

Response to Comment

ICE received one substantive, in-scope response to its notices published in the Federal Register that it intended to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance of revisions to its immigration bond form (Form I-352). 84 Fed. Reg. 18431 (Aug. 27, 2019); 84 Fed. Reg. 58403 (Oct. 31, 2019). The commenter strongly opposed the revisions to the bond form, arguing that ICE should engage in notice-and-comment rulemaking before issuing the revised form and that the proposed revisions were unlawful. After carefully reviewing the commenter's arguments, ICE has concluded that no additional administrative procedures are necessary before review and approval of the ICR by OMB and that the proposed revisions comply with applicable legal requirements.

ICE's Federal Register Notices Were Adequate for the ICR

The commenter contended that the proposed changes and additions to the bond form constituted new rules and regulations, stating that ICE must engage in rulemaking pursuant to 5 U.S.C. § 553(b) before issuing the revised bond form. The commenter also incorrectly claimed that the notice of ICR was not published in the Federal Register. In addition, the commenter asserted that ICE should have published a "redline" version of the revised bond form to facilitate comparison of the revised bond form to the previous version of the form.

The issuance of the new bond form is not subject to the rulemaking requirements of 5 U.S.C. § 553(b) because the new bond form makes no changes to the Agency's regulations. ICE's immigration bonds are governed by 8 C.F.R. § 103.6 which provides the applicable regulatory framework for issuing, cancelling, and breaching immigration bonds. The conditions for cancelling a bond are described in 8 C.F.R. § 103.6(c), which lists the grounds for cancelling

a maintenance of status and departure bond and explains that other types of immigration bonds issued by ICE are cancelled when the obligor has substantially performed all conditions imposed by the terms of the bond. 8 C.F.R. § 103.6(c)(2)-(3). To determine whether a bond is breached, the applicable regulation provides that “a bond is breached when there has been a substantial violation of the stipulated conditions of the bond.” 8 C.F.R. § 103.6(e). The issuance of the new bond form does not change these or any other regulatory provisions; instead, the new bond form is being promulgated pursuant to the existing regulations.

Once executed, an immigration bond is a contract between the bond obligor(s) and the government. *Safety Nat'l Cas. Corp. v. Dep't of Homeland Sec.*, 711 F. Supp. 2d 697, 716 (S.D. Tex. 2008) (“The I-352 is a contract, and the instructions on the form have been incorporated into the section of the regulations requiring its submission.”) (internal quotation marks omitted); *United States v. Gonzales & Gonzales Bonds and Ins. Agency, Inc.*, 103 F. Supp. 3d 1121, 1130 (N.D. Cal. 2015) (explaining that immigration bonds are contracts). Courts have applied general contract principles to the interpretation of the bond form. *Safety Nat'l*, 711 F. Supp. 2d at 717. As a contract, the bond form is specifically exempted from rulemaking procedures of the Administrative Procedure Act (APA). 5 U.S.C. § 553(a)(2) (exempting contracts from rulemaking requirement); see *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978) (ruling that, to the extent that any one of the categories listed in 5 U.S.C. § 553(a)(2) is clearly and directly involved in the regulatory effort at issue, the APA’s procedural compulsions are suspended); *Peterson v. Nat'l Telecomm. & Info. Admin.*, 505 F. Supp. 2d 313, 319 (E.D. Va. 2006) (holding that the APA’s notice, comment, and rulemaking requirements do not apply to agency action related to government contracts or benefits).

Moreover, even if the exemption for government contracts were not applicable, the bond form is properly considered a collection of information, governed by the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. § 3501, *et seq.*, rather than the APA. The PRA defines a “collection of information,” such that it includes answers to identical questions or identical reporting requirements. 44 U.S.C. § 3502(3)(A). “Typical information collection requests include tax forms, Medicare forms, financial loan applications, job applications, questionnaires, compliance reports, and tax or business records.” *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 33 (1990).

The bond form is an information collection request subject to the requirements of the PRA because it requires persons or entities seeking to post a bond to provide the information requested on the form before the bond is accepted by ICE. *See AAA Bonding Agency Inc. v. Dep’t of Homeland Sec.*, 2013 WL 5424972, at *4 (S.D. Tex. filed Sep. 26, 2013) (ruling that the bond form “is undoubtedly an information collection request”), *rev’d on other grounds*, 596 F. App’x 294 (5th Cir. 2015). When an agency’s action is an information collection, it is not subject to APA notice-and comment-procedures and instead falls under the ambit of the PRA. *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 54 (D.D.C. 2018).

As to the commenter’s statement that a “redline” version of the bond form should have been included with the notice, an agency is not required to provide a redline version when promulgating a new form. Moreover, a redline version is unnecessary given the brevity of the form and the fact that the commenter was able to ascertain the substantive changes to the form.

The Revised Bond Form Complies with Applicable Law

In addition to arguing that ICE should have undertaken notice and comment rulemaking, the commenter asserted that many of the changes to the bond form violate existing law and two settlement agreements entered into in 1995 and 1997 between the commenter and the former

Immigration & Naturalization Service known as the Amwest Agreements.¹ As explained below, each of the substantive changes challenged by the commenter is legally valid.

1. Ability to re-bond an alien

The commenter noted that ICE has removed a provision in the General Terms and Conditions of the bond form that stated, “Provided it has the concurrence of the government and it does not change the amount of the bond, an obligor may re-bond the alien at any time and at no expense to the government.” The commenter argued that obligors have always been permitted to re-bond an alien and that the Amwest agreements authorize it to issue a new delivery bond in place of a previously issued delivery bond.

The removal of the re-bonding provision does not change the terms and conditions of the bond because an obligor may continue to re-bond an alien with the concurrence of the government and at no expense to the agency. An obligor’s ability to enter into a new agreement with the Agency’s concurrence is based on fundamental contract principles and restating those principles in the bond form is unnecessary and made the General Terms and Conditions more difficult for an unsophisticated obligor, such as a family member of an alien, to comprehend. Therefore, a statement of an obligor’s ability to re-bond an alien with the concurrence of the government was not included in the revised form.

2. Bond continues in effect when alien is detained by other law enforcement authorities

The commenter also opposed a change to the terms and conditions of the bond that allows for a bond to continue in effect when an alien is detained by local, state, or federal

¹ The Amwest agreements apply only to signatories of those agreements; they are inapplicable to other bond obligors. *Safety Nat’l Cas. Corp. v. Dep’t of Homeland Sec.*, 711 F. Supp. 697, 715 (S.D. Tex. 2008). Currently, the Amwest agreements only apply when an immigration bond is underwritten by American Surety Company with Gonzales & Gonzales Immigration Bonds as the agent.

authorities for 30 or more days. The commenter claimed that the revision was contrary to the Amwest agreements and that the revision may result in an immigration bond remaining open “for decades.” In arguing that the revision violates the Amwest agreements, the commenter relied on a portion of the agreements whereby ICE agreed that it was required to place a detainer on an alien within 30 days of notice of the alien’s detention by another law enforcement agency, and if ICE failed to place a detainer, the bond would be cancelled.

Under the previous version of the bond form, a bond was cancelled automatically if the alien was detained by law enforcement authorities for 30 or more days. The revised bond form removes this condition for cancellation of the bond because certain law enforcement entities disregard ICE detainers, and continuation of the bond is necessary so that ICE may request that the obligor deliver an alien once the alien has been released from the custody of the other law enforcement agency.

This change to the bond form conforms with the Amwest agreements. The Amwest agreements require cancellation of a bond where ICE does not place a detainer, but they do not require cancellation of a bond where ICE properly places a detainer and the detainer is disregarded by other law enforcement authorities. In addition, the proposed revision does not change the possibility that a bond may remain open for many years. Because immigration court proceedings may continue for years before an administratively final order of removal is issued, it is not uncommon under the terms of the previous version of the bond form for an immigration bond to remain open for an extended period while immigration court proceedings are ongoing. Because the commenter is a signatory of the Amwest agreements, those agreements provide the applicable period that a bond posted by the commenter may remain open after issuance of a final order of removal, and that time period remains unchanged after the revisions to the bond form.

3. *Bond cancellation upon voluntary departure as shown by probative documentation*

The revised bond form provides that the bond is cancelled upon “voluntary departure by the bonded alien pursuant to a grant of voluntary departure by the immigration court or Board of Immigration Appeals as evidenced by probative documentation (valid proof) thereof[.]” The commenter stated that this revision may conflict with the Amwest agreements and that it may result in a bond remaining open even though the alien has departed the United States. The commenter also expressed concern about the requirement that the alien’s departure be shown by probative documentation.

The language in the revised bond form does not change the situations where a bond will be cancelled based on an alien’s voluntary departure but instead clarifies terms that were set forth in the prior version of the form. More specifically, the previous version of the bond form contained language that an obligor might have misunderstood to mean that an alien’s temporary departure from the United States resulted in the cancellation of a bond. Bonded aliens sometimes leave the United States temporarily while immigration court proceedings are pending. The revised language clarifies that if an alien temporarily departs the United States and returns, the bond is not subject to cancellation because the alien did not depart the United States permanently. If an alien permanently departs the United States, as evidenced by the alien remaining outside of the United States for an extended period of time, DHS may cancel the bond in its discretion because the bond would no longer serve any useful purpose.

The requirement of probative documentation is also not new; the previous version of the bond form required “valid proof” of the alien’s departure. If ICE is unable to determine that an alien has voluntarily departed based on information in its systems, a bond obligor may submit a Notification of Departure of Alien (Bonded) (Form I-392) to show that the alien has departed the

United States. The Form I-392 has been in use in its current form since December 2007. Thus, the revisions to the current bond form do not represent a change from ICE's existing requirement for appropriate, probative documentation before cancellation of a bond based on an alien's voluntary departure.

4. Notification to surety and to agent

Previous versions the bond form included checkboxes that an entity posting a surety bond could use to indicate whether the agent, the surety, or both should receive bond-related notices. The revised bond form eliminates those checkboxes. The commenter claims that this revision violates the Amwest agreements because they require notices to be sent to both the agent and surety.

ICE removed the checkboxes from the revised form because they were unnecessary. Most surety bond obligors used the checkboxes on the previous version of the form to indicate that notice should be mailed to both the surety and the agent. When an obligor indicates its preference that notice should be issued to both the surety and the agent, the legal effect was that if ICE provided notice to only one obligor, the notice triggered that obligor's duty to act, but it did not trigger the co-obligor's duty to act. *AAA Bonding Agency, Inc. v. Dep't of Homeland Sec.*, 447 F. App'x 603, 609-10 (5th Cir. 2011). For example, if ICE issued a notice only to the agent and the alien was not delivered to ICE as requested, any subsequent bond breach could be enforced against the agent only. Under the revised bond form, ICE will send notices to both co-obligors assuming both are still in business. If ICE sends a notice to one obligor, ICE will seek to enforce any resulting breach determination only against that obligor.

5. Indemnitor information

The commenter noted that the revised bond form that was published by ICE omitted the information line for the “name and address of the person who executed a written instrument with the surety company requesting it to post bond,” also known as the indemnitor. This information line did not appear on the published version of the bond form based on an inadvertent error because it was “hidden” in the word-processing version of the document. This information about the indemnitor was requested on the previous version of the bond form, and the information line will be included in the final version of the revised form.

6. Immediately liable

The commenter expressed uncertainty about the reason that the revised bond form states that an obligor is “immediately liable” upon execution of the bond. The commenter did not provide any specific reason that the revision was objectionable. This revision is being made to clarify that liability for the bond attaches immediately when a bond is posted. The liability can be discharged if the obligor substantially complies with the conditions of the bond and the bond is cancelled.

7. Administratively final breach determination

The commenter questioned the use of the phrase “administratively final breach determination” in the revised form, claiming that the phrase is undefined. However, the general terms and conditions of the bond form explain when a breach determination becomes administratively final. “DHS regulations provide that, upon notification of a breach, the obligor has 30 days in which to file an administrative appeal or motion for reconsideration of the breach. Any obligor who contests a declaration of breach shall file an administrative appeal seeking review of the declaration of breach. A declaration of breach shall be administratively final if not

timely appealed.” This definition is consistent with the definition of administrative finality for previous versions of the form. Moreover, the concept of an administratively final decision is a fundamental principle of administrative law and should be generally understood by any attorney advising clients about immigration bonds.

8. Notice by mail

The commenter noted that ICE removed a reference to notices being issued by mail from the bond form. The commenter stated it was unclear whether ICE will mail notices in connection with immigration bonds. Certain obligors participating in ICE’s eBonds program have agreed to receive electronic notices instead of notices sent by mail. For other obligors, notices will continue to be issued by ICE in the same manner as they were issued under the previous version of the bond form.

9. Riders

The commenter asserted that ICE added a provision referring to “any attached rider or riders specified above” in paragraph C of the bond form. The references to riders were also included in the previous version of the bond form, and the new bond form contains no substantive changes relevant to riders. The commenter claimed to have “often” not received riders. Riders are rarely used with immigration bonds, but if an obligor has a bond that includes a rider, the obligor may contact ICE to request a copy of the applicable rider if necessary.

10. Authority to issue bond

The commenter questioned the removal of references to Section 236 and Section 241 of the Immigration and Nationality Act (INA) in paragraph G.(1) of the bond form, without providing any specific reason why the change was objectionable. ICE removed the references to sections of the INA to eliminate unnecessary surplusage from the terms of the bond and to clarify

that a delivery bond may be used under any applicable authority, including but not limited to Sections 236 and 241 of the INA.

11. Breach upon failure to surrender alien in response to demand

The commenter noted that ICE has removed the qualifier of a “timely” demand before a bond can be breached. Under the revised version of the bond form, a bond is breached upon failure “to surrender the alien in response to a demand while the bond remains in effect.” The commenter argues that the removal of the word “timely” defies prior court rulings that were applicable to signatories of the Amwest agreements.

The deletion of the word “timely” has no effect on bonds posted by obligors who are signatories of the Amwest agreements. Under the Amwest agreements, a delivery bond is cancelled if the demand notice is not issued within the 90-day removal period after a final order of removal. This requirement, which is applicable only to Amwest signatories, remains effective and unchanged by issuance of the revised bond form.

12. Removal of reference to authority to accept voluntary departure bonds

Without stating any specific objection, the commenter stated that ICE has removed a citation to 8 U.S.C. § 1229c in paragraph G.(2) of the revised bond form. ICE removed the citation to eliminate unnecessary surplusage from the terms of the bond. This revision has no substantive effect.

13. Maintenance of status and departure bonds

The commenter observed that the revised bond form includes provisions for maintenance of status and departure (MS&D) bonds. The commenter does not list any specific objection to the section addressing MS&D bonds, stating that it is difficult to determine if this new type of bond complies with applicable law.

MS&D bonds were previously issued by the former Immigration and Naturalization Service using earlier versions of the bond form. Because ICE discontinued issuing MS&D bonds, the provision for that type of bond had been removed from more recent versions of the bond form. However, DHS is considering the issuance of new MS&D bonds. To allow for those types of bonds to be posted using the bond form, the terms applicable to MS&D bonds were added to the bond form.