

(C) Have been designated by the mill to supply sugarcane replacing sugarcane lost to the mill since the 2001 crop year,

(ii) Sugar production from base acreage, as established under § 1435.312, but exclusive of the acreage described in paragraph (b)(1)(i) of this section, for producers who meet the requirements of paragraph (b)(1)(i) of this section, then

(iii) All other sugar production.

(2) If a mill cancels a producer's contract, the mill must permit the producer to move an allocation commensurate with the producer's production history to a mill of the producer's choice.

(3) In determining the payment priority, a processor may aggregate the acreage of an operator (producer making the crop production decisions) across all the operator's farms delivering cane to the processor.

(c) CCC will determine that a processor not in a proportionate share state, which is cooperatively owned by producers, has met the conditions of paragraph (a) of this section if the processor shares its allocation with its producers according to its cooperative membership agreement.

(d) CCC will disclose farm base and reported acres data in a proportionate share state to processors upon their request for growers delivering to their mill. In the case of multiple producers on a farm or growers delivering to more than one mill, subject mills will be responsible for coordinating proportionate share data.

* * * * *

■ 5. In § 1435.319, revise paragraph (b) to read as follows:

§ 1435.319 Appeals and arbitration.

* * * * *

(b) For issues arising under section 359d establishing allocations for marketing allotments, and sections 359f(b) and (c), and section 359i of the Agricultural Adjustment Act of 1938, as amended, after completion of the process provided in paragraph (a) of this section, a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal within 20 days of the issuance of the reconsidered determination with the Hearing Clerk, USDA, Room 1081, South Building, 1400 Independence Ave., SW., Washington, DC 20250-9200. Any hearing conducted under this paragraph shall be in accordance with instructions issued by USDA's Judicial Officer.

* * * * *

Signed in Washington, DC, on June 25, 2004.

James R. Little,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 04-14900 Filed 6-30-04; 8:45 am]

BILLING CODE 3410-05-M

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 214, and 299

[ICE No. 2297-03]

RIN 1653-AA23

Authorizing Collection of the Fee Levied on F, J, and M Nonimmigrant Classifications Under Public Law 104-208; SEVIS

AGENCY: Bureau of Immigration and Customs Enforcement, DHS.

ACTION: Final rule.

SUMMARY: On October 26, 2003, the Department of Homeland Security (DHS) published a proposed rule in the **Federal Register**, to implement section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), requiring the collection of information relating to nonimmigrant foreign students and exchange visitors, and providing for the collection of the required fee to defray the costs.

This rule amends the DHS regulations to provide for the collection of a fee to be paid by certain aliens who are seeking status as F-1, F-3, M-1, or M-3 nonimmigrant students or as J-1 nonimmigrant exchange visitors. Generally, the rule levies a fee of \$100, although applicants for certain J-1 exchange visitor programs will pay a reduced fee of \$35, and certain other aliens will be exempt from the fee altogether. This final rule explains which aliens will be required to pay the fee, describes the consequences that an alien seeking F-1, F-3, M-1, M-3, or J-1 nonimmigrant status faces upon failure to pay the fee, and specifies which aliens are exempt from the fee. This fee is being levied on aliens seeking F-1, F-3, M-1, M-3, or J-1 nonimmigrant status to cover the costs of administering and maintaining the Student and Exchange Visitor Information System (SEVIS), which includes ensuring compliance with the system's requirements by individuals, schools, and exchange visitor program sponsors. The fee will also pay for the continued operation of the Student and Exchange Visitor Program (SEVP) and offset the resources to ensure compliance with SEVIS requirements,

including funds to hire and train SEVIS Liaison Officers and other Bureau of Immigration and Customs Enforcement (ICE) officers.

The rule will be effective on September 1, 2004, and will apply to potential nonimmigrants who are initially issued a Form I-20 or Form DS-2019 on or after that date. Potential nonimmigrants, for purposes of this rule, are those aliens who will apply to the Department of State (DOS) or DHS for initial attendance as an F, M, or J nonimmigrant, certain nonimmigrants in the United States that will apply for a change of status to an F, M, or J classification, and current J-1 nonimmigrants that will apply for a J-1 category change on or after that date. If a Form I-20 or Form DS-2019 for initial status in a new program is issued on or after the effective date, the nonimmigrant traveling on that document will be required to pay the fee. Applicants, schools, and exchange visitor program sponsors should refer to the fee pay table contained in this rule for more detailed information concerning when a fee is required.

DATES: This final rule is effective September 1, 2004.

FOR FURTHER INFORMATION CONTACT: Jill Drury, Director Student and Exchange Visitor Program (SEVP), Bureau of Immigration and Customs Enforcement, Department of Homeland Security, 800 K Street, NW., Room 1000, Washington, DC 20536, telephone (202) 305-2346.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2003, the former Immigration and Naturalization Service (Service) transferred from the Department of Justice to DHS pursuant to the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135 (November 25, 2002). The Service's adjudication functions transferred to the Bureau of Citizenship and Immigration Services (CIS), and the Service's SEVIS function transferred to the Bureau of Border Security, now the Bureau of Immigration and Customs Enforcement (ICE). For the sake of simplicity, any reference to the Service has been changed to DHS, even when referencing events that preceded March 1, 2003.

What Are SEVP, SEVIS, and the SEVIS Fee?

Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law No. 104-208, 110 Stat. 3546 (September 30, 1996), codified at 8 U.S.C. 1372, required the creation of a program to collect

information relating to nonimmigrant foreign students and exchange visitor program participants during the course of their stay in the United States, using electronic reporting technology to the fullest extent practical. While the pilot program initially involved a small number of schools, the program has been expanded and fully implemented to cover all DHS-approved schools and DOS-designated exchange visitor program sponsors that enroll foreign nationals. The program became known as SEVP, and its core technology became known as SEVIS. The substantive requirements and procedures for SEVIS have been promulgated in separate rulemaking proceedings. See 67 FR 34862 (May 16, 2002, proposed rule for implementing SEVIS); 67 FR 44343 (July 1, 2002, interim rule for schools to apply for preliminary enrollment in SEVIS); 67 FR 60107 (September 25, 2002, interim rule for certification of schools applying for enrollment in SEVIS); 67 FR 76256 (December 11, 2002, DHS's final rule implementing SEVIS); and 67 FR 76307 (December 12, 2002, DOS interim final rule implementing SEVIS). Under section 442(a)(4) of the HSA, as amended, responsibility over SEVIS specifically transferred to ICE. Section 641(e) of IIRIRA requires that a fee be established and charged to aliens tracked in SEVIS to fund the program, and further requires that the fee be used only for SEVP related purposes. Consistent with this mandate, a sub-account will be created within the Immigration Examination Fee Account into which SEVIS fees will be deposited and maintained for exclusive use related to SEVP.

Who Are the Nonimmigrants Affected by IIRIRA Section 641?

The Immigration and Nationality Act (Act) provides for the admission of different classes of nonimmigrant aliens, who are foreign nationals seeking temporary admission to the United States. The purpose of the alien's intended stay in the United States determines his or her proper nonimmigrant visa classification. Some visa classifications permit the nonimmigrant's spouse and qualifying children to accompany the nonimmigrant to the United States, or to join the nonimmigrant who is already in the United States. To qualify, the alien's child must be unmarried and under the age of 21.

F-1 nonimmigrants, as defined in section 101(a)(15)(F) of the Act, are foreign nationals who come to the United States as foreign students to pursue a full course of study in DHS-

approved colleges, universities, seminaries, conservatories, academic high schools, private elementary schools, other academic institutions, or in language training programs in the United States. For the purposes of this rule, the term "school" refers to all of these types of DHS-approved institutions. Generally, F-1 nonimmigrants are subject to the SEVIS fee and monitoring in SEVIS. An F-2 nonimmigrant is a foreign national who is the spouse or qualifying child of an F-1 student. While F-2 nonimmigrants are subject to monitoring in SEVIS, as an alien deriving his or her status from that of the F-1 nonimmigrant, they are not required to pay a separate SEVIS fee.

J-1 nonimmigrants, as defined in section 101(a)(15)(J) of the Act, are foreign nationals who have been selected by an exchange visitor program sponsor designated by the United States DOS to participate in an exchange visitor program in the United States. The J-1 classification includes nonimmigrants participating in programs in which they will receive graduate medical education or training. Generally, J-1 nonimmigrants are required to pay a SEVIS fee, and are subject to monitoring in SEVIS. A J-2 nonimmigrant is a foreign national who is the spouse or qualifying child of a J-1 exchange visitor. While J-2 nonimmigrants are subject to monitoring in SEVIS, as an alien deriving his or her status from that of the J-1 nonimmigrant, they are not required to pay a separate SEVIS fee.

M-1 nonimmigrants, as defined in section 101(a)(15)(M) of the Act, are foreign nationals pursuing a full course of study at a DHS-approved vocational or other recognized nonacademic institution (other than in language training programs) in the United States. The term "school" also encompasses those institutions attended by M-1 students for the purposes of this rule. Generally, M-1 nonimmigrants are subject to the SEVIS fee and monitoring in SEVIS. An M-2 nonimmigrant is a foreign national who is the spouse or qualifying child of an M-1 student. While M-2 nonimmigrants are subject to monitoring in SEVIS, as an alien deriving his or her status from that of the M-1 nonimmigrant, they are not required to pay a separate SEVIS fee.

On November 2, 2002, Congress passed the Border Commuter Student Act of 2002, Public Law 107-274, 116 Stat. 1923 (2002), which created the F-3 and M-3 nonimmigrant classifications for certain aliens who are citizens of Canada or Mexico and who continue to reside in their home country while commuting to the United States to

attend an approved school. Such border commuter students are not subject to the existing requirement for F-1 and M-1 students to be pursuing a full course of study. Instead, these border commuter students are specifically permitted to engage in either full-time or part-time studies. DHS adopted regulations relating to border commuter students, 67 FR 54941 (August 27, 2002) (codified at 8 CFR 214.2(f)(18) and (m)(19)), and will be amending those regulations in the future to conform to the new legislation. In this rule, DHS notes that F-3 and M-3 students will be subject to the same rules as F-1 and M-1 students regarding the collection of the fee.

Response to Public Comments on the Proposed Rule

DHS initially proposed a rule implementing section 641(e) of IIRIRA, requiring fee collection related to SEVIS on December 21, 1999, at 64 FR 71323, and received 4,617 comments in response to this proposed rule. On October 26, 2003, DHS published a second proposed rule in the **Federal Register** at 68 FR 61148. The October 26, 2003, proposed rule addressed the 4,617 comments, as well as setting forth a new proposal for collection of the SEVIS fee. Comments to the second proposed rule were due to DHS on or before December 26, 2003. DHS received 239 comments regarding the collection of the required fee, as set forth in the second proposed rule. The following paragraphs will address each substantive issue raised in comments received in response to the October 2003 proposed rule. However, this discussion will not describe in detail all the provisions outlined in either of the prior proposed rules. Rather, it will address only those provisions relevant to the October 2003 comments. Commenters frequently addressed identical issues in their comments and, as a result, the number of comments received exceeds the number of issues discussed.

In general, commenters acknowledged the Congressional mandate that DHS collect this fee and stated that this 2003 proposed rule was a significant improvement over the 1999 proposed rule. A significant number of commenters stated that they were generally pleased with SEVIS and DHS efforts to reach out to the schools and exchange visitor program sponsors. However, most of these commenters further stated that they believed the imposition of the fee would adversely impact participation by foreign students and exchange visitors. The commenters discussed the fee amount, the collection and remittance process, exemptions and

reductions to the fee, the frequency of the fee, the applicability of the fee, and the propriety of the fee.

I. Fee Amount

The October 2003 proposed rule set the fee amount at \$100, with the exception of specific J-1 exchange visitor programs. Although several commenters stated that the \$100 fee was not overly burdensome, the majority of commenters stated that the fee was excessive and should be set at \$54, based upon the fee study conducted in September 2002 by an independent contractor for DHS. Some commenters expressed concern regarding the use of the SEVIS fee to pay for SEVIS-related enforcement and compliance costs. Additionally, some commenters expressed concern that excessive fee receipts would become a money-generating tool for DHS, subsidizing other, unrelated programs.

DHS reviewed and considered all comments on the fee amount, but has made the decision not to change the amount of the \$100 proposed fee. Comments in response to the 1999 rule raised concerns about the proposed \$95 fee, which had been determined by a fee study done in conjunction with the 1999 rule making. An independent fee study, carried out in September 2002, was done to respond to those commenter concerns, and to reassess the amount of the fee, based on changes in the SEVIS project funding since the publication of the 1999 proposed rule. An independent consulting firm was hired to conduct an objective fee review and ensure that applicable Federal law and fee guidance were followed. The fee review included the recovery of historical costs and costs over the FY 2003/2004 time period, as well as the appropriated monies received. The fee review also included costs for increased staffing and training for DHS personnel involved in the SEVP at DHS headquarters, district offices, service centers, and regional offices, as well as training for DOS personnel. The fee study determined that the fee should be set at \$54.

DHS arrived at the final rule fee amount of \$100 by taking the fee recommended in the independent study (\$54) and adding estimated compliance and enforcement costs, which the fee study did not include. DHS has determined that this fee should offset the resources necessary to ensure compliance with regulations, since compliance and maintenance of system integrity are an integral part of SEVP. Indeed, Congress, in placing SEVIS within ICE, specifically directed that the information collected in the program be

used for enforcement purposes; thus, the use of the SEVIS fee for enforcement purposes is consistent with the HSA. See HSA 442(a)(4). This application of user fees as a funding source for compliance activities is also consistent with the introduction of user fees in the early 1980s. A Federal agency is authorized to recoup the "full cost" of providing special benefits, including the costs of enforcement, collection, research, as well as establishment of standards and regulations, when calculating its fees. DHS currently recoups some of the costs of detecting and deterring fraud and protecting the integrity of benefits and documents through its immigration benefit application fees.

One important program benefit to be funded by the \$100 fee is the establishment of localized personnel, or SEVIS Liaison Officers. These SEVIS Liaison Officers will be a local resource for schools and students, providing timely and accurate information or assistance in meeting the requirements of the program. SEVIS Liaison Officers may visit schools, interview school officials, review records, compare system information to school information, and assist schools with SEVP issues. They will also coordinate with local school representatives and assist with local training program development and implementation. Finally, SEVIS Liaison Officers will be available to assist immigration and other law enforcement officials who may have a need for information derived from SEVIS.

As previously noted, consistent with the HSA mandate to utilize the information collected in SEVIS for enforcement purposes, also included in the fee calculation are funds that will be used to offset the total cost of SEVP enforcement. A portion of the fee will be used to fund new positions and to support officers in existing positions who are performing SEVIS enforcement, as well as to pay for any training, equipment, technical systems, or other items necessary to enhance their ability to enforce SEVIS. The ICE officers supported by the SEVIS fee will conduct investigations to ensure compliance with student and exchange visitor regulations. These officers are essential to ensuring data integrity in SEVIS. In addition, these officers will work in conjunction with SEVIS Liaison Officers on school reviews and re-certifications. As noted in the 2003 proposed rule, while the fee will fund only a portion of the ICE officer positions needed to ensure SEVP integrity, DHS intends to staff all of the ICE officers necessary to

ensure the success of compliance efforts.

This rule sets the fee at the maximum amount initially authorized by IIRIRA (\$100) for all F, M, and J nonimmigrants, with the exception of exchange visitors admitted as au pairs, camp counselors, or participants in summer work/travel programs who will be subject to a fee of \$35, and those exempt from the fee altogether. IIRIRA also provides that the Secretary of Homeland Security may, on a periodic basis, revise the amount of the fee imposed and collected to take into account changes in the cost of carrying out the SEVP. Pursuant to the Chief Financial Officers Act of 1990, DHS will review this fee amount at least every 2 years. Upon review, if DHS finds that the fee is either too high or too low, the fee amount may be adjusted. Adjustments will be made subject to the Federal rulemaking process.

Fee reviews to determine the appropriate amount of the fee and any adjustments required typically look at historical costs as well as anticipated costs based upon programmatic changes. Since DHS is establishing a dedicated sub-account for SEVIS fees within the Immigration Examination Fee Account, any excess revenue will accrue until the next scheduled fee review and will then be factored into the establishment of the new fee. As required by section 641 of IIRIRA, DHS will not use the proceeds from SEVIS fees except for SEVIS-related purposes, and will not generate revenue for other programs from this source. DHS notes that several commenters suggested that future fee studies be conducted by independent contractors and DHS acknowledges the value of this suggestion. However, DHS will not specifically comment in this rule on how future fee studies will be conducted.

Several commenters objected to both the concept of a fee and the fee amount proposed. Some commenters stated that the imposition of a fee would deter participation and adversely affect the position of the United States in the international student/exchange visitor market, and that the regulations authorizing collection of such a fee will interfere with important cultural exchanges. DHS acknowledges these concerns; however, Congress has mandated that DHS set the SEVIS fee at an amount sufficient to cover the costs associated with the SEVP, including recouping the historical costs of program implementation, and ongoing costs of program maintenance. Thus, DHS is required to impose a fee on the nonimmigrants for whom the system

was developed and maintained. DHS set the fee amount based upon program costs and is statutorily prohibited from lowering the fee to an amount that does not fund the program in order to address these concerns.

Some commenters expressed concern that imposition of a SEVIS fee might lead to fraudulent use of visitor visa classifications to attend non-SEVIS-certified schools (particularly short-term English language programs). However, DHS cannot fail to implement the statutorily mandated fee because of potential fraud. Rather, DHS enforcement officers will continue to work to ensure that all nonimmigrant entries and stays in the United States are legal and based upon appropriate visa classifications.

II. The Fee Collection and Remittance Process

The 1999 proposed rule required that educational institutions and exchange visitor program sponsors collect the fee, based upon then existing law, and mandated that the fee be collected prior to visa issuance. Congress subsequently amended the law to permit DHS to collect the fee directly from the F-1, F-3, J-1, M-1, or M-3 nonimmigrants. Based upon these amendments to the law, the October 2003 proposed rule provided for fee collection by DHS and required that proof of payment be presented during the visa application process or prior to submitting a change of status request.

A number of the comments DHS received focused on the DHS fee collection process. The majority of commenters suggested that DOS collect the fee at the time of the visa interview, similar to the payment methodology used for collecting visa fees. Many commenters felt that without this change, nonimmigrants would experience difficulties and delays with payment methods that required use of the Internet, use of credit cards, use of checks drawn on U.S. banks and payable in U.S. dollars, and/or use of foreign mail delivery systems which may not be timely or reliable. A few commenters proposed the collection of the fee at the ports-of-entry when students and exchange visitors entered the United States, as an alternative payment method.

DHS has considered the concerns raised by the commenters and will continue to work on alternate fee payment methodologies. DHS will not be able to establish a workable arrangement for fee collection by DOS prior to the effective date of this rule. However, a pilot DOS fee collection methodology is being developed at this

time. Additionally, DHS is unable to implement fee collection at ports-of-entry due to the statutory mandate that the SEVIS fee be paid prior to visa issuance. Aliens who are exempt from the F, M, or J visa requirement, as described in section 212(d)(4) of the Act (e.g., Canadians), will be required to pay the fee and have the fee processed prior to applying for admission at a U.S. port-of-entry. Ports-of-entry will not be equipped to collect fees or provide mechanisms for nonimmigrants to submit fee payments. Also, consistent with the requirements of section 641 of IIRIRA, nonimmigrants who are already located in the United States will be required to pay the fee prior to being approved for a change of classification to an F or M student or J exchange visitor, unless specifically exempt by DHS due to extenuating circumstances as determined by SEVP.

A. Payment Options on Implementation

In order to allow for fee collection by DHS under the constraints outlined in the preceding paragraph, this rule establishes the same fee payment methods discussed in the proposed rule. However, recognizing that aliens abroad will be required to pay the fee prior to obtaining an F, J, or M visa at a U.S. embassy or consulate, DHS has sought to build in as much flexibility as possible for the payment of the fee. Accordingly, DHS establishes two options for fee payment:

(1) The fee may be paid by mail, by submitting Form I-901, Fee Remittance for Certain F, M, and J Nonimmigrants, together with a check or money order drawn on a U.S. bank and payable in U.S. currency; or

(2) The fee may be paid electronically, by completing Form I-901 through the Internet and using a credit card.

These options are similar to the means currently used by nonimmigrants abroad to pay fees and expenses to a school or exchange visitor program sponsor, as well as methods used by aliens in other circumstances to pay fees to DHS for immigration purposes.

DHS acknowledges the commenters' concerns that some aliens may have difficulty making these payments. To alleviate these problems as much as possible, DHS will accept fee payment from a third party, either in the United States or abroad, using the methods outlined previously. This allows schools and exchange visitor program sponsors to pay for some or all of their participants, as they choose. Friends, family, or other interested parties may also make the fee payment on behalf of an alien.

Additionally, some commenters requested a bulk or batch fee payment system that would allow exchange visitor program sponsors to pay the fee for their participants. In response, DHS has established a bulk fee payment process that will allow an exchange visitor program sponsor to pay the fee for large numbers of individuals at one time. This automated fee payment system has been successfully pilot tested. At this time, only exchange visitor program sponsors have expressed an interest in making bulk payments on behalf of affected aliens. As a result, DHS has only developed the bulk payment option for exchange visitor program sponsors. Although this regulation does not provide for a bulk payment option for schools enrolling F and M nonimmigrants, should schools express an interest in bulk payments in the future, DHS will assess the feasibility of developing this option for them.

DHS wishes to clarify that the requirement that a check or money order be drawn on a U.S. bank does not necessitate that the student or potential exchange visitor living outside the United States approach a U.S. bank to make a payment. As provided in 8 CFR 103.7(a)(1), an application fee submitted from outside the United States, "may be made by bank international money order or foreign draft drawn on a financial institution in the United States," and payable in U.S. currency. Many foreign banks are able to issue checks or money orders drawn on a U.S. bank. Accordingly, students or potential exchange visitors may obtain checks from banks chartered or operated in the United States, from foreign subsidiaries of U.S. banks, or from foreign banks that have an arrangement with a U.S. bank to issue a check, money order, or foreign draft that is drawn on a U.S. bank.

DHS also clarifies that any Visa, MasterCard, or American Express credit card, whether issued in the United States or overseas, can be used to pay the fee over the Internet.

B. Payment Options in the Future

DHS will continue to explore alternate fee payment methods that might ease potential difficulties associated with fee payment from foreign countries. Most significantly, DHS is working closely with DOS to establish a pilot project for DOS collection of the SEVIS fee overseas. This pilot is being developed to explore the feasibility of SEVIS fee collection at both consular offices with outsourced fee collection using foreign financial institutions and at consular offices with internal cashiers. The pilot will be

conducted in a small number of consulates.

A number of issues surround the implementation of SEVIS fee collection at DOS consulates. It is important to note that fee settlement costs are distributed among all fee-payers. DHS will avoid implementing collection solutions that result in excessively high fee collection costs. The very real possibility of excessive costs associated with fee collections performed by some foreign financial institutions may make this method untenable in some locations. It is also possible that DHS and DOS will not be able to reach a negotiated agreement with foreign financial institutions to collect the fees in some locations where the Machine Readable Visa Fee is currently collected. The visa application fee is collected from all visa applicants every time they apply for a visa with no reductions or exceptions; the SEVIS fee is collected from a select group of nonimmigrants, does not apply each time a new visa is sought, and the amount varies depending upon several factors. Further, the SEVIS fee must be associated with an I-901 form so that the payment can be linked to a specific nonimmigrant in the SEVIS system. Because these factors may complicate collection, some foreign financial institutions may not be interested in collecting the fee. Further difficulties may arise with foreign government regulations limiting the ability of the Consulate Offices to transfer funds to the United States.

Additionally, a needs analysis will be done to document the requirement for an alternative fee collection method in each individual country being considered. To avoid increased fee settlement costs that would be spread among all fee payers, the DOS pilot would be extended only post-by-post, country-by-country, on the basis of documented need. For these reasons, DHS will assess the feasibility, efficiency, and effectiveness of these pilot projects to determine whether and how SEVIS fee collection can occur through DOS consulates.

Two additional methods being explored are the use of payment clearinghouses and the establishment of direct contractual relationships with foreign financial institutions to allow the potential nonimmigrant to pay that financial institution in foreign funds, similar to the process used by DOS for visa fee payments. While DHS remains committed to providing many options for fee payment, DHS can only allow for two avenues for fee remittance at this time. The alternative types of fee remittance discussed in this section will be fully explored and piloted as

appropriate; however they will not be fully implemented without a cost-benefit analysis and a needs analysis. DHS will issue further guidance and a **Federal Register** notice relating to alternative collection methods when they become feasible.

C. Verification of Fee Payment

Several commenters expressed concerns that, due to the timeframes involved in the visa application process, requiring fee payment prior to visa issuance creates an undue burden on F, M, and J visa applicants. DHS wishes to clarify that fee payment does not need to be completed prior to scheduling an interview with the consulate, or any other activities undertaken prior to the in-person application process at the consulate. However, in order to assure that fee payment can be verified for purposes of visa issuance, the fee payment must be processed at least 3 business days prior to the date upon which the alien reports to the consulate to submit the visa application and undergo a visa interview. For nonimmigrants paying the fee electronically using the Internet, and who choose to rely on electronic fee verification at the consulate, the fee must be submitted at least 3 days in advance of the interview. However, a nonimmigrant paying the fee electronically by using the Internet is able to print out a receipt at the time of fee payment, and will be able to use that printed fee receipt for immediate verification of payment. For nonimmigrants paying the fee by mail, the fee must be submitted in a manner that assures arrival at the DHS address listed on the Form I-901 at least 3 business days before the scheduled interview. This timeframe is also required for aliens who are exempt from the F, M, or J visa requirement, as described in section 212(d)(4) of the Act (e.g., Canadians). For the fee to be verified electronically, the nonimmigrant must pay the fee either electronically via the Internet or by mail so that it arrives at the address listed on the I-901 form at least 3 business days prior to applying for admission at a U.S. port-of-entry. Again, a nonimmigrant paying electronically using the Internet who is able to print out the receipt at the time of fee payment will immediately be able to use that printed fee receipt for verification of payment.

Other commenters expressed concern that the use of paper receipts would lead to fraud. DHS acknowledges this concern, but also must make receipts available to nonimmigrants because the statute requires that nonimmigrants be able to present proof of fee payment

before being granted certain benefits, such as admission, a visa, or change of status. At this time, certain SEVIS users (e.g., DHS service centers processing change of status requests, SEVP telephone hotline) will be able to electronically verify fee payment status for nonimmigrants. DHS is working with DOS to finalize the interface that will allow consular officers overseas to see fee payment status electronically in the DOS data management system. Unfortunately, not every DOS consulate and embassy is anticipated to have electronic fee verification upon the effective date of this final rule. However, DHS believes that if fee collection were delayed until such time as paper receipts can be eliminated this would be inconsistent with Congressional statements favoring expeditious implementation of a SEVIS fee, and also with the Congressional requirement that nonimmigrants be able to present proof of fee payment before receiving benefits. See Visa Waiver Permanent Program Act of 2000 404(6), Public Law 106-396, 114 Stat 1637 (October 30, 2000); 8 U.S.C. 1372(e)(5). Therefore, at this time, DHS will issue an official paper receipt acknowledging every payment regardless of payment method used. The paper receipt will be mailed or sent via express delivery service to the address provided on the Form I-901. Additionally, anyone who submits an individual fee electronically will be able to print out an electronic receipt immediately at the time of payment for use pending the mail delivery of the official paper receipt. Exchange visitor program sponsors who submit Form I-901s and pay the fee via the bulk filing process will receive receipts via express delivery for distribution to their program participants.

While DHS will continue to provide a paper fee receipt, consular officials will use the DOS system to verify fee payment when validating Form I-20 or Form DS-2019 information, wherever possible. Even in cases where DOS can generally use the system to verify fee payment, the paper receipts will continue to serve as a secondary means of fee verification. Paper receipts will serve to assist students in demonstrating that the fee has been paid. However, a paper receipt is not required for the visa interview, admission at the port-of-entry, or any other part of the SEVIS process when proof of payment can be verified electronically. This dual system will ensure that, in instances where paper receipts sent by mail are either delayed in transit or not received at all, the issuance of the nonimmigrant visa

will proceed unimpeded; additionally, in instances where paper receipts are presented as proof of fee payment, the electronic records will serve as fraud prevention. As part of the regulatory implementation and during this initial period of dual paper and electronic fee payment verification, DHS will also initiate and maintain a telephone hotline to be used by DOS consular officers, DHS inspectors at ports-of-entry, and DHS officers adjudicating change of status cases at service centers as a backup means to allow these officials to verify the electronic record of fee payment. This dual process, in which paper receipts may be relied upon for fee verification until electronic verification is available at every consulate, is necessary to assure a timely and effective implementation of the fee payment validation process. DHS may issue a notice in the **Federal Register** to eliminate the paper receipt at some time in the future, if it has been clearly demonstrated that it is no longer necessary. In summation, non-immigrants affected by this rule are encouraged to present a paper receipt in the following cases:

- Nonimmigrants applying for an F, M, or J visa abroad should present a paper receipt to verify fee payment until such time that all consular officers can electronically verify fee payment. DHS will inform all schools and program sponsors when an electronic fee verification capability has been established at all consulates.

- Nonimmigrants exempt from the visa requirement (pursuant to section 212(d)(4) of the Act) should present a paper receipt to verify fee payment at the port-of-entry, prior to being admitted to the United States as an F, M, or J nonimmigrant, although all DHS inspectors should be able to electronically verify fee payment if a paper receipt is not available.

- Nonimmigrants applying for a change of status to F, M, or J from within the United States will not be required to send the paper receipt with their change of status application. Rather, the adjudicating officer will access SEVIS to verify payment of the fee. However, students and exchange visitors should note that if the adjudicating officer does not find verification of fee payment in SEVIS, the applicant will receive a request for evidence from the service center and the applicant may be required to submit a paper receipt in response to this request.

D. The I-901 Form

Finally, in response to the notice published in the **Federal Register** (68 FR 59800) on October 17, 2003, some

commenters expressed concern about the Form I-901, Fee Remittance For Certain F, J, and M Nonimmigrants. Commenters were concerned that a fee payment was linked to a single SEVIS identification number, since a nonimmigrant may apply to more than one school or exchange visitor program, and, therefore, may have multiple I-20s or DS-2019s with multiple SEVIS identification numbers. DHS clarifies that fee verification will allow for a fee payment made on one SEVIS identification number to be applied to another SEVIS identification number issued to the same individual. Nonimmigrants are strongly encouraged to bring proof of both SEVIS identification numbers to the consulate or port-of-entry when payment has been made on a SEVIS identification number that is different than the one being used to obtain a visa or entry. DHS notes that if a new fee payment is required, as explained fully below, it must be paid, regardless of payments made on the same or different SEVIS identification numbers. In the future, multiple SEVIS identification numbers for a single nonimmigrant are likely to be augmented with the unique biometric identifier used by the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT). This will enable positive matches where more than one record exists for a single person.

In response to comments, several minor changes are being made to the I-901 form. The titles for the name blocks are being further clarified. DHS is amending the instructions to clarify that a credit card may be used to pay the fee when the Internet version of the form is used. In addition, DHS is changing the form so that an "N" will automatically populate the first space of the SEVIS identification number to help prevent data entry errors. And finally, DHS is adding a street address to the form to allow for courier delivery of the form and payment to DHS.

III. Fee Exemption and Reduction

IIRIRA section 641 provides that an alien seeking J-1 status to participate in an exchange visitor program that is sponsored by the Federal government is exempt from paying a fee. Several commenters requested clarification on how to determine which programs the Federal government sponsors. DHS clarifies that those potential J-1 exchange visitors exempt from the fee as participants in a Federal government sponsored exchange visitor program are those participating in an exchange visitor program with a program

identification designator prefix of G-1, G-2, or G-3.

Commenters suggested that other students and/or exchange visitors should be exempt from the fee. Similarly, a number of commenters suggested that the fee be reduced below \$100 for other programs to mirror the reduction Congress expressly provided to certain J-1 participants, including lower fees for short-term English language programs, for all English language programs, for some or all short-term programs, for part-time and full-time commuter students, and for secondary school students. As noted in the 2003 proposed rule, Congress specifically exempted from the SEVIS fee only J-1 nonimmigrants who are participating in an exchange visitor program sponsored by the Federal government, and explicitly reduced it only for certain other J-1 nonimmigrants. DHS interprets the Congressional mandate such that no other groups of nonimmigrants should be exempted from the SEVIS fee or have a reduced SEVIS fee based upon the principle of *expressio unius*: when one or more things of a class are expressly mentioned, others of the same class are necessarily excluded.

Additionally, DHS cannot adopt the suggestion made by some commenters, that secondary school students and exchange visitors should be exempt from the fee payment because they were not initially required to be tracked in SEVIS. DHS is requiring that all elementary and secondary non-immigrant students on F-1 and J-1 visas be tracked in SEVIS, based upon amendments to section 641(e)(1) of IIRIRA made by section 416 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law 107-56, 115 Stat 272 (October 26, 2001). Since these students are required to be tracked in SEVIS and are not expressly exempted from paying fees by Congress, DHS requires fee payment from them.

IV. The Frequency of the Fee

In the 2003 proposed rule, DHS suggested that aliens who paid the fee and were denied a visa would not have to pay another fee to apply for the same visa classification for a period of 9 months, and specifically sought comments on this timeframe. The majority of commenters felt that this timeframe should be extended to 12 months to accommodate the academic and program-specific annual calendars. This suggestion was accepted and adopted in this final rule.

Although DHS provided an explanation of when a new fee payment would be required in the 2003 proposed rule, several commenters requested a more detailed clarification. In the following paragraphs, DHS re-states and further clarifies exactly when a fee is initially required, and when an additional fee payment would be subsequently required by the same individual. The SEVIS fee is a one-time fee for each nonimmigrant program in which the student or exchange visitor participates. For purposes of this fee, a "single program" for an F or M student generally extends from the time that the student is granted a particular nonimmigrant status, until such time that the nonimmigrant falls out of status, changes status, or departs the United States for an extended period of time. For a J exchange visitor, a single program is defined by the category and/or sponsor at the time of initial program participation, and extends until a change of category, a transfer from a fee-exempt sponsor to a non-fee-exempt sponsor, or until such time as the nonimmigrant falls out of status or changes status. In general:

- An F or M student will be required to pay only one fee if he/she maintains continuous status in a single visa classification, or if he/she is granted a reinstatement to student status in a timely manner following a violation of status;

- A J exchange visitor will be required to pay only one fee if he/she maintains status while participating in a single exchange visitor program, or if he/she resumes status within the same program following a violation of status;

- A student or exchange visitor will be required to pay a new fee if he/she violates status and cannot or does not resume status in a program, in accordance with 8 CFR 214.2 (f)(16) and (m)(16) or 22 CFR 62.45, and subsequently returns to the United States to participate in another program;

- A student or exchange visitor will be required to pay a new fee if he/she wishes to change to another student or exchange visitor status, unless explicitly exempt; and,

- An exchange visitor will be required to pay a new fee prior to applying for a change of category.

This final rule further clarifies that an F or M student will not be required to pay a new fee upon transfer to a new school, extension of stay, change in educational level, when obtaining a new visa for re-entry for program continuation, upon a temporary absence of less than 5 months, or upon a period of approved absence in which the student is engaged in overseas study as

a part of his/her U.S. educational program requirements. Further, a student will not have to pay a new fee if he/she falls out of status and files for reinstatement prior to the presumptive ineligibility deadline set forth in 8 CFR 214.2(f)(16)(i)(A) or (m)(16)(i)(A). An exchange visitor will not generally be required to pay a new fee upon transfer between programs within the same exchange visitor category. However, an exchange visitor that transfers from a fee-exempt program to a non-fee-exempt program under the same exchange visitor category, e.g., a program with a prefix of G-1, G-2 or G-3, to another program with a program prefix that is not G-1, G-2 or G-3, but is within the same program category (e.g., research scholar), will be required to pay the fee upon transfer. Further, as previously stated, a change of J-1 exchange visitor category will require payment of a new fee. An intending J-1 nonimmigrant will be required to pay a new fee if, after completion of an exchange visitor program, he/she wishes to return to the United States to begin a new program, even if it is in the same category. An exchange visitor will not be required to pay a new fee if he/she falls out of valid program status due to a minor or technical infraction. However, an exchange visitor will be required to pay the SEVIS fee prior to applying for reinstatement under 22 CFR 62.45 with DOS.

As previously noted, this final rule extends the period of time from 9 months to 12 months during which an alien does not need to repay the fee when re-applying for the same category of visa after initial denial. Additionally, DHS clarifies that this 12-month exemption applies to a student or exchange visitor who has been denied a change of status within the United States, and whose application is subsequently re-opened and approved. However, DHS wishes to clarify that if a visa is denied for a particular J-1 exchange visitor category, and the alien is applying for a visa in a different J-1 category, the alien will have to pay a new fee in conjunction with that visa application, even if the second application is made within the 12-month period identified previously. This restriction on J-1 applications also applies to applications for change of status to a J-1 exchange visitor program.

Where an F or M nonimmigrant is applying for reinstatement to student status, and has been out of status for a period that exceeds 5 months at the time of filing, the nonimmigrant will be required to pay a new fee to DHS prior to the adjudication of the reinstatement request. This 5-month time limit is set

in accordance with the 5-month presumptive ineligibility deadline at 8 CFR 214.2(f)(16)(i)(A) and (m)(16)(i)(A). Similarly, pursuant to 22 CFR 62.45, where an exchange visitor applies for reinstatement after a substantive violation or after falling out of his/her valid J program status for longer than 120 days but less than 270 days, the exchange visitor will be required to pay a new fee prior to applying with DOS for reinstatement.

A new fee would also be required if an F, M, or J nonimmigrant changes to a non-student/exchange visitor visa classification and then wishes to return to the previously held F, M, or J status. Finally, a new fee is needed if an alien re-applies for the same visa status or for the same change in status more than 12 months after a denial is issued either overseas at a U.S. embassy or consulate, or within the United States.

The following charts outline who is exempt from paying a fee, who is required to pay a fee and when a fee payment is required, and who may pay a reduced fee:

Chart I—Fee payment *not* required if applicant is:

A continuing F, M, or J nonimmigrant who maintains that status, and whose initial Form I-20 or DS-2019 was issued before September 1, 2004, as evidenced by their SEVIS record and the issuance date on their form.

An F-2, J-2, or M-2 dependent .

A J-1 participant in an exchange visitor program sponsored by the Federal government. A program sponsored by the Federal government is identified by a program designation prefix of G-1, G-2, or G-3 .

An F-1, F-3, J-1, M-1, or M-3 nonimmigrant applying for a visa to return to the United States as a continuing student or a continuing participant of an exchange visitor program.

- This provision applies only to nonimmigrants returning to the United States to resume participation in a program that was previously begun, in which he or she has maintained status, and which has not yet been completed.

- This includes F or M nonimmigrants who will return as continuing students after a temporary absence from the United States for a period of less than 5 months in duration.

- This provision also includes F or M students returning as continuing students after working towards completion of the U.S. program in authorized overseas study.

An F-1 or F-3, nonimmigrant maintaining continuous status and

changing educational levels. Examples include F students:

- Moving directly from high school to college.

- Moving directly from a masters degree program to a doctoral program.

An F-1, F-3, M-1, or M-3 nonimmigrant transferring between approved schools at the same educational level.

A J-1 nonimmigrant transferring between programs in the same exchange visitor category where no differential fee exists. Examples include transfers:

- Between two fee-exempt programs (a transfer between G-1, G-2, or G-3 programs).

- Between two non-fee-exempt programs.

- From a non-fee-exempt program to a fee-exempt program (G-1, G-2, or G-3 program).

A nonimmigrant applying for a change of classification from within the United States between an F-1 and F-3 status, or between M-1 and M-3 status.

An F-1, F-3, J-1, M-1, or M-3 nonimmigrant requesting/applying for an extension of stay in a single program.

- “Extension” for purposes of this example applies to students who have maintained participation in a program when additional time is needed for program completion.

An alien who paid an initial fee when seeking an F-1, F-3, M-1, or M-3 visa from an embassy or consulate abroad, was denied a visa, and is applying again for a visa for the same type of program within 12 months of the initial denial.

An alien who paid an initial fee when seeking a J-1 visa from an embassy or consulate abroad, was denied a visa, and is applying again for a visa in the same J-1 exchange visitor category within 12 months of the initial visa denial.

- This provision does *NOT* apply to J-1 applicants who initially applied for a fee exempt program (e.g., a program with a program identifier designation prefix of G-1, G-2 or G-3), and who, after visa denial, apply for a program that is not fee exempt.

A nonimmigrant who has applied for a change of status in the United States to an F, M, or J classification, had the initial application for the change of status denied for a reason other than failure to pay the SEVIS fee, and is applying for a motion to re-open the case within 12 months of the original denial.

Pursuant to SEVP discretion, certain nonimmigrants changing between F and M status due solely to a change in school classification during their course of study.

An F or M nonimmigrant applying for reinstatement of student status, who has

not been out of student status for a period exceeding the presumptive ineligibility requirement set forth in 8 CFR 214.2(f)(16)(A) or 214.2(m)(16)(A).

Chart II—Fee payment of \$100 is required if the applicant is:

An alien seeking an initial F-1, F-3, J-1, M-1, or M-3 visa from an embassy or consulate abroad for initial attendance at a DHS-approved school or initial participation in a Department of State-designated exchange visitor program that is subject to the \$100 fee amount. (Specific J-1 programs not subject to the \$100 fee are described in both Chart I and Chart III.)

The fee must be processed 3 business days before the consular interview, unless the applicant has a printed receipt from Internet payment. Fees will not be payable at the consulate.

An alien exempt from the visa requirement described in section 212(d)(4) of the Act, who will be applying for admission at a United States port-of-entry to begin initial attendance at a DHS-approved school or initial participation in a Department of State-designated exchange visitor program that is subject to the \$100 fee amount. (Specific J-1 programs not subject to the \$100 fee are described in both Chart I and Chart III.) Such fee must be processed at least 3 business days prior to making an application for admission at the port-of-entry, unless the applicant has a printed receipt from Internet payment. Fees will not be payable at the port-of-entry.

An alien in the United States seeking a change of status to F-1, F-3, J-1, M-1, or M-3. Exceptions are listed in Chart I for instances not requiring fee payment.

A nonimmigrant who was initially granted J-1 status as a participant in an exchange visitor program sponsored by the Federal government, (i.e., with a program identifier designation prefix of G-1, G-2, or G-3), and who is now transferring to another J-1 program in the same category that is not similarly sponsored (i.e., has a program identifier designation prefix other than G-1, G-2, or G-3).

A J-1 nonimmigrant who is applying for a change of category within the United States, with the exception of a change to a J-1 program specifically requiring an alternate fee, as indicated in Chart III, or a program whose program identifier designation prefix is G-1, G-2, or G-3.

A J-1 nonimmigrant who is applying for reinstatement after a substantive violation, or who has been out of program status for longer than 120 days but less than 270 days during the course of his or her program.

An F or M nonimmigrant applying for reinstatement of student status, who has been out of student status for a period exceeding the presumptive ineligibility requirement set forth in 8 CFR 214.2(f)(16)(A) or 214.2(m)(16)(A).

An F or M nonimmigrant, including an F-3 or M-3 nonimmigrant, who has been absent from the United States for a period exceeding 5 months, was not working towards completion of curriculum in authorized overseas study, and now wishes to re-enter for a new F or M program of study in the United States.

Chart III—Fee payment is *reduced* to \$35 if applicant is:

A J-1 nonimmigrant applying for participation in a summer work/travel, au pair, or camp counselor program.

V. Applicability of the Fee Requirement

A number of commenters to the proposed rule stated that the fee should not be implemented without adequate notice. Generally, commenters suggested that implementation be delayed to not earlier than September 2004, although one commenter felt that January 2005 would be most appropriate. Additionally, various commenters stated that fee implementation should not take place in the spring, summer, or fall due to considerations with academic and program calendars. However, Congress mandated in section 641 of the IIRIRA that the Student and Exchange Visitor Program information collection effort be funded by those aliens included in the program, and made express provisions to expedite implementation and collection of the fee. See, e.g., Visa Waiver Permanent Program Act of 2000, 404, Public Law 106-396, 114 Stat. 1637 (October 30, 2000) (exempting the SEVIS fee from the Administrative Procedures Act rulemaking process in order to “ensure the expeditious, initial implementation of this section”). SEVIS is currently operational and DHS is incurring associated operating costs. As such, while the fee is not being imposed retroactively, this fee must be collected as soon as feasible. This final rule imposes the fee requirement for students and exchange visitors whose Form I-20 or Form DS-2019 is initially issued on or after September 1, 2004. In general, nonimmigrants maintaining F, M, or J status will not be subject to the fee. Further, intending F, M, or J nonimmigrants issued an I-20 or DS-2019 prior to September 1, 2004, (as evidenced by the issuance date on the form) will not be subject to the fee except as defined in the preceding charts. While some school and exchange visitor programs requested more time to

prepare for the implementation of the fee, a proposed rule on this fee was initially published in 1999 and, most recently, a revised proposal was published in October 2003. The statutory provisions and proposed rules have informed the schools and exchange visitor programs that this fee collection will occur. Moreover, DHS is collecting the fee, which is a change to the 1999 proposal that schools and exchange visitor program sponsors collect this fee. Thus, DHS believes that there has been sufficient time to prepare for fee implementation.

As noted, this rule will be effective on September 1, 2004, and will apply to potential nonimmigrants that are initially issued a Form I-20 or Form DS-2019 on or after that date. Potential nonimmigrants, for purposes of this rule, are those aliens who will apply to DOS or DHS for initial attendance as an F, M, or J nonimmigrant, certain nonimmigrants in the United States that will apply for a change of status to an F, M, or J classification, and current J-1 nonimmigrants that will apply for a J-1 category change, on or after that date. If a Form I-20 or Form DS-2019 for initial status in a new program is issued on or after the effective date, the nonimmigrant traveling on that document will be required to pay the fee. Applicants, schools, and exchange visitor program sponsors should refer to the fee pay table contained in this rule for more detailed information concerning when a fee is required.

VI. Propriety of the Fee Requirement

Some commenters stated that it is unfair to charge fees to nonimmigrants who were denied a visa, stating that these nonimmigrants receive no benefit from the program. A few commenters further stated that the fee should only be paid by those who choose to actually come to the United States, regardless of whether or not a visa is issued. These recommendations, while acknowledged, cannot be adopted by DHS. Pursuant to statutory mandate, the fee payment must be processed prior to obtaining a nonimmigrant visa.

DHS has modified the proposed rule to make the fee payable prior to obtaining a visa, rather than prior to starting the visa application process. Likewise, for aliens who are exempt from the visa requirements, the fee must be paid and processed prior to making an application for admission at a port-of-entry. However, DHS wishes to further clarify this distinction. Fee payment does not need to be completed prior to scheduling an interview with the consulate or any other activities undertaken prior to the in-person

application process at the consulate. In order to assure that fee payment can be verified for purposes of visa issuance, the fee payment should be processed at least 3 business days prior to the date upon which the alien reports to the consulate to submit the visa application and undergo a visa interview, unless the alien can present a printed receipt from Internet payment. Similarly, 3 business days also must elapse between the processing of a fee and submitting an application for admission at a port-of-entry for aliens exempt from the visa provisions, as described in section 212(d)(4) of the Act, unless the alien can present a printed receipt from Internet payment. As stated in previous sections, if the visa or admission is subsequently denied and the alien applies again within 12 months, no new SEVIS fee will be required.

DHS further wishes to clarify that those nonimmigrants who are denied a visa or who are granted a visa and then choose not to come to the United States have already benefited from SEVIS. A nonimmigrant seeking F, M, or J status must prove to the consular officer granting his or her visa that he or she has been admitted by a DHS certified school or DOS designated exchange visitor program sponsor. Prior to SEVIS, nonimmigrants used hard copy forms issued by the schools or sponsors to verify their claim. These forms were subject to fraud and difficult to verify. This led to abuse of these nonimmigrant classifications as well as delays and denials of visa applications when consular officers suspected fraud. SEVIS allows nonimmigrant information to be entered into the system by certified schools or designated sponsors. The nonimmigrant is then granted a Form I-20 or Form DS-2019, which he or she can then use to apply for an F, M, or J visa. SEVIS allows for immediate electronic verification of an alien's I-20 or DS-2019 information, assisting consular officers as they determine the alien's eligibility for F, M, or J status. This constitutes a benefit for every applicant seeking student or exchange visitor status.

Further, some commenters argued that the tracking of F, M, and J nonimmigrants while they are in the United States does not benefit individuals, but rather benefits the population as a whole by increasing the security of the United States. DHS disagrees. SEVIS was developed subsequent to the discovery that some of the terrorists participating in the 1993 World Trade Center bombing and the September 11, 2001 attacks were nonimmigrants using student visas. At a time when some Americans felt that

student and exchange visitor visas ought to be severely curtailed or eliminated, the development of SEVIS with its ability to maintain information on F, M, and J nonimmigrants allowed for the continued use of these visa classifications. Thus, SEVIS benefits the individual nonimmigrants able to obtain and use visas of these classifications. Additionally, when an F, M, or J nonimmigrant seeks further benefits such as employment, change of status, or reinstatement, SEVIS is used to verify their eligibility.

Further, enforcement of F, M, or J status violations benefits all F, M, or J nonimmigrants. DHS notes that these visa classifications allow nonimmigrants to enter the United States for long periods of time with benefits (such as employment opportunities) not available for many other visa classifications. Prior to SEVIS, there was widespread abuse of these visa classifications, including overstays. Widespread abuse of the F, M, and J visa classifications undermines the legitimacy of the entire foreign student and exchange visitor program. An effective enforcement program that relies upon SEVIS information to identify and initiate investigations of status violations enhances the integrity of the entire program. Enforcement oversight leads to the increased integrity of the program; it is possible to differentiate between legitimate students and exchange visitors and the status violators. This benefits the individual F, M, or J nonimmigrants who are legitimate.

SEVIS allows each F, M, or J nonimmigrant to provide easily verifiable documentation that confirms that he or she is abiding by the requirements of his or her student or exchange visitor status. Further, SEVIS creates alerts when certified schools or designated sponsors provide or fail to provide certain required information. These alerts are used to initiate investigations in which ICE enforcement officers verify whether or not a violation of status has occurred. By enforcing status violations, DHS helps ensure that the majority of students and exchange visitors in SEVIS are legitimately in status and that the data in SEVIS is reliable. Without enforcement, the violations of status that undermined the student and exchange visitor program in the past would occur again. With enforcement ensuring the integrity of SEVIS data, legitimate students and exchange visitors can provide reliable documentation of their status and avoid difficulties and delay when seeking benefits.

As previously stated, some nonimmigrants may not be granted visas or may choose not to come to the United States after their visas are granted. DHS will not refund the fee in these cases. However, fees paid in error will be refunded.

VII. Miscellaneous Comments and Concerns

A number of commenters suggested that the proposed fee will deter participation by foreign students and exchange visitors. In particular, it was noted that participation in short-term or intensive English language programs has already dropped significantly. DHS recognizes that there have been significant changes in the national security environment since September 11, 2001. However, DHS notes that while the demand for foreign student and exchange visitor visas has been down in the past 2 years, so has the demand for visas in general. Therefore, there is little reason to believe that this downward trend for students and exchange visitors is based solely upon the implementation of SEVIS. Similarly, future reduced participation (especially that already evidenced by reduced applications) will not necessarily be linked directly to the implementation of the SEVIS fee. It is noted that in many cases, compared with the overall cost of a U.S. education or participation in an exchange visitor program, the imposition of the SEVIS fee does not significantly increase the financial burden on foreign students and exchange visitor program participants.

Additionally, a few commenters expressed a belief that the imposition of this fee would deter the participation of students and exchange visitors with the most limited resources, particularly those from the least developed countries. While DHS acknowledges this possibility, the statute mandating the implementation of the fee allows for no specific fee reductions, exemptions, or delayed payments based upon a nonimmigrant's available resources or the infrastructure limitations of his/her country. Further, F, M, and J nonimmigrants are required by DHS and DOS regulations to provide evidence of sufficient financial resources to support themselves throughout their program. When considering the average cost of a temporary stay in the United States, including all related program costs, DHS does not believe that the SEVIS fee presents an additional cost burden sufficient to act as a deterrent to F, M, or J program participation. DHS notes that many schools and exchange visitor program sponsors, as well as other interested third party organizations

(such as advocacy groups), already make special efforts to assist these nonimmigrants. DHS commends and encourages this assistance and, to facilitate such assistance, DHS will accept fee payment from third parties.

Regulatory Flexibility Act

I have reviewed this final rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and, by approving it, I preliminarily certify that this rule will not have a significant economic impact on a substantial number of small entities. The students and exchange visitors impacted by this rule are not considered "small entities," as that term is defined in 5 U.S.C. 601(6).

Since Congress changed the law to provide that DHS will collect the fee directly from the nonimmigrant, rather than having the school or exchange visitor program sponsor collect and remit the fee, schools and exchange visitor program sponsors will no longer need to be involved in any way with respect to the collection of the fee. However, they are free to offer assistance to their students or potential exchange visitors if they choose to do so. Exchange visitor program sponsors who choose to participate in the bulk payment process to pay the fee on behalf of their participants may incur costs associated with establishing their batch file connection with the fee payment system, as well as the costs of the fees. However, the program sponsor's assumption of these costs on behalf of their participants is voluntary and, therefore, not subject to the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule, as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the U.S. economy of \$100 million or more; a major increase in costs or prices; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies

to compete with foreign-based companies in domestic and export markets. As mandated by Congress, this rule levies a fee in the amount of \$100 on some nonimmigrant students and exchange visitors, and a fee in the amount of \$35 for exchange visitors admitted as au pairs, camp counselors, or participants in a summer work/travel program.

Executive Order 12866

DHS is required to implement this rule under section 641(e) of IIRIRA, 8 U.S.C. 1372. This rule is considered by DHS to be a significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review. In particular, DHS has assessed both the costs and benefits of this rule, as required by Executive Order 12866, section 1(b)(6), and has made a reasoned determination that the benefits of this regulation justify its costs.

How Was the Amount of the Fee Determined?

The costs to the public that this rule imposes are primarily the fees that must be paid by nonimmigrant students and exchange visitors that will be processed through SEVIS prior to being admitted to the United States. DHS is required by section 641 of IIRIRA to collect a fee to recover the cost of collecting student and exchange visitor information electronically. After careful evaluation of the costs to design, develop, and accurately maintain the statutorily mandated information collection system, DHS is now imposing a fee of \$100 for nonimmigrant students and most intending exchange visitors, and \$35 for potential exchange visitors admitted as au pairs, camp counselors, or participants in a summer work/travel program. The fees imposed under this final rule will support personnel costs, ongoing system operation and maintenance costs, training costs, and other costs related to the program, as well as offset the resources necessary to ensure compliance with the regulations.

Approximately 362,400 F-1 students and 312,400 J-1 exchange visitors are expected to enter the United States in Fiscal Year 2004. Based upon historical trends, it is further estimated that as many as 10% may subsequently violate the terms of their nonimmigrant status each year. However, in an effort to compensate for the possible inaccuracies of earlier systems and data on student and exchange visitor noncompliance, the estimated number of violators has been reduced to 5%.

Using this percentage, DHS estimates 33,720 foreign students and exchange visitors might be subject to enforcement actions on an annual basis, although no actual measure of the number of student and exchange visitors who have violated their immigration status has ever been conducted. While remaining within the initial \$100 statutory limitation, DHS has calculated the fee to cover the costs of systems and program office operations and maintenance, training, and personnel, including SEVIS liaison officers and ICE officers in the field. Based upon estimates of the total F, M, and J visa population and estimates of the total staff-hours that will be needed to ensure compliance with SEVIS requirements, DHS has estimated that the fee will fund approximately 60% of the personnel resources needed for compliance efforts.

Why Is the SEVIS Fee Necessary?

If DHS failed to assess a SEVIS fee, it would be in violation of the law. Additionally, should DHS either not assess the fees under this rule or assess the fees at a lesser amount, DHS would be unable to continue to implement and operate SEVIS or, at a minimum, be forced to sustain a more limited capability to ensure compliance by foreign students and exchange visitors with the requirements of SEVIS. This would be contrary to the intent of Congress in giving ICE responsibility over SEVIS. If the fees are not imposed or are imposed at a lesser amount, the public could incur the intangible impact of reduced security, as a result of a more limited ability to ensure compliance. The imposition of this fee shifts the burden of funding program operating and compliance efforts to the population whose data is actually entered and tracked in SEVIS. If the fees are not imposed, or are imposed at a lesser amount, the general public would become responsible for bearing the shortage in the funding of program implementation and conformity. This would be contrary to the explicit directive of Congress, as set out in section 641 of IIRIRA, and subsequent amendments.

What Are the Benefits of Establishing the SEVIS Fee?

SEVIS is a vital tool in protecting the public by: (1) Enhancing the process by which nonimmigrants seeking to be foreign students and exchange visitors gain admission to the United States; and (2) increasing the ability of DHS to track and monitor foreign students and exchange visitors to ensure that they arrive in the United States, show up and register at the school or be validated as

participating in their exchange visitor program activity, and properly maintain their status during their stay in this country. SEVIS enables a proper balance between openness in admitting foreign students and exchange visitors into the United States and preserving the security enhanced by enforcing the law.

What Are the Costs of Establishing the SEVIS Fee?

The projected time per response for this collection of information were derived by first breaking the process into three basic components:

Learning about the Law and the Form—5 Minutes

Completion of the Form—9 Minutes
Assembling and Filing the Form—5 Minutes

Total Time per Response—19 Minutes

For all components, DHS used tests to determine completion times. People who were not conversant with immigration processes were used to determine average completion times. The Total annual reporting burden hours is 192,000. This figure was derived by multiplying the number of respondents (600,000) × frequency of response (1) × 19 minutes or (.32 hours) per response. The estimated annual public cost is \$61,920,000. This figure is based on the number of respondents 600,000 multiplied by 19 minutes (.32), multiplied by \$10 (average hourly rate); plus the number of respondents (600,000) × fee of \$100.

Conclusion

Balanced against the costs and requirements to collect information electronically, the burden imposed by this regulation is fully justified by the benefits it provides.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 Civil Justice Reform

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

Paperwork Reduction Act

This final rule requires the use of the Form I-901, Fee Remittance Form for Certain F, J, and M Nonimmigrants. This form is considered an information collection document and subject to review and clearance under Paperwork Reduction Act procedures. On October 17, 2003, at 68 FR 59800, DHS published a notice in the **Federal Register**, soliciting public comments on the Form I-901 for a period of 60 days. The comments that were filed by the public and OMB have been addressed and reconciled in the preamble of this final rule. DHS has received OMB approval for proposed information collection, Form I-901, Fee Remittance for Certain F, J, and M Nonimmigrants (OMB No. 1653-0034) that is contained in this final rule. The costs and benefits of Form I-901 have been fully set out in the supporting statement for the Form I-901 that will be published separately in the **Federal Register**.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements, Students.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

■ 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; Pub. L. 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 adding the entry for Form I-901 to the listing of fees, in proper alpha/numeric sequence, to read as follows:

§ 103.7 Fees.

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

Form I-901. For remittance of the SEVIS fee levied on certain F, J, and M

nonimmigrant aliens—\$100. For remittance of the SEVIS fee levied for J-1 au pairs, camp counselors, and participants in a summer work/travel program—\$35.

* * * * *

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), 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1372, 1379, 1731–32; section 643, Pub. L. 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 214.2 is amended by:

■ a. Adding a new paragraph (f)(19);

■ b. Adding a new paragraph (j)(5); and by

■ c. Adding a new paragraph (m)(20).

The additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(19) *Remittance of the fee.* An alien who applies for F–1 or F–3 nonimmigrant status in order to enroll in a program of study at a Department of Homeland Security (DHS)-approved educational institution is required to pay the Student and Exchange Visitor Information System (SEVIS) fee to DHS, pursuant to 8 CFR 214.13, except as otherwise provided in that section.

* * * * *

(j) * * *

(5) *Remittance of the fee.* An alien who applies for J–1 nonimmigrant status in order to commence participation in a Department of State-designated exchange visitor program is required to pay the SEVIS fee to DHS, pursuant to 8 CFR 214.13, except as otherwise provided in that section.

* * * * *

(m) * * *

(20) *Remittance of the fee.* An alien who applies for M–1 or M–3 nonimmigrant status in order to enroll in a program of study at a DHS-approved vocational educational institution is required to pay the SEVIS fee to DHS, pursuant to 8 CFR 214.13, except as otherwise provided in that section.

* * * * *

■ 5. Section 214.13 is added to read as follows:

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

(a) *Applicability.* Except as otherwise provided for in this section, the following aliens are required to submit a payment of \$100 to the Department of Homeland Security (DHS) in advance of obtaining nonimmigrant status as a student or exchange visitor, in addition to any other applicable fees:

(1) An alien who applies for F–1 or F–3 nonimmigrant status in order to enroll in a program of study at a DHS-approved 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 DHS-approved academic or language-training institution including private elementary and secondary schools and public secondary schools;

(2) An alien who applies for J–1 nonimmigrant status in order to commence participation in an exchange visitor program designated by the Department of State (DOS), 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 nonimmigrant status in order to enroll in a program of study at a DHS-approved vocational educational institution, including a flight school.

(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, or G–3;

(2) Dependents of F, M, or J nonimmigrants. The principal alien must pay the fee, when required under this section, in order for his/her qualifying dependents to obtain F–2, J–2, or M–2 status. However, an F–2, J–2, or M–2 dependent is not required to pay a separate fee under this section in order to obtain that status or during the time he/she remains in that status.

(3) A nonimmigrant described in paragraph (a) of this section whose Form I–20 or Form DS–2019 for initial attendance was issued on or before May 31, 2004.

(c) *Special Fee for Certain J–1 Nonimmigrants.* A J–1 exchange visitor coming to the United States as an au pair, camp counselor, or participant in a summer work/travel program is subject to a fee of \$35.

(d) *Time for payment of SEVIS fee.* An alien who is subject to payment of the SEVIS fee must remit the fee directly to DHS as follows:

(1) An alien seeking an F–1, F–3, J–1, M–1, or M–3 visa from a consular officer abroad for initial attendance at a DHS-approved school or to commence participation in a Department of State-designated exchange visitor program, must pay the fee to DHS before issuance of the visa.

(2) An alien who is exempt from the visa requirement described in section 212(d)(4) of the Act must pay the fee to DHS before the alien applies for admission at a U.S. port-of-entry to begin initial attendance at a DHS-approved school or initial participation in a Department of State-designated exchange visitor program.

(3) A nonimmigrant alien in the United States seeking a change of status to F–1, F–3, J–1, M–1, or M–3 must pay the fee to DHS before the alien is granted the change of nonimmigrant status, except as provided in paragraph (e)(4) of this section.

(4) A J–1 nonimmigrant who is applying for a change of program category within the United States, in accordance with 22 CFR 62.42, must pay the fee associated with that new category, if any, prior to being granted such a change.

(5) A J–1 nonimmigrant initially granted J–1 status to participate in a program sponsored by the Federal government, as defined in paragraph (b)(1) of this section, and transferring in accordance with 22 CFR 62.42 to a program that is not similarly sponsored, must pay the fee associated with the new program prior to completing the transfer.

(6) A J–1 nonimmigrant who is applying for reinstatement after a substantive violation of status, or who has been out of program status for longer than 120 days but less than 270 days during the course of his/her program must pay a new fee to DHS, if applicable, prior to being granted a reinstatement to valid J–1 status.

(7) An F or M student who is applying for reinstatement of student status because of a violation of status, and who has been out of status for a period of time that exceeds the presumptive ineligibility deadline set forth in 8 CFR 214.2(f)(16)(i)(A) or (m)(16)(i)(A), must pay a new fee to DHS prior to being granted a return to valid status.

(8) An F–1, F–3, M–1, or M–3 nonimmigrant who has been absent from the United States for a period that exceeds 5 months in duration, and wishes to reenter the United States to engage in further study in the same course of study, with the exception of students who have been working toward completion of a U.S. course of study in authorized overseas study, must pay a

new fee to DHS prior to being granted student status.

(e) *Circumstances where no new fee is required.* (1) Extension of stay, transfer, or optional practical training for students. An F-1, F-3, M-1, or M-3 nonimmigrant is not required to pay a new fee in connection with:

(i) An application for an extension of stay, as provided in 8 CFR 214.2(f)(7) or (m)(10);

(ii) An application for transfer, as provided in 8 CFR 214.2(f)(8) or (m)(11);

(iii) A change in educational level, as provided in 8 CFR 214.2(f)(5)(ii); or

(iv) An application for post-completion practical training, as provided in 8 CFR 214.2(f)(10)(ii) or (m)(14).

(2) Extension of program or transfer for exchange visitors. A J-1 nonimmigrant is not required to pay a new fee in connection with:

(i) An application for an extension of program, as provided in 22 CFR 62.43; or

(ii) An application for transfer of program, as provided in 22 CFR 62.42.

(3) Visa issuance for a continuation of study. An F-1, F-3, J-1, M-1, or M-3 nonimmigrant who has previously paid the fee is not required to pay a new fee in order to be granted a visa to return to the United States as a continuing student or exchange visitor in a single course of study, so long as the nonimmigrant is not otherwise required to pay a new fee in accordance with the other provisions in this section.

(4) Certain changes in student classification.

(i) No fee is required for changes between the F-1 and F-3 classifications, and no fee is required for changes between the M-1 and M-3 classifications.

(ii) Institutional reclassification. DHS retains the discretionary authority to waive the additional fee requirement when a nonimmigrant changes classification between F and M, if the change of status is due solely to institutional reclassification by the Student and Exchange Visitor Program during that nonimmigrant's course of study.

(5) Re-application following denial of application by consular officer. An alien who fully paid a SEVIS fee in connection with an initial application for an F-1, F-3, M-1, or M-3 visa, or

a J-1 visa in a particular program category, whose initial application was denied, and who is reapplying for the same status, or the same J-1 exchange visitor category, within 12 months following the initial notice of denial is not required to repay the SEVIS fee.

(6) Re-application following denial of an application for a change of status. A nonimmigrant who fully paid a SEVIS fee in connection with an initial application for a change of status within in the United States to F-1, F-3, M-1, or M-3 classification, or for a change of status to a particular J-1 exchange visitor category, whose initial application was denied, and who is granted a motion to reopen the denied case is not required to repay the SEVIS fee if the motion to reopen is granted within 12 months of receipt of initial notice of denial.

(f) [Reserved]

(g) *Procedures for payment of the SEVIS fee.* (1) Options for payment. An alien subject to payment of a fee under this section may pay the fee by any procedure approved by DHS, including:

(i) Submission of Form I-901, to DHS by mail, along with the proper fee paid by check, money order, or foreign draft drawn on a financial institution in the United States and payable in United States currency, as provided by 8 CFR 103.7(a)(1);

(ii) Electronic submission of Form I-901 to DHS using a credit card or other electronic means of payment accepted by DHS; or,

(iii) A designated payment service and receipt mechanism approved and set forth in future guidance by DHS.

(2) Receipts. DHS will provide a receipt for each fee payment under paragraph (g)(1) of this section until such time as DHS issues a notice in the **Federal Register** that paper receipts will no longer be necessary. Further receipt provisions include:

(i) DHS will provide for an expedited delivery of the receipt, upon request and receipt of an additional fee;

(ii) If payment was made electronically, both DHS and the Department of State will accept a properly completed receipt that is printed-out electronically, in lieu of the receipt generated by DHS;

(iii) If payment was made through an approved payment service, DHS and the Department of State will accept a

properly completed receipt issued by the payment service, in lieu of the receipt generated by DHS.

(3) Electronic record of fee payment. DHS will maintain an electronic record of payment for the alien as verification of receipt of the required fee under this section. If DHS records indicate that the fee has been paid, an alien who has lost or did not receive a receipt for a fee payment under this section will not be denied an immigration benefit, including visa issuance or admission to the United States, solely because of a failure to present a paper receipt of fee payment.

(4) Third-party payments. DHS will accept payment of the required fee for an alien from an approved school or a designated exchange visitor program sponsor, or from another source, in accordance with procedures approved by DHS.

(h) *Failure to pay the fee.* The failure to pay the required fee is grounds for denial of F, M, or J nonimmigrant status or status-related benefits. Payment of the fee does not preserve the lawful status of any F, J, or M nonimmigrant that has violated his or her status in some other manner.

(1) For purposes of reinstatement to F or M status, failure to pay the required fee will be considered a "willful violation" under 8 CFR 214.2(f)(16) or (m)(16), unless DHS determines that there are sufficient extenuating circumstances (as determined at the discretion of the Student and Exchange Visitor Program).

(2) For purposes of reinstatement to valid J program status, failure to pay the required fee will not be considered a "minor or technical infraction" under 22 CFR 62.45.

PART 299—IMMIGRATION FORMS

■ 6. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

■ 7. Section 299.1 is amended in the table by adding, in proper alpha/numeric sequence, the entry for "Form I-901" to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
I-901	02-09-04	Fee Remittance for Certain F, J, and M Nonimmigrants.

- 8. Section 299.5 is amended by:
 - a. Revising the term “INS form No.” to read “Form No.” in the table heading;
 - b. Revising the term “INS form title” to read “Title” in the table heading; and

- c. Adding the entry for Form “I-901” to the table, in proper alpha/numeric sequence.

§ 299.5 Display of control numbers.

* * * * *

The addition reads as follows:

Form No.	Title	Currently assigned OMB control No.
I-901	Fee Remittance For Certain F, J, and M Nonimmigrants.	1653-0034

Dated: June 25, 2004.
Tom Ridge,
Secretary of Homeland Security.
 [FR Doc. 04-14961 Filed 6-30-04; 8:45 am]
BILLING CODE 4410-10-P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 704

Investment in Exchangeable Collateralized Mortgage Obligations

AGENCY: National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The National Credit Union Administration (NCUA) is issuing final revisions to its regulations regarding investment in collateralized mortgage obligations (CMOs) to authorize all federal credit unions (FCUs) and corporate credit unions to invest in exchangeable CMOs representing interests in one or more SMBS subject to certain safety and soundness limitations. Currently, NCUA regulations prohibit FCUs and certain corporate credit unions from investing in stripped mortgage backed securities (SMBS) and exchangeable CMOs that represent interests in one or more SMBS. NCUA has safety and soundness concerns with direct investment in SMBS, but recognizes that some exchangeable CMOs representing interests in one or more SMBS may be safe investments for credit unions. This rule will also authorize FCUs and corporate credit unions to accept exchangeable CMOs as assets in a repurchase transaction or as collateral on a securities lending transaction regardless of whether the CMO contains SMBS. Finally, this rule contains miscellaneous technical corrections and minor changes to NCUA’s Investment and Deposit Activities rule and Corporate Credit Unions rule.

DATES: This rule is effective August 2, 2004.

FOR FURTHER INFORMATION CONTACT:

Steve Sherrod, Senior Investment Officer, Office of Strategic Program Support and Planning (OSPSP) at the above address or telephone (703) 518-6620; Kim Iverson, Senior Investment Officer, Office of Strategic Program Support and Planning, at the above address or telephone (703) 518-6620; George Curtis, Corporate Program Specialist, Office of Corporate Credit Unions at the above address or telephone (703) 518-6640; or Paul Peterson, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6555.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Credit Union Act permits FCUs and corporate credit unions to purchase mortgage related securities (MRS) subject to such regulations as the NCUA Board may prescribe. 12 U.S.C. 1757(15)(B). NCUA regulations generally permit the purchase of CMOs, a multi-class MRS, but not if the CMO is a stripped mortgage backed security (SMBS). 12 CFR 703.14(d) and 703.16(e); 704.5(c)(5) and (h)(4). SMBS include interest-only CMOs (IOs) and principal-only CMOs (POs).

Currently, many CMO issues contain one or more classes of exchangeable CMOs. An exchangeable CMO represents a beneficial ownership interest in a combination of two or more underlying CMOs, and the owner may pay a fee and take delivery of the underlying CMOs. In many cases, these underlying CMOs include IOs and POs.

Because NCUA regulations prohibit investment in SMBS, the regulations also prohibit investment in an exchangeable CMO that represents an interest in one or more IOs or POs. Certain exchangeable CMOs representing IOs or POs, however, do not carry the risk or raise the same safety and soundness concerns

associated with direct investment in an SMBS.

On January 22, 2004, the NCUA Board issued a notice of proposed rulemaking to amend NCUA rules to authorize FCUs and corporate credit unions to invest in an exchangeable CMO representing interests in one or more IOs or POs if the exchangeable CMO meets certain conditions. 69 FR 4886 (February 2, 2004).

The first condition concerned the rate of amortization of the underlying IOs and POs. For an exchangeable CMO representing one or more IOs, the Board proposed that the notional principal of each IO must decline at the same rate as the principal on one or more non-IO CMOs included in the combination. For an exchangeable CMO representing one or more POs, the Board proposed that the principal of each PO must decline at the same rate as the notional principal of one or more IOs included in the combination or at the same rate as the principal on one or more interest-bearing CMOs included in the combination. The Board also proposed a second condition: that, at the time of purchase, the ratio of the market price of the CMO to its remaining principal balance is between .8 and 1.2, meaning that the discount or premium of the market price to par must be less than 20 points. The proposed rule also stated that credit unions may not exercise the right to exchange an exchangeable CMO if it represents an interest in one or more SMBS that would be impermissible for that credit union to hold as a separate investment.

The Board’s proposal also contained several definitional changes and other technical corrections to Parts 703 and 704 of NCUA’s rules and regulations. In Part 703, the Board proposed to add a definition of “collateralized mortgage obligation;” amend the definitions of “put,” “call,” “custodial agreement,” “derivative,” and “european financial options;” and change the phrase “nationally recognized statistical rating