may initiate withdrawal proceedings against the school pursuant to 8 CFR 214.4(b) if noncompliance or ineligibility of a school is identified.

(iv) *On-site review.* SEVP-certified schools are subject to on-site review at any time. SEVP will initiate withdrawal proceedings against a certified school, pursuant to 8 CFR 214.4(b), if the certified school selected for on-site review prior to its certification expiration date fails to comply with and complete the review within 30 days of the date SEVP contacted the school to arrange the review.

(v) *Notice of Continued Eligibility.* SEVP will serve the school a notice of continued eligibility if, upon completion of an out-of-cycle review, SEVP determines that the school remains eligible for certification. Such notice will not change the school's previously-determined certification expiration date unless specifically notified by SEVP.

(vi) *Withdrawal of certification.* SEVP will institute withdrawal proceedings in

accordance with 8 CFR 214.4(b) if, upon completion of an out-of-cycle review, SEVP determines that a school or its programs are no longer eligible for certification.

(vii) *Voluntary withdrawal.* A school can voluntarily withdraw from SEVP certification at any time or in lieu of complying with an out-of-cycle review or request. Failure of a school to comply with an out-of-cycle review or request by SEVP will be treated as a voluntary withdrawal. A school must initiate voluntary withdrawal by sending a request for withdrawal on official school letterhead to SEVP.

(i) *Administration of student regulations.* DHS officials may conduct out-of-cycle, on-site reviews on the campuses of SEVP-certified schools to determine whether nonimmigrant students on those campuses are complying with DHS regulations pertaining to them, including the requirement that each maintains a valid passport. DHS officers will take appropriate action regarding violations of the regulations by nonimmigrant students.

* * * * *

(k) *Issuance of Certificate of Eligibility.* A DSO of an SEVP-certified school must sign any completed Form I-20 issued for either a prospective or continuing student or a dependent. A Form I-20 issued by a certified school system must state which school within the system the student will attend. Only a DSO of an SEVP-certified school may issue a Form I-20 to a prospective student and his or her dependents, and only after the following conditions are met:

* * * * *

(l) * * *

(1) * * *

(ii) Each campus must have one PDSO. The PDSO is responsible for updating SEVIS to reflect the addition or deletion of any DSO on his or her associated campus. SEVP will use the PDSO as the point of contact on any issues that relate to the school's compliance with the regulations, as well as any system alerts generated by SEVIS. SEVP may also designate certain functions in SEVIS for use by the PDSO only. The PDSO of the main campus is the only DSO authorized to submit a Form I-17 for recertification. The PDSO and DSO will share the same responsibilities in all other respects.

* * * * *

(2) *Name, title, and sample signature.* Petitions for SEVP certification, review and recertification must include the names, titles, and sample signatures of designated officials. An SEVP-certified

school must update SEVIS upon any changes to the persons who are principal or designated officials, and furnish the name, title and e-mail address of any new official within 21 days of the change. Any changes to the PDSO or DSO must be made by the PDSO within 21 days of the change. DHS may, at its discretion, reject the submission of any individual as a DSO or withdraw a previous submission by a school of an individual.

* * * * *

■ 5. Section 214.4 is amended by:

■ a. Revising the section heading;

■ b. Revising paragraph (a)(1);

■ c. Redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4) respectively;

■ d. Adding a new paragraph (a)(2);

■ e. Revising newly designated paragraph (a)(3);

■ f. Revising paragraph (b);

■ g. Revising paragraphs (g) and (h); and by

■ h. Adding paragraph (i).

The revisions and addition read as follows:

§ 214.4 Denial of certification, denial of recertification or withdrawal of SEVP certification.

(a) * * *

(1) *Denial of certification.* The petitioning school will be notified of the reasons and appeal rights if a petition for certification is denied, in accordance with the provisions of 8 CFR 103.3(a)(1)(iii). No fee is required with appeals related to SEVP certification. A petitioning school denied certification may file a new petition for certification at any time.

(2) *Denial of recertification or withdrawal on notice.* The school must wait at least one calendar year from the date of denial of recertification or withdrawal on notice before being eligible to petition again for SEVP certification if a school's petition for recertification is denied by SEVP pursuant to 8 CFR 214.3(h)(3)(v), or its certification is withdrawn on notice pursuant to paragraph (b) of this section. Eligibility to re-petition will be at the discretion of the Director of SEVP. SEVP certification of a school or school system for the attendance of nonimmigrant students, pursuant to sections 101(a)(15)(F)(i) and/or 101(a)(15)(M)(i) of the Immigration and Nationality Act, will be withdrawn on notice subsequent to out-of-cycle review, or recertification denied, if the school or school system is determined to no longer be entitled to certification for any valid and substantive reason including, but not limited to, the following:

(i) Failure to comply with 8 CFR 214.3(g)(1) without a subpoena.

(ii) Failure to comply with 8 CFR 214.3(g)(2).

(iii) Failure of a DSO to notify SEVP of the attendance of an F-1 transfer student as required by 8 CFR 214.2(f)(8)(ii).

(iv) Failure of a DSO to identify on the Form I-20 which school within the system the student must attend, in compliance with 8 CFR 214.3(k).

(v) Willful issuance by a DSO of a false statement, including wrongful certification of a statement by signature, in connection with a student's school transfer or application for employment or practical training.

(vi) Conduct on the part of a DSO that does not comply with the regulations.

(vii) The designation as a DSO of an individual who does not meet the requirements of 8 CFR 214.3(l)(1).

(viii) Failure to provide SEVP paper copies of the school's Form I-17 bearing the names, titles, and signatures of DSOs as required by 8 CFR 214.3(l)(2).

(ix) Failure to submit statements of DSOs as required by 8 CFR 214.3(l)(3).

(x) Issuance of Forms I-20 to students without receipt of proof that the students have met scholastic, language, or financial requirements as required by 8 CFR 214.3(k)(2).

(xi) Issuance of Forms I-20 to aliens who will not be enrolled in or carry full courses of study, as defined in 8 CFR 214.2(f)(6) or 214.2(m)(9).

(xii) Failure to operate as a bona fide institution of learning.

(xiii) Failure to employ adequate qualified professional personnel.

(xiv) Failure to limit advertising in the manner prescribed in 8 CFR 214.3(j).

(xv) Failure to maintain proper facilities for instruction.

(xvi) Failure to maintain accreditation or licensing necessary to qualify graduates as represented in the school's Form I-17.

(xvii) Failure to maintain the physical plant, curriculum, and teaching staff in the manner represented in the Form I-17.

(xviii) Failure to comply with the procedures for issuance of Forms I-20 as set forth in 8 CFR 214.3(k).

(xix) Failure of a DSO to notify SEVP of material changes, such as changes to the school's name, address, or curricular changes that represent material change to the scope of institution offerings (e.g., addition of a program, class or course for which the school is issuing Forms I-20, but which does not have Form I-17 approval), as required by 8 CFR 214.3(f)(1).

(3) *Automatic withdrawal.* A school that is automatically withdrawn and

subsequently wishes to enroll nonimmigrant students in the future may file a new petition for SEVP certification at any time. The school must use the certification petition procedures described in 8 CFR 214.3(h)(1) to gain access to SEVIS for submitting its petition. Past compliance with the recordkeeping, retention, reporting and other requirements of 8 CFR 214.3(f), (g), (j), (k), and (l), and with the requirements for transition of students under paragraph (i) of this section will be considered in the evaluation of a school's subsequent petition for certification. SEVP certification will be automatically withdrawn:

(i) As of the date of termination of operations, if an SEVP-certified school terminates its operations.

(ii) As of a school's certification expiration date, if an SEVP-certified school does not submit a completed recertification petition in the manner required by 8 CFR 214.3(h)(2).

(iii) Sixty days after the change of ownership if an SEVP-certified school changes ownership, unless the school files a new petition for SEVP certification, in accordance with the procedures at 8 CFR 214.3(h)(1), within 60 days of the change of ownership. SEVP will review the petition if the school properly files such petition to determine whether the school still meets the eligibility requirements of 8 CFR 214.3(a)(3) and is still in compliance with the recordkeeping, retention, reporting and other requirements of 8 CFR 214.3(f), (g), (j), (k), and (l). SEVP will institute withdrawal proceedings in accordance with paragraph (b) of this section if, upon completion of the review, SEVP finds that the school is no longer eligible for certification, or is not in compliance with the recordkeeping, retention, reporting and other requirements of 8 CFR 214.3(f), (g), (j), (k), and (l).

(iv) If an SEVP-certified school voluntarily withdraws from its certification.

* * * * *

(b) *Withdrawal on notice.* SEVP will initiate an out-of-cycle review and serve the school with an NOIW if SEVP has information that a school or school system may no longer be entitled to SEVP certification prior to the school being due for its two-year recertification. The NOIW will inform the school of:

(1) The grounds for withdrawing SEVP certification.

(2) The 30-day deadline from the date of the service of the NOIW for the

school to submit sworn statements, and documentary or other evidence, to rebut the grounds for withdrawal of certification in the NOIW. An NOIW is not a means for the school to submit evidence that it should have previously submitted as a part of its established reporting requirements.

(3) The school's right to submit a written request (including e-mail) within 30 days of the date of service of the NOIW for a telephonic interview in support of its response to the NOIW.

* * * * *

(g) *Decision.* The decision of SEVP will be in accordance with 8 CFR 103.3(a)(1).

(h) *Appeals.* Notices of denial or withdrawal of SEVP certification will include appeal alternatives and filing instructions. Any appeal must be taken within 15 days after the service of the decision by stating the reasons for the appeal in the notice of appeal provided with the instructions, and supported by a statement or brief specifically setting forth the grounds for contesting the withdrawal of the approval. No fee is required with appeals related to denial of SEVP recertification or withdrawal of SEVP certification.

(i) *Operations at a school when SEVP certification is relinquished or withdrawn, or whose recertification is denied and on the SEVIS access termination date.*

(1) *General.* A school whose certification is relinquished or withdrawn, or whose recertification is denied may, at SEVP discretion, no longer be able to create Initial student records or issue new Forms I-20, Certificate of Eligibility for Nonimmigrant Student, for initial attendance. Schools must comply with the instructions given in the notice of withdrawal or denial with regard to management of status for their Initial and continuing F and/or M students. All other SEVIS functionality, including event reporting for students, will remain unchanged until the school's SEVIS access termination date. The school must continue to comply with the recordkeeping, retention, reporting and other requirements of 8 CFR 214.3(f), (g), (j), (k), and (l) until its SEVIS access termination date.

(2) *SEVIS access termination.* In determining the SEVIS access termination date, SEVP will consider the impact that such date will have upon SEVP, the school, and the school's nonimmigrant students in determining the SEVIS access termination date. In most situations, SEVP will not determine a SEVIS access termination date for that school until the appeals

process has concluded and the initial denial or withdrawal has been upheld unless a school whose certification is withdrawn or whose recertification is denied is suspected of criminal activity or poses a potential national security threat. The school will no longer be able to access SEVIS, and SEVP will automatically terminate any remaining Active SEVIS records for that school on the SEVIS access termination date.

(3) *Legal obligations and ramifications for a school and its DSOs when a school is having SEVP certification denied or withdrawn.* Schools are obligated to their students to provide the programs of study to which they have committed themselves in the students' application for enrollment and acceptance process. Schools are obligated to the U.S. government to comply with the recordkeeping, retention, reporting and other requirements contained in 8 CFR 214.3. With any new petition for SEVP certification, SEVP will consider the extent to which a school has fulfilled these obligations to students and the U.S. government during any previous period of SEVP certification.

■ 6. Section 214.13 is amended by revising paragraphs (a) and (b)(1), to read as follows:

§ 214.13 SEVIS fee for certain F, J, and M nonimmigrants.

(a) *Applicability.* The following aliens are required to submit a payment in the amount indicated for their status to the Student and Exchange Visitor Program (SEVP) in advance of obtaining nonimmigrant status as an F or M student or J exchange visitor, in addition to any other applicable fees, except as otherwise provided for in this section:

(1) An alien who applies for F-1 or F-3 status in order to enroll in a program of study at an SEVP-certified institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, as amended, or in a program of study at any other SEVP-certified academic or language-training institution including private elementary and secondary schools and public secondary schools, the amount of \$200;

(2) An alien who applies for J-1 status in order to commence participation in an exchange visitor program designated by the Department of State (DoS), the amount of \$180, with a reduced fee for certain exchange visitor categories as provided in paragraphs (b)(1) and (c) of this section; and

(3) An alien who applies for M-1 or M-3 status in order to enroll in a program of study at an SEVP-certified

vocational educational institution, including a flight school, in the amount of \$200.

(b) *Aliens not subject to a fee.* No SEVIS fee is required with respect to:

(1) A J-1 exchange visitor who is coming to the United States as a participant in an exchange visitor program sponsored by the Federal government, identified by a program identifier designation prefix of G-1, G-2, G-3, or G-7;

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Michael Chertoff,

Secretary.

[FR Doc. E8-22786 Filed 9-25-08; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket ID OCC-2008-0015]

RIN 1557-AD15

Risk-Based Capital Guidelines—Money Market Mutual Funds

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Interim final rule with request for public comment.

SUMMARY: To reduce liquidity and other strains being experienced by money market mutual funds, the Board of Governors of the Federal Reserve System adopted on September 19, 2008, a special lending facility that enables depository institutions and bank holding companies to borrow from the Federal Reserve Bank of Boston on a nonrecourse basis if they use the proceeds of the loan to purchase certain types of asset-backed commercial paper (ABCP) from money market mutual funds. This lending facility is referenced to as the ABCP Lending Facility. To facilitate the ability of national banks to participate in the program, the Office of the Comptroller of the Currency (OCC) has adopted, on an interim final basis, an exemption from its risk-based capital guidelines for ABCP held by a national bank as a result of its participation in this program.

DATES: This interim final rule is effective on September 19, 2008. However, comments must be received on or before October 31, 2008.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by e-

mail, if possible. Please use the title "Risk-Based Capital Guidelines—Money Market Mutual Funds" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—"Regulations.gov":* Go to <http://www.regulations.gov>, under the "More Search Options" tab click next to the "Advanced Docket Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC-2008-0015" to submit or view public comments and to view supporting and related materials for this interim final rule. The "How to Use This Site" link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- *E-mail:*

regs.comments@occ.treas.gov.

- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1-5, Washington, DC 20219.

- *Fax:* (202) 874-4448.

- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1-5, Washington, DC 20219.

Instructions: You must include "OCC" as the agency name and "Docket ID OCC-2008-0015" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this interim final rule by any of the following methods:

- *Viewing Comments Electronically:* Go to <http://www.regulations.gov>, under the "More Search Options" tab click next to the "Advanced Docket Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC-2008-0015" to view public comments for this rulemaking action.