Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This interim rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. In § 301.53–3, paragraph (c), the entry for Michigan is revised to read as follows:

§ 301.53–3 Quarantined areas.

* * * * *

(c) * * *

Michigan

Upper Peninsula: *Chippewa County.* Brimley area. That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Michigan Route 28 and Crawford Street; then north on Crawford Street to Irish Line Road; then north on Irish Line Road to its end and continuing north along an imaginary line to the Bay Mills/Superior Township line; then north and east along the Bay Mills/Superior Township line to the Lake Superior shoreline; then east along the Lake Superior shoreline to the Bay Mills/Soo Township line; then south on the Bay Mills/Soo Township line to the intersection of the Dafter and Superior Township lines at 6 Mile Road; then south along the Dafter/Superior Township line to Forrest Road; then south on Forrest Road to Michigan Route 28; then west on Michigan Route 28 to the point of beginning. [Note: This quarantined area includes tribal land of the Bay Mills Indian Community. Movement of regulated articles on those lands is subject to tribal jurisdiction.]

Lower Peninsula: All counties, in their entirety (i.e., Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Macomb, Manistee, Mason, Mecosta, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw Sanilac, St. Clair, St. Joseph, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties).

* * * * *

Done in Washington, DC, this 25th day of September 2006.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 06–8424 Filed 9–29–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF JUSTICE

8 CFR Part 1003

[EOIR Docket No. 143F; AG Order No. 2838–2006]

RIN 1125–AA47

Review of Custody Determinations

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This rule adopts, with changes, an interim rule published in the **Federal Register** on October 31, 2001, by the Department of Justice, pertaining to the review of custody decisions by the Executive Office for Immigration Review (EOIR) with respect to aliens being detained by the Immigration and Naturalization Service (INS), now the Department of Homeland Security (DHS). This rule retains the existing regulatory provision for DHS to invoke a temporary automatic stay of an immigration judge's decision ordering an alien's release in any case in which a DHS official has ordered that the alien be held without bond or has set a bond of $10,000 or more, in order to maintain the status quo while DHS seeks expedited review of the custody order by the Board of Immigration Appeals (Board) or the Attorney General. However, this rule clarifies the basis on which DHS may invoke the automatic stay provision, and limits the duration of the automatic stay.

DATES: This final rule is effective November 1, 2006.

FOR FURTHER INFORMATION CONTACT: MaryBeth Keller, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION:

Introduction

On October 31, 2001, the Attorney General published an interim rule to amend the regulations relating to review of custody determinations by immigration judges. The interim rule expanded a preexisting provision first adopted in 1998 for a temporary automatic stay of an immigration judge's decision ordering the release of an alien in certain cases where the INS had determined that no conditions of release were appropriate for an alien or had set an initial bond of $10,000 or more. 66 FR 54909 (Oct. 31, 2001). The purpose of the 2001 interim rule was to provide a means for the INS to maintain the status quo in those cases where it chose to invoke the automatic stay while it was seeking an expedited review of the custody order by the Board. The 2001 interim rule also provided for a temporary automatic stay in those cases where the Commissioner of INS, within five days of the Board's decision, refers a custody decision by the Board to the Attorney General for review.

The Department explained when the interim rule was published that ''This stay is a limited measure and is limited in time—it only applies where the Service determines that it is necessary to invoke the special stay procedure pending appeal, and the stay only remains in place until the Board has had the opportunity to consider the matter.'' 66 FR at 54910. The Department at that time also explained that it was merely

building on the approach of the preexisting automatic stay rule, citing the Board's decision in *Matter of Joseph,* 22 I&N Dec. 660 (BIA 1999). In *Matter of Joseph,* which addressed the 1998 version of the automatic stay rule, the Board observed that:

> The automatic stay provision is intended as a safeguard for the public, as well as a measure to enhance agencies' ability to effect removal should that be the ultimate final order in a given case. It ''preserv[es] the status quo briefly while the Service seeks expedited appellate review of the immigration judge's custody decision. The Board of Immigration Appeals retains full authority to accept or reject the Service's contentions on appeal.''

Id. at 670.

In connection with the provision for a temporary stay of a decision referred to the Attorney General by the Commissioner, the Department explained in 2001 (66 FR at 54910):

> This change in § 3.19 makes explicit, in the context of bond appeals, the general principle that a ''decision of the Board is not final while pending review before the Attorney General on certification.'' *Matter of Farias,* 21 I&N Dec. 269, 282 (BIA 1996; A.G. 1997). This provision for an automatic stay will avoid the necessity of having to decide whether to order a stay on extremely short notice with only the most summary presentation of the issues.

After the adoption of the interim rule, Congress enacted the Homeland Security Act (HSA), which abolished the INS and transferred its functions to DHS. Pub. L. 107–296, tit. IV, subtits. D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002), as amended (codified primarily at 6 U.S.C. 101 *et seq.*). The HSA, however, retained the functions of EOIR (including the immigration judges and the Board) within the Department of Justice, under the direction of the Attorney General. HSA, tit. XI, 116 Stat. at 2273. The transfer of the former INS functions to DHS took effect on March 1, 2003.

In order to reflect the division of authority under the HSA, it was necessary for the Attorney General to promulgate regulations pertaining to EOIR separate from the regulations of the former INS that are codified in 8 CFR chapter I. Accordingly, on February 28, 2003, the Attorney General transferred or duplicated the regulations related to EOIR and certain other functions that the Attorney General retained under the HSA from 8 CFR Chapter I into a new 8 CFR Chapter V and into 28 CFR. 68 FR 9824 (Feb. 28, 2003); 68 FR 10349 (March 5, 2003).

As a result of these changes, the automatic stay rule, previously codified at 8 CFR 3.19(i)(2), is now found at 8 CFR 1003.19(i)(2). The authority to invoke the automatic stay of a decision of an immigration judge pending an expedited appeal to the Board is now vested in DHS. Moreover, the authority to certify a Board decision to the Attorney General for review is now vested in the Secretary of Homeland Security, or in senior DHS officials designated by the Secretary with the concurrence of the Attorney General. *See* 8 CFR 1003.1(h)(1)(iii); *Matter of D-J-,* 23 I&N Dec. 572, 573 & n.1 (A.G. 2003).

More recently, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109–13, Div. B, 119 Stat. 231 (May 11, 2005). Among other things, this law eliminated the jurisdiction of the Federal district courts to review challenges to removal orders through habeas corpus proceedings, and transferred such habeas petitions then pending in district courts to the courts of appeals, to be treated as petitions for review of the removal order. The REAL ID Act, however, does not preclude habeas corpus review of challenges to detention that are independent of challenges to removal orders. *See id.; see also, e.g., Hernandez* v. *Gonzales,* 424 F.3d 42, 42 (1st Cir. 2005) (mem. & order).

Changes Made by This Final Rule

This final rule adopts the interim rule in final form with several changes, in light of the public comments and the Department's experience in adjudicating cases that are subject to the automatic stay rule. These changes are explained here and are further discussed below in the responses to the public comments.

First, in order to allay possible concerns that in some case the automatic stay might be invoked by low-level employees of DHS without supervisory review, or might be invoked without an adequate factual or legal basis, this rule makes two changes in the process for invoking the automatic stay. The final rule provides that the decision to file the Form EOIR–43 (which must be done within one business day of the immigration judge's custody decision) will be subject to the discretion of the Secretary. Under the provisions of the automatic stay rule which are not changed by this final rule, the automatic stay will lapse 10 business days after the issuance of the immigration judge's decision unless DHS files within that time a notice of appeal with the Board presenting DHS's arguments for reversal or modification of the immigration judge's custody decision. This rule adds a new requirement that, in order to preserve the automatic stay, a senior legal official of DHS must certify that the official has approved the filing of the notice of appeal to the Board and that there is factual and legal support justifying the continued detention of the alien.

Second, the final rule provides that the automatic stay will lapse 90 days after the filing of the notice of appeal. DHS, however, may seek a discretionary stay under the existing provisions of 8 CFR 1003.19(i)(1) if the Board has not decided the appeal by the time the automatic stay is expiring. The rule makes clear that DHS may submit a motion for discretionary stay at any time after the filing of its notice of appeal of the custody decision, even well in advance of the 90-day deadline, and can incorporate by reference the arguments in its custody brief in favor of continued detention of the alien, as provided in section 236 of the INA (8 U.S.C. 1226), during the pendency of the removal proceedings against the alien.[1]

The 90-day duration for the automatic stay in bond cases should not be confused with the specific deadlines in the existing rules governing the timeliness of the Board's decisions. Under 8 CFR 1003.1(e)(8), the time for the Board's disposition of appeals is measured from the time the case is ready for adjudication on appeal—that is, the 90-day period for adjudication of single Board member cases begins only after the preparation of the record (including transcripts) and the completion of briefing by the parties. Section 1003.1(e)(8) directs the Board to issue decisions as soon as practicable, with a priority for cases or custody appeals involving detained aliens, but does not set a specific shorter period of time for such priority cases.

In contrast to § 1003.1(e)(8), this final rule measures the 90-day duration of the automatic stay from the date that the notice of appeal is filed. That is a short time frame for action by the Board since it does not include an additional allowance of time for preparation of the record of proceedings and the 21-day period for the filing of simultaneous briefs in appeals involving detained aliens. *See* 8 CFR 1003.5(a), 1003.3(c)(1). In the past, the Board has been able to issue a decision within a 90-day time frame in most automatic stay cases, and the Department expects that the Board will continue to be able to do so in the future.

The Department recognizes, however, that case processing delays may occur that affect preparation of the record and ultimately the timeliness of the Board's

[1] According to EOIR statistics, the immigration judges conducted over 86,000 removal proceedings during Fiscal Year 2004 involving aliens who were detained during the pendency of the removal proceedings.

decision. Such delays can be both internal to the process of preparing a case for adjudication or caused externally by the parties. The Department is adding to the rule several new provisions that should assist in addressing procedural delays that may adversely affect the Board's ability to resolve these custody appeals during the pendency of the automatic stay period. These requirements should improve the Board's priority handling of bond appeals in automatic stay cases.

The final rule directs immigration judges to issue written custody decisions in automatic stay cases within 5 business days after the immigration judge is advised that DHS has filed a notice of appeal, a rule similar to current operating policy and procedure. (In exigent circumstances, the Board may agree to an extension of not more than 5 additional business days.) With rare exceptions, the custody hearings conducted by immigration judges are not recorded or transcribed at the present time, so when a custody decision is appealed it is necessary for the immigration judge to issue a written decision describing the evidence and explaining the result. The regulation already requires that DHS must file the Form EOIR–43 (invoking the automatic stay) within one business day of the immigration judge's decision, but DHS's notice of appeal (after review of the case by a senior legal official) is not due until 10 business days after the immigration judge's decision. The rule also directs the immigration court to prepare and submit the record of proceedings on the custody decision without delay. The Department 's intent is to avoid unnecessary delays before the record of proceedings is submitted to the Board.

In addition, the Department is inserting a provision into the rule directing the Board to track the progress of each custody appeal which is subject to an automatic stay in order to avoid unnecessary delays in completing the record for decision. The Board will notify the parties of the date the automatic stay will expire.

Also, the rule provides that, if the Board grants an alien's request for additional briefing time, then the Board's order will also toll the 90-day period for the same number of days. Such requests for extensions are rare, but they do occur. The premise of this provision is to provide flexibility if the Board grants additional time for the filing of the alien's brief, to ensure that such delays do not impact the ability of the Board to resolve the custody appeal during the period of the automatic stay. This provision does not cover requests by DHS for additional briefing time, as DHS is free to seek a discretionary stay if necessary.

For those appeals where, for whatever reason, the process of preparing the record of proceedings, briefing by the parties, and consideration and decision by the Board is not accomplished within the 90-day duration of the automatic stay, the final rule provides that the automatic stay will lapse at the end of the 90-day period even though the Board has not completed action on the custody appeal. Although the Board gives priority to custody appeals involving detained aliens, pursuant to § 1003.1(e)(8), the Department recognizes that it may not always be possible for the Board to resolve a custody appeal within 90 days after the filing of a notice of appeal because of the complexity of the issues or some unusual delay in the process. In that instance, DHS will be required to seek a discretionary stay under 8 CFR 1003.19(i)(1) pending final action by the Board. DHS should file its motion for discretionary stay a reasonable time before the expiration of the 90-day period in order to avoid the disruptions resulting from last-minute stay motions.

Because the Board generally will already have the record of proceedings and the parties' briefs before it at that point, the Board should be able to determine very promptly whether to grant a discretionary stay in connection with its disposition of the merits of the custody appeal. To ensure that there is no inadvertent gap in the process, the rule provides that, if the Board fails to adjudicate a previously-filed stay motion by the end of the 90-day period, the stay will remain in effect (but not more than 30 days) during the time it takes for the Board to decide whether or not to grant a discretionary stay.

Then, if the Board denies a discretionary stay or issues a decision upholding the immigration judge's custody decision, then the Secretary or designated DHS official will have 5 business days to consider whether to refer the decision for the Attorney General's personal review, as discussed below. This time frame is consistent with the current regulation at § 1003.19(i)(2).

Third, the final rule provides a new limitation on the duration of the automatic stay in the context of the Attorney General's personal review of a custody decision. Under the final rule, if the Secretary or designated DHS official refers a custody decision to the Attorney General within 5 business days after the Board's decision, the automatic stay will continue for 15 business days after the case is referred to the Attorney General. The Attorney General may, of course, grant a further stay in the exercise of his discretion, and the rule provides that DHS's referral of a case to the Attorney General may include a motion and proposed order in support of a discretionary stay. This rule, as revised, will allow a brief period of time for the Attorney General to consider the merits of the referred decision and the arguments presented, and either to act on the referred decision, to decline to intervene, or to order a discretionary stay pending the Attorney General's final decision of the case on the merits. The final rule provides that DHS may include in connection with the referral a motion requesting a discretionary stay if DHS believes that the case requires such a stay, but DHS may also suggest that the legal questions in the case referred to the Attorney General be preserved for decision even if the stay is allowed to terminate. This revised approach is eminently reasonable in connection with the rare and significant cases where the Secretary or designated DHS official refers a custody decision from the Board for the Attorney General's consideration and decision.[2]

The interim rule already provides an automatic stay for 5 business days of a decision by the Board authorizing the release of an alien, in order to allow a brief period of time for the Secretary or a senior DHS official to consider the case personally and decide whether to refer the decision to the Attorney General for his personal review. The final rule preserves the existing provision, but makes a necessary conforming change in light of the new provision setting a fixed date for the expiration of the automatic stay of the immigration judge's decision. This rule provides that the automatic stay will continue for 5 business days not only if the Board issues a decision authorizing the alien's release, but also if the Board denies a discretionary stay or if the Board fails to act prior to the expiration of the automatic stay on a DHS motion for discretionary stay, since the result in those cases would also be the release of the alien from custody. In either case, the premise of this rule is to allow the Secretary or designated DHS official the

[2] Former Attorney General Janet Reno had previously elaborated on issues relating to staying a decision by the Board pending review of the merits by the Attorney General in *Matter of A-H-*, A.G. Order 2380–2001 (A.G. Jan. 19, 2001). *See In re E-L-H-*, 23 I&N Dec. 700 (A.G. 2004) (attachment). This rule sets a specific time limit with respect to custody appeals referred to the Attorney General, providing that the stay will extend only 15 business days after the Board's decision is certified to the Attorney General, unless the Attorney General grants a discretionary stay pending his further review.

opportunity within a brief 5-day period to consider whether to refer the case to the Attorney General, before DHS is obligated to release the alien. This result is similar to the mandate rules in effect in many courts, which provide that decisions of the court do not take effect until the issuance of the mandate a fixed number of days after the court's decision. Under the existing provisions of the rule, the automatic stay will lapse if DHS does not refer the case to the Attorney General within 5 business days.

Fourth, although the change was not included in the interim rule, the final rule clarifies the language of the existing stay provision in 8 CFR 1003.19(i)(1) to refer to the authority of DHS to seek ''a discretionary stay (whether or not on an emergency basis)'' at any time. This is not a substantive change in the applicability of this provision, but is a more accurate description of the Board's existing stay authority under this provision rather than the current shorthand term ''an emergency stay.'' The Board itself already refers to a stay under § 1003.19(i)(1) as a ''discretionary stay'' and considers whether to grant a stay as such. *See, e.g., Matter of Joseph,* 22 I&N Dec. at 662 (''the Board granted the Service a temporary discretionary stay of the Immigration Judge's release order pursuant to our authority under 8 CFR 3.19(i)(1)''). The rule properly allows DHS to seek a stay under § 1003.19(i)(1) (whether or not on an emergency basis) at any time. However, the actual decision granting a stay of an immigration judge's custody decision under § 1003.19(i)(1) has never been limited to ''emergency'' situations on the merits of the custody appeal, but a stay may be granted in the exercise of discretion by the Board.

Finally, the final rule makes stylistic changes to § 1003.19(i) reflecting the transfer of authority from the former INS to DHS and the redesignation of § 3.19(i) as § 1003.19(i). The rule also makes a technical change to the organization of the automatic stay provisions by removing provisions relating to the Board's procedures from § 1003.19, which relates to the immigration judge proceedings, and transferring them to a more appropriate location in the Board's regulations at § 1003.6(c) and (d) (covering the Board's review of an immigration judge's decision, and Attorney General review, respectively). Paragraph (d) codifies the Attorney General's existing authority to grant a case-by-case discretionary stay in any case certified to the Attorney General for review.

Public Comments

The interim rule provided for a 60-day comment period which ended on December 31, 2001. The Department received six comments from various organizations and will respond to them by subject matter. Five commenters were opposed to the interim rule in general, raising issues regarding its constitutionality, the breadth of its provisions, and the present meaningfulness of custody review, and challenging the need to change the preexisting stay provisions. Several of those commenters also offered alternative suggestions to achieve the stated goal of the rule. One commenter supported the interim rule in general but urged that the automatic stay provisions be applied selectively.

After careful review and consideration of the comments, the Department has chosen not to adopt the comments and suggestions precisely as stated. However, the Department has decided to make several changes to the interim rule, in response to the public comments and the Department's experience in adjudicating cases subject to the automatic stay, to limit the duration of the automatic stay and clarify the circumstances in which it is invoked. These changes, taken together, substantially respond to the merits of the comments and establish an unquestionably firm legal basis for the implementation of the final rule in the future.

Due Process—Freedom From Restraint

Five commenters stated that the interim regulation is unconstitutional because it violates the Due Process Clause of the Fifth Amendment. Specifically, the commenters assert that the interim regulation violates the substantive due process right to be free from restraint because it is too broad and not narrowly tailored.

The commenters cited several Supreme Court cases for the proposition that aliens are to be afforded due process upon entry into the United States. The most recent Supreme Court decision cited in the comments, *Zadvydas* v. *Davis,* 533 U.S. 678 (2001), states that due process guarantees apply to '' 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.'' *Id.* at 693. Commenters contended that the Department could point to no authority holding that the fundamental right to be free from bodily restraint is reserved only to citizens. Several commenters criticized the regulation based on their view that aliens in removal proceedings should be entitled to a right to be free from restraint that is analogous to the right that applies to the pre-trial detention of criminal defendants.

Moreover, commenters stated that the supplementary language in the interim rule skirted or misstated important Federal court cases. For example, the Department cited *Wong Wing* v. *United States,* 163 U.S. 228, 235 (1896), and *Doherty* v. *Thornburgh,* 943 F.2d 204 (2d Cir. 1991), in support of the interim rule. The commenters, however, asserted that the Department ignored the finding in those cases that all aliens present in the United States have full due process rights.

Conversely, the commenter in support of the interim rule stated this constitutionally protected liberty interest is weak in the case of illegal aliens who have no well-founded expectations of being permitted to remain in the United States. According to the commenter, their detention can be avoided if they are willing to depart the United States voluntarily. This commenter noted that the custody review process provides for administrative appeals of detention decisions even though there is no constitutional requirement to do so, that individuals detained pursuant to the automatic stay provisions can challenge their detention by seeking a writ of habeas corpus from a Federal district court, and that, therefore, aliens are provided with ''all the 'process' they are due under the Fifth Amendment's due process clause.''

In response, the Department notes that the due process arguments of the commenters opposed to the interim rule are not well founded and fundamentally misstate the relevant jurisprudence. The Department extensively considered the constitutional issues relating to the detention of aliens in general and the automatic stay rule in particular when the Attorney General first adopted the automatic stay provision in 1998. *See* 63 FR 27441, 27448–49 (1998). The following discussion reviews the jurisprudence as it relates to the detention of aliens during removal proceedings, and explains how this rule functions within the statutory framework. When properly considered, there is no question that the authority for this rule is well grounded in law.

Aliens have no right to bond during removal proceedings. The Supreme Court has repeatedly ''recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process,'' *Demore* v. *Kim,* 538 U.S. 510, 523 (2003), and has recognized that ''Congress eliminated any presumption

of release pending deportation, committing that determination to the discretion of the Attorney General,'' *Reno* v. *Flores,* 507 U.S. 292, 306 (1993); *see also Carlson* v. *Landon,* 342 U.S. 524, 534 (1952). Under longstanding provisions of the Immigration and Nationality Act, the Attorney General has had broad detention authority. *Flores,* 507 U.S. at 294 (''Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing''). Now, after enactment of the HSA, the Secretary of Homeland Security exercises that discretion in carrying out the detention and enforcement authority formerly administered by the INS, and the Attorney General and his delegates (the Board and the immigration judges) exercise that discretion in the review of the custody decisions initially made by DHS. *See Matter of* D-J-, 23 I&N Dec. at 573–76.

Neither the regulations nor administrative decisions place any official limit on the discretion that the Attorney General or his delegates exercise with respect to the granting of bond or parole during removal proceedings. *See id.* at 575–76 (''As recognized by the Supreme Court, section 236(a) does not give detained aliens any *right* to release on bond. *See Carlson* v. *Landon,* 342 U.S. 524, 534 (1952). Rather, the statute merely gives the Attorney General the authority to grant bond if he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted * * *. Further, the INA does not limit the discretionary factors that may be considered by the Attorney General in determining whether to detain an alien pending a decision on asylum or removal.''). Release on bond is, in fact, ''a form of discretionary relief.'' *Barbour* v. *INS,* 491 F.2d 573, 578 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974). Given that many aliens in removal proceedings are clearly engaged in a continuing violation of United States law by their mere presence in the United States, release on bond is an extraordinary act of sovereign generosity. *See Reno* v. *American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 491 (1999) (''in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law''); *INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1039 (1984) (''The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws''); *Gomez-Chavez* v. *Perryman,* 308 F.3d 796, 800–01 (7th Cir. 2002) (an alien ''can have no liberty interest in remaining in violation of applicable United States law'').

Moreover, removal proceedings are civil proceedings, and aliens have no substantive due process right to be at large during the pendency of removal proceedings against them because they have no fundamental right to be in the United States at all. *See Carlson* v. *Landon,* 342 U.S. 524, 534 (1952) (''So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders''); *DeMartinez* v. *Ashcroft,* 363 F.3d 1022, 1028 (9th Cir. 2004) (''Aliens have no fundamental right to be in the United States and Congress has exceedingly broad power over the admission and expulsion of aliens.'') (internal quotations omitted); *Munoz* v. *Ashcroft,* 339 F.3d 950, 954 (9th Cir. 2003) (rejecting alien's substantive due process argument, because control over immigration is a ''fundamental sovereign attribute exercised by the Government's political departments''). In addition, another primary distinction between a criminal defendant and an alien detained pending his removal proceedings is that the alien may secure his release at any time by agreeing to leave the country. *See Richardson* v. *Reno,* 180 F.3d 1311, 1317 n.7 (11th Cir. 1999) (unlike criminal cases, immigration detention ''is not entirely beyond [the alien's] control; he is detained only because of the removal proceedings, and he may obtain his release any time he chooses by withdrawing his application for admission and leaving the United States''); *Parra* v. *Perryman,* 172 F.3d 954, 958 (7th Cir. 1999) (detained alien ''has the keys in his pocket''); *Doherty* v. *Thornburgh,* 943 F.2d 204, 212 (2d Cir. 1991) (detained alien ''possessed, in effect, the key that unlocks his prison cell''). Aliens who are clearly deportable (often admittedly so) and seek only discretionary relief have even less at stake, because they have no liberty interest in discretionary relief applications. *See Tovar-Landin* v. *Ashcroft,* 361 F.3d 1164, 1167 (9th Cir. 2004); *United States* v. *Aguirre-Tello,* 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *Mireles-Valdez* v. *Ashcroft,* 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft,* 344 F.3d 805, 808 (8th Cir. 2003); *Smith* v. *Ashcroft,* 295 F.3d 425, 429 (4th Cir. 2002); *Huicochea Gomez* v. *INS,* 237 F.3d 696, 699–700 (6th Cir. 2001); *Tefel* v. *Reno,* 180 F.3d 1286, 1300 (11th Cir. 1999); *Ahmetovic* v. *INS,* 62 F.3d 48, 53 (2d Cir. 1995); *Adras* v. *Nelson,* 917 F.2d 1552, 1558 (11th Cir. 1990); *Achacoso-Sanchez* v. *INS,* 779 F.2d 1260, 1264 (7th Cir. 1985).[3] Finally, as observed, unlike most criminal defendants, immigration law violators are engaged in an ongoing violation of law. *Lopez-Mendoza,* 468 U.S. at 1046 (applying the exclusionary rule in a deportation proceeding that sought to prevent ongoing illegal activity as opposed to punishing the alien for past transgressions would allow courts ''to close their eyes to ongoing violations of the law''). Thus, to the extent an illegal alien in immigration proceedings has any constitutional right to remain at large, it is a weak one.

Congress clearly provided for the Attorney General and the Secretary to have broad discretionary authority with respect to the detention of aliens pending removal. The INA places no substantive limits on their discretion to detain or grant bonds or parole to aliens during removal proceedings. INA section 236(a), 8 U.S.C. 1226(a), grants unfettered discretion to grant or deny bonds, and section 236(b) gives discretion to revoke bonds. The HSA transferred the former INS's detention, removal, enforcement, and investigative functions to DHS. *See also* INA § 103(a)(3), 8 U.S.C. 1103(a)(3) (2000) (granting broad authority to the Secretary to issue regulations with respect to the administration of the immigration laws); INA § 236(e), 8 U.S.C. 1226(e) (providing that discretionary bond and parole decisions

[3] Although the initial custody decision by an immigration judge often may take place at an early stage of the removal proceedings, there are also instances where the immigration judge or the Board are making custody decisions after an alien has conceded removability at a master calendar hearing but is seeking discretionary relief from removal, or even after an immigration judge has ordered the alien removed during the time that the merits issues are still pending on appeal before Board. For example, in *Matter of D-J-*, the Board made its decision on the alien's custody appeal more than one month after the alien had already been denied asylum and ordered removed by the immigration judge, but before the alien's merits appeal had been addressed by the Board. 23 I&N Dec. at 582 (''The IJ's denial of the respondent's application for asylum increases the risk that the respondent will flee if released from detention'').

Moreover, for those cases that are the subject of petitions for review in the circuit courts, it is very often the case that the alien has either conceded removability before an immigration judge or been found removable, or at least does not contest that anything other than discretionary relief from removal is at issue. In such cases, where there is no claim for mandatory relief, the alien can secure his freedom by agreeing to leave the country, and the only cost is merely the abandonment of a discretionary relief application in which he or she has no liberty interest anyway.

are not within any court's jurisdiction to set aside or review).

The important immigration-related purpose of detaining aliens in appropriate cases during the pendency of removal proceedings is plainly evident from the Department of Justice Inspector General's report in February 2003, which updated and largely mirrored the results of the Inspector General's 1996 report. In the 2003 report, the Inspector General found that the former INS had successfully carried out removal orders and warrants with respect to almost 94% of aliens who had been detained during the pendency of their removal proceedings. However, in stark contrast, only 13% of final removal orders and warrants were carried out against non-detained aliens (a group that includes aliens ordered released by DHS, immigration judges, or the Board). The Inspector General specifically noted the former INS was successful in removing only 6% of non-detained aliens from countries that the United States Department of State identified as sponsors of terrorism; only 35% of non-detained aliens with criminal records; and only 3% of non-detained aliens denied asylum. Office of the Inspector General, U.S. Department of Justice, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders,* Report Number I–2003–004 (Feb. 2003).

Statistics prepared by the Executive Office for Immigration Review also substantiate that large numbers of respondents who are released on bond or on their own recognizance fail to appear for their removal hearings before an immigration judge. For the last 4 fiscal years, 37% (FY 2004), 41% (FY 2003), 49% (FY 2002), and 52% (FY 2001) of such respondents have failed to appear for their scheduled hearings, and the immigration judges have either issued in absentia removal orders or administratively closed those removal proceedings. EOIR, FY 2004 Statistical Year Book at H3 (March 2005).[4] These numbers—*totaling over* 52,000 ''*no-show*'' *aliens in just the last four years after being released from custody*—reflect only those respondents released from custody who fail to appear for their removal hearings before the immigration judges. (They do not include the substantial additional number of non-detained aliens who *do* appear for their immigration judge hearing, but then fail to surrender after their removal order becomes final and join the growing ranks of hundreds of thousands of absconders currently at large.) Given that over 52,000 aliens who had been released from custody—45% of the total number of respondents who were released on bond or on their own recognizance—failed to show up for their scheduled removal hearings in just the past 4 years, the Attorney General has very good reason to provide a special process for prompt review by the Board of initial decisions by the immigration judges in certain cases. DHS can then invoke that process, on a discretionary basis, but only in those cases where DHS had detained an alien without bond or had set a bond of $10,000 or more, prior to being required to release the alien.

Past experience shows that DHS has invoked the automatic stay in only a select number of custody cases. For example, the EOIR statistics indicate that, in FY 2004, the immigration judges conducted some 33,000 custody hearings and the Board adjudicated 1,373 custody appeals. Yet, DHS sought an automatic stay only with respect to 273 aliens in FY 2004—and only 43 aliens in FY 2005.

Due Process—Indefinite Detention

Several commenters also suggested that the interim rule provides for indefinite detention of aliens and is therefore contrary to the Supreme Court's decision in *Zadvydas* v. *Davis,* 533 U.S. 678 (2001).

In response, the Department notes that these arguments misstate the procedural posture of these cases. *Zadvydas* was a case where removal proceedings were completed but the government was unable to remove the alien from the United States, and the alien contended that continued detention under section 241(a) of the INA served no immigration-related purpose as an aid to deportation in light of the difficulties in repatriating the alien.

By contrast, the detention cases covered by the automatic stay in this final rule only concern the detention of aliens under section 236 of the INA during the pendency of removal proceedings against them. The duration of such detention is necessarily limited by the ultimate completion of those removal proceedings, and the immigration-related purpose of such detention during the pendency of removal proceedings as an aid to removal of aliens who ultimately receive final orders of removal cannot be doubted, for the reasons summarized herein and discussed at greater length in the relevant judicial decisions relating to section 236 of the INA and the supplementary information accompanying the 1998 and 2001 automatic stay rules. The Supreme Court in *Kim* contrasted that case with *Zadvydas,* and found that because ''the statutory provision at issue governs detention of deportable criminal aliens *pending their removal proceedings* * * *[,] the detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings.'' *Kim,* 538 U.S. at 527–28. The Court also found that the detention during the pendency of removal proceedings was not ''indefinite'' or ''potentially permanent,'' because the detention has ''a definite termination point,'' that being the completion of proceedings. *Id.* at 528–29.

As the Supreme Court noted in *Kim,* an alien's detention during the pendency of removal proceedings is necessarily bounded by the period of time necessary to bring the underlying removal proceedings themselves to a conclusion. *Id.* Once the alien becomes the subject of a final order of removal, the alien is no longer detained under the authority of section 236 of the INA, and any issues relating to the automatic stay would become moot. At that point, detention of aliens subject to final orders of removal is governed instead by section 241(a) of the INA, 8 U.S.C. 1231(a), which generally requires detention of such aliens until they can be removed from the United States.

In fact, in most cases the alien will be detained pursuant to the automatic stay rule for a period of time substantially shorter than the length of the removal proceedings. The stay remains in effect only until the Board has ruled on the custody appeal, and the automatic stay is extinguished by the Board's order on the custody appeal, even if the Board has not yet considered the alien's removal proceedings on the merits. *See Matter of Joseph,* 22 I&N Dec. 799 (BIA 1999) (*Joseph II*). The existing regulations, 8 CFR 1003.1(e)(8), already require the Board to give ''a priority for cases or custody appeals involving detained aliens'' and also provide direction with respect to how long appeals should take: in general, *all appeals* assigned to a single Board member will be disposed of within 90 days after completion of the record on

[4] These EOIR statistics for ''released'' aliens who are released on bond or on their own recognizance cover only those aliens who were released from custody after the initiation of removal proceedings against them.

EOIR also tracks a separate category of ''non-detained'' aliens—including those aliens who were never taken in custody by DHS at all (such as many asylum applicants) as well as those aliens who had been apprehended but were released by DHS prior to or at the time of the initiation of removal proceedings against them. Of those ''non-detained'' aliens, 38% failed to appear for their removal hearings during the last 4 fiscal years—a total of almost 130,000 ''no-show'' aliens in just the last 4 years. FY 2004 Statistical Year Book at H2.

appeal, and all appeals assigned to a three-member panel of the Board will be disposed of within 180 days. Id. Thus, the automatic stay ''is a limited measure and is limited in time—it only applies where the [DHS] determines that it is necessary * * * and the stay only remains in place until the Board has had the opportunity to consider the matter.'' 66 FR at 54910. Under this final rule, the automatic stay of the decision of the immigration judge is further limited to 90 days after the filing of the notice of appeal, even if the Board has not yet completed action on DHS's custody appeal or an appeal on the merits of the removal proceedings.

We note the Ninth Circuit's recent decision concluding that DHS is not authorized to continue an alien in detention for an indefinite period more than six months where there is no significant likelihood of the alien's removal in the reasonably foreseeable future. *See Nadarajah* v. *Gonzales,* 443 F.3d 1069 (9th Cir. 2006). Nadarajah was an arriving alien and was therefore detained under section 235(b) of the INA. As a result, he was not eligible for an IJ custody hearing pursuant to 8 CFR 1003.19(h)(2)(i)(B), and the case therefore has no direct bearing on the rules for stays in custody hearings. That said, however, the *Nadarajah* court read *Demore* v. *Kim* more narrowly than suggested above. Nothing in *Nadarajah,* however, suggests any infirmity in this final rule. This rule imposes a flat 90-day limitation on the duration of the automatic stay in any case in which DHS pursues an appeal of an IJ custody order; includes several provisions to expedite the timing of the Board's adjudication of such appeals; and also imposes a brief fixed period for an automatic stay in those rare custody cases certified for review by the Attorney General. Thus, there is no issue of indefinite detention in connection with review of custody issues under this rule. Moreover, although IJ custody proceedings are distinct from removal proceedings, 8 CFR 1003.19(d), the likelihood that the alien will or will not be able to obtain relief from removal on the merits is an important factor the IJ and the Board consider in evaluating whether an alien who is seeking to be released may pose a risk of flight. *See Matter of* X-K-, 23 I&N Dec. 731, 736 (BIA 2005) (''Some aliens may demonstrate to the Immigration Judge a strong likelihood that they will be granted relief from removal and thus have great incentive to appear for further hearings.''); *Matter* of D-J-, 23 I&N Dec. 572, 582 (A.G. 2003) (''The IJ's denial of the respondent's application for asylum increases the risk that the respondent will flee if released from detention.''); *Matter of Adeniji,* 22 I&N Dec. 1102,____(BIA 1999) (''In view of [the alien's] criminal record and history of other questionable or deceitful behavior, we do consider him to present a risk of flight should he lose his case on the merits.'').

It is also important to note that the automatic stay rule in no way creates a new class of mandatory detention. As explained, aliens who are subject to mandatory detention under section 236(c) of the INA—the process that was explicitly upheld by the Supreme Court's decision in *Kim*—are detained without any individualized risk assessment, and *DHS has no choice whether or not to detain the alien.* By contrast, aliens subject to the automatic stay are being detained under the authority of section 236(a) of the INA and are in fact *still in the process* of receiving just such an individualized assessment. In any event, as discussed, the Supreme Court in *Lopez* v. *Davis* affirmed the authority of agencies ''to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.'' 531 U.S. 230, 244 (2001). DHS is able to invoke the automatic stay with respect to aliens whom it believes are potentially dangerous, or are at risk of absconding prior to the conclusion of removal proceedings, or whose cases DHS believes otherwise present important considerations calling for detention during the course of removal proceedings. The INA in no way withheld authority for the Attorney General to rely on rulemaking in making the discretionary judgment about whether such aliens must be released during the brief period of time required for DHS to pursue an expedited appeal of the immigration judge's decision and for the Board to render a decision on the custody issue.

In any event, as discussed above, the Department has amended the final rule to provide additional limitations on the duration of the automatic stay both with respect to custody decisions of the immigration judges on appeal to the Board, and with respect to decisions of the Board that are referred for review by the Attorney General. The multiple time limits built into the final rule plainly obviate any argument that the detention authorized pursuant to the automatic stay is in any way ''indefinite,'' much less ''potentially permanent'' as the Supreme Court found in *Zadvydas* with respect to the post-final order detention of an alien whom the government was unable to remove.

After the expiration of the automatic stay pursuant to the strict time limits set forth in this rule, the IJ's custody order will not be stayed unless the IJ, the Board, or the Attorney General orders a discretionary stay pending a final decision. Such case-by-case discretionary stays have long been available in immigration proceedings, and may be granted consistent with applicable legal standards during the time needed to allow the decisionmaker to complete action on a pending appeal.

Due Process—Meaningful Opportunity To Challenge Detention

Several commenters also contended that the interim rule deprives aliens of due process by preventing them from having a meaningful opportunity to challenge their detention before a neutral arbiter. In their view, DHS should not be able to override an immigration judge's individualized decision to order an alien's immediate release by invoking an automatic stay in connection with DHS's expedited appeal to the Board challenging the immigration judge's release order. One commenter stated, ''the [DHS] has complete control of a noncitizen's custody status for months * * *. The regulation gives local [DHS] personnel the unilateral authority to hold noncitizens in detention for significant periods of time regardless of the decision rendered by an immigration judge.''

In response, the Department notes that the INA places no restrictions on the Attorney General's or the Secretary's discretion to prescribe procedures for the adjudication of bond requests by aliens during removal proceedings, and agencies are generally afforded great latitude in organizing themselves internally and in developing procedures for carrying out their responsibilities. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 544 (1978) (''agency should normally be allowed to exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.''); *Dia* v. *Ashcroft,* 353 F.3d 228, 238 (3d Cir. 2003) (en banc) (''The Supreme Court has forcefully emphasized that '[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their

multitudinous duties.' '') (*citing Vermont Yankee*).

This is particularly true in the immigration area. In finding that individual bond hearings are not required to detain aliens during proceedings pursuant to section 236(c) of the INA, the Supreme Court in *Kim* stated that ''when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.'' 538 U.S. at 528; *see also id.* at 521 (''In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'') (quoting *Matthews* v. *Diaz,* 426 U.S. 67, 79–80 (1976)); *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999) (''judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations''); *Matthews* v. *Diaz,* 426 U.S. 67, 81–82 (1976) (''Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution'').

The Act itself contains no requirement whatsoever for the immigration judges to conduct custody reviews for aliens detained by DHS during the pendency of removal proceedings. In contrast to section 240 of the INA, which expressly refers to the role of immigration judges in conducting removal proceedings, section 236 of the INA makes no reference at all to the immigration judges, but vests the discretion in the Attorney General to determine the processes and standards for exercising discretion in determining which aliens to release from custody during the pendency of proceedings, and under what conditions of release. Thus, the authority that the immigration judges exercise in conducting custody reviews is drawn solely from the delegation of authority by the Attorney General by regulation—including 8 CFR 1003.19, the very rule being amended in this final rule.

The Attorney General and the Secretary have exercised their discretion to create separate but interrelated systems for determining whether aliens in removal proceedings ought to be released. Under this regime, an initial custody determination is made by DHS enforcement officials acting in an adjudicative capacity. *See* 8 CFR 236.1(a). The Supreme Court has affirmed the combination of adjudicative and investigative roles in the former INS. See *Marcello* v. *Bonds,* 349 U.S. 302, 311 (1955).

Though allowing further review of DHS custody decisions is not required by law, the Attorney General has chosen to provide that, if an alien is dissatisfied with that determination, he or she may ask an immigration judge to review the conditions of his or her custody, subject to further review by the Board. *See* 8 CFR 1003.19(c)(1)–(3), 1236.1(d)(1). The immigration judges and the Board are delegates of the Attorney General in carrying out his authority under the INA. See INA § 101(b)(4), 8 U.S.C. 1101(b)(4) (''An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe''); 8 CFR 1003.1(a)(1) (''The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.''); *see also Matter of Hernandez-Casillas,* 20 I&N Dec. 262, 289 n.9 (BIA 1990; A.G. 1991). Under the Attorney General's regulations, the decision of the immigration judge is not the final step in the agency proceedings because it is subject to appeal to the Board, and ultimately to the possibility of review by the Attorney General.

In most cases, an immigration judge's order granting an alien release will result in the alien's release upon the posting of bond or on recognizance, in compliance with the immigration judge's decision. The Attorney General has determined, however, that certain bond cases require additional safeguards before an alien is released during the pendency of removal proceedings against him or her. In these cases, the immigration judge's order is only an interim one, pending review and the exercise of discretion by another of the Attorney General's delegates, the Board. Barring review by the Attorney General, it is the Board's decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond. Thus, the Attorney General made an operational decision under section 236(a) of the INA with respect to how his discretion should be exercised in a limited class of cases where DHS, which now has independent statutory authority in this area, had sought to detain the alien without bond or with a bond of $10,000 or more and disagrees with the immigration judge's interim custody decision. *See* 66 FR 54909 (Oct. 31, 2001); 63 FR 27441, 27448 (May 19, 1998); 8 CFR 1003.19(i)(2). The Attorney General provided, as a matter of discretion, that the alien should continue to be detained for a period of time necessary to allow for the Board to review the case. Section 1003.19(i)(2) provided that, when this procedure is invoked by DHS as a matter of discretion, the immigration judge's decision is not a final decision; instead, in those cases the Board, not the immigration judge, issues the final agency action. Moreover, in those rare cases where the Attorney General reviews a custody decision by the Board, the rule also provides that the decision of the Board is not final while it is under review by the Attorney General. *See* 66 FR at 54910. This rule may properly be viewed as a categorical discretionary denial of early release to this class of aliens. *See Lopez* v. *Davis,* 531 U.S. 230 (2001).

This additional safeguard is needed for all the reasons stated by the Attorney General in connection with the adoption of the earlier automatic stay rules in 2001 and 1998. A custody decision that allows for immediate release is effectively final if the alien turns out to be a serious flight risk, a danger to the community, or otherwise did not merit bond. DHS's right to appeal is effectively vitiated if the alien absconds after being released pursuant to the immigration judge's order—and, as noted above, over 52,000 aliens, some 45% of the total number of aliens who were released on bond or on personal recognizance during the pendency of their proceedings, failed to appear for their removal hearings in just the last 4 years. Although the automatic stay is not available in all cases, and is invoked by DHS only in a relatively small number of cases that are within the scope of the rule, the automatic stay provides an important safeguard to the public in those cases where DHS determines that it should be invoked. The rule preserves the status quo briefly while DHS seeks expedited appellate review of the immigration judge's custody decision. The stay provides the Board an opportunity to review the case in an expedited but orderly fashion, on a record, with full briefing, and to resolve the conflicting views of DHS and the immigration judge with respect to whether the alien merits bond. The Board retains full authority to accept or reject DHS's contentions on appeal. The Board's rejection of a number of INS and DHS custody appeals since the interim rule was promulgated demonstrates the Board's independence in exercising this authority.

The rule also briefly preserves the stay for the rare case in which the Attorney General will personally review a case referred to him by a senior DHS official. For example, in *Matter of D-J-,* 23 I&N Dec. at 581, DHS

successfully invoked the automatic stay in order to overturn decisions that had excluded consideration of national security concerns pertaining to the granting or denying of release for aliens pending completion of removal proceedings. For cases personally reviewed by the Attorney General, however, this rule provides that the automatic stay will expire 15 business days after the case is referred to the Attorney General. The Attorney General may grant a discretionary stay pending final disposition of the appeal.

The automatic stay rule does not deprive an alien of the opportunity meaningfully to challenge his or her detention during the pendency of removal proceedings or an individualized determination of whether the alien was a flight risk or danger to the community. The alien in *Kim*, of course, received no such individualized determination, and yet the statutory scheme of mandatory detention of criminal aliens was upheld. Moreover, unlike *Kim*, in cases involving the automatic stay where release is a matter of discretion, the alien receives several individualized, discretionary assessments of whether he or she merits bond. As discussed, the alien first receives an individualized assessment by DHS, followed by an individualized assessment by an immigration judge, and then an individualized assessment by the Board. The commenters pointed to no authority suggesting that an alien must be released while the Attorney General and his delegates are still in the process of determining whether the alien merits bond. In fact, the opposite has long been the law. *See Carlson* v. *Landon,* 342 U.S. 524, 538 (1952) (''Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.'').

In sum, the automatic stay rule establishes a process, well within the discretion of the Attorney General, to regulate the workings of the decision-making process and provide for the opportunity for review not only by the immigration judge but also by the Board in certain cases or even by the Attorney General personally before an alien is released from custody. It is the Attorney General's prerogative to establish a process to reconcile opposing decisions by DHS and an immigration judge with respect to whether an alien should be released prior to a decision by the Board on review. There is nothing in the Due Process Clause requiring that an alien must be released from custody immediately upon the issuance of an initial decision by an immigration judge. Instead, the ultimate decision regarding the alien's custody will be structured and rendered according to the processes established under § 1003.19(i)(2).

Principles of International Law

Another commenter suggested that the interim rule violates international laws and principles prohibiting arbitrary detention. The commenter cites Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), ratified by the United States in 1992, which states, ''Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'' The comment also cites a 1988 United Nations General Assembly resolution which states, ''a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.'' *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). The commenter believes that, by allowing a DHS official to, in effect, ''overturn'' the decision of the immigration judge while it is being appealed, the effectiveness of the immigration judge's determination is rendered meaningless.

In response, the Department notes that the automatic stay rule does not conflict with the provisions that the commenter cites. The rule does not render the immigration judge's decision meaningless, but simply provides a process for DHS, in certain cases, to be able to present its arguments in favor of continued detention to the Board, the reviewing authority constituted by the Attorney General, before DHS is obligated to release the alien. Allowing for an expedited appeal to the Board is an integral part of the Attorney General's process for reviewing the custody decisions initially made by DHS. We also note that unlike the specific constitutional and statutory authority for the detention of aliens in connection with the completion of removal hearings against those aliens, discussed at length in the responses to other comments, *cf. Matter of D-J-,* 23 I&N Dec. at 584 & n.3, the obligations cited by the commenter are not binding as a matter of domestic law.

Scope of the Interim Rule

In support of the proposition that the interim rule is too broad, several commenters contrasted the rule with the provisions of section 236A of the INA, 8 U.S.C. 1226a, which was enacted by Congress in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law No. 107–56, 115 Stat. 272 (Oct. 26, 2001). Specifically, commenters suggested that the rule goes beyond the detention parameters set by Congress in the provisions of section 236A of the INA, which authorizes DHS to hold an alien in certain circumstances for no more than 7 days without the alien's being charged with an immigration or criminal offense. Beyond that, the commenters note, it authorizes the Attorney General and Deputy Attorney General to indefinitely hold an alien after certifying that there are ''reasonable grounds to believe'' that the alien is involved in terrorism. In contrast, the commenters noted that the automatic stay regulation can be invoked for any immigration offense whenever DHS sets a bond of $10,000 or more or determines that no conditions of release are appropriate for the alien. The commenters suggest the interim rule belies the narrow case-by-case review standards set forth in section 236A of the INA and, moreover, that it is not narrowly tailored to achieve a legitimate government interest.

In response, the Department notes that these commenters confused the automatic stay, and the statutory authority upon which it is based, with the additional detention authority granted to the Attorney General in section 236A of the INA. At the outset, it is important to note that this authority under section 236A was granted *in addition* to the already broad detention authority possessed by the Attorney General under section 236 of the INA, which is discussed at length in previous portions of this supplementary information. Nothing in section 236A purports to limit the Attorney General's authority under section 236; in fact, section 236A(c) expressly provides that the provisions of section 236A do not apply to any other provision of the INA. Further, section 236A provides the Attorney General with broad authority in national security cases to detain aliens for a period commencing even before removal proceedings are commenced, and continuing after proceedings are terminated. By contrast, the automatic stay is in effect only while proceedings are pending, and then only

until the Board (or in certified cases the Attorney General) can review the immigration judge's discretionary custody decision. Aliens subject to section 236A have no right to an individualized determination by an immigration judge.

Moreover, as discussed above, the Supreme Court's decision in Kim has made clear that the government is not obligated to follow the least burdensome means when dealing with deportable aliens. 538 U.S. at 528.

DHS's Decisionmaking Process To Invoke the Automatic Stay

The commenters contended that hundreds of decentralized DHS officers would be operating with low accountability to set the bond amounts which, based on the officer's discretion, could easily be set at $10,000 or higher. The utilization of the automatic stay provisions, the commenters assert, would thereafter ensure that aliens could be held in DHS detention for many months. Commenters also suggested that the regulation was indiscriminate in that it could be applied regardless of the nature of the immigration offense.

Another commenter who generally supported the interim rule contended that there would be little reason for immigration judges to render decisions in bond cases if DHS filed automatic stays on a routine basis. The commenter favored a selective application of the automatic stay rule in order to prevent the diminution of the immigration judge's role in bond proceedings. The comment suggested that some form of DHS review be implemented to prevent any routinization, for example, by requiring that the initial decision by DHS to invoke an automatic stay in a case should be reviewed by another DHS official not involved in that particular case.

The Department has considered these comments, but declines to abandon or modify the automatic stay rule in response to these objections except, as noted above, to provide that the decision to file Form EOIR–43 to invoke the automatic stay will be subject to the discretion of the Secretary, and that a senior legal official of DHS, in order to preserve the automatic stay, must approve the filing of the notice of appeal and the use of the automatic stay in the case.

Subject to these important qualifications, the final rule preserves the discretion of DHS to determine on a case-by-case basis whether it is appropriate to invoke the automatic stay. DHS does not invoke the automatic stay in every case in which a DHS officer had set a bond of at least $10,000 or had denied bond but an immigration judge orders the alien's release on a lower bond or on recognizance. Invoking the automatic stay—*i.e.*, calling for expedited review by the Board and not merely by an immigration judge before an alien is required to be released—is appropriately left within the sound discretion of the Secretary and his enforcement officials, and the final decision will be approved by a senior legal official of DHS, after consideration of the circumstances of the case and the applicable custody standards. Within these parameters, the Secretary and DHS officials are free to implement internal guidance regarding the circumstances in which an automatic stay will or will not be invoked. In a case in which the automatic stay has been invoked, if a senior legal official fails to certify that the official has approved the filing of a notice of appeal within ten business days after the immigration judge's decision, the automatic stay will lapse, although DHS will still be free to seek a discretionary stay pursuant to 8 CFR 1003.19(i)(1).

DHS's detention of aliens during the pendency of removal proceedings necessarily incurs great costs to the government, and necessarily requires the exercise of judgment in the allocation of scarce funds and limited detention spaces with respect to a very large number of aliens who must either be detained or released by DHS, whether during the pendency of removal proceedings or after the issuance of final orders of removal for those aliens. Since the interim rule and this final rule provide for DHS to invoke the automatic stay provision as an exercise of discretion, with respect to the continued detention of aliens who are not subject to mandatory detention, DHS will inevitably be obligated to consider such competing priorities and limited resources in each case in deciding whether or not to pursue an appeal in an automatic stay case. Each year, tens of thousands of aliens are released on bond or on recognizance after being placed into removal proceedings, yet in the nearly 4 years since the interim rule was promulgated in 2001 there have only been a few hundred custody appeals adjudicated by the Board in which DHS (or the former INS) invoked the automatic stay rule in connection with an appeal of an immigration judge's custody decision.

The argument that the automatic stay rule should be restricted only to certain kinds of immigration charges ignores the fact that the appropriateness of an alien's release during the pendency of removal proceedings against the alien is not necessarily related to the underlying immigration charge. In many cases, aliens in removal proceedings present obvious risks of flight without regard to the particular charges against them; large numbers of absconding aliens had been charged, for example, as an overstay or as being present in the United States without inspection or parole. As noted above, the Inspector General's report found that the former INS was able to effectuate the removal of only 3% of non-detained aliens who had unsuccessfully sought asylum, after those aliens received final orders of removal. Moreover, experience amply demonstrates that initial predictions by DHS or an immigration judge as to an alien's flight risk often are contradicted in practice, since over 52,000 aliens (45%) who were released on bond or on recognizance in the last 4 fiscal years after the initiation of removal proceedings failed to appear for their scheduled removal hearings. An alien charged with overstaying a visa may, depending on the case, be a serious flight risk, a danger to the community, or even a potential threat to the national security. In many cases, DHS may choose only to bring a ''lesser'' charge such as overstaying a visa, rather than a more serious charge of deportability or inadmissibility, since the end result—removal of the alien from the United States—would be the same in any event and the government would not be required to bear the greater expense of establishing and adjudicating the merits of the more serious removal charge.

The Prior Stay Rule

Five commenters contended that the pre-existing regulatory provision for obtaining a stay of a custody decision already achieved the goals of the interim rule. The goal of the interim rule, as expressed by several of these commenters, was to remedy the concern over the ''bureaucratic challenge of timely filing stay motions by the [DHS] and issuance of interim stay by the Board prior to bond being posted for a noncitizen.'' To that end, commenters challenged the Department's assertion in the supplemental language that the preexisting process would result in a rush to the Board clerk's office to file stay motions.

Specifically, the commenters stated that the Board had already granted stays on an interim basis, as requested by the former INS, now DHS, via brief summary motions. The Board, the commenters note, had also granted the former INS time thoroughly to brief its position and even to add evidence to the record. Moreover, the commenters

contended that the interim rule exaggerated the possibility of the government's releasing an alien before DHS can file a motion for a stay because the detainees are in DHS custody to begin with, and they asserted that, under the preexisting rules, there had been no incidents of release because of the Board's untimely response to a DHS stay request. Three commenters provided the same example of two aliens who were held on security-related suspicions and were ultimately released on bond, contending that the individuals would have been held for months longer, without necessity, if the interim rule were in effect at that time. Several commenters also found the tone of the supplemental language to be disrespectful to the Board, perceiving that the language implied that the Board was not diligent in its role under the pre-existing stay provision.

In response, the Department notes that the commenters substantially downplay the unprecedented circumstances during which the Attorney General developed and promulgated the interim automatic stay rule in 2001, at a time when a substantial influx of aliens being detained in connection with investigations or removal proceedings were expected to seek orders of release from the immigration judges. The automatic stay process was intended to provide an orderly process for the expedited consideration of custody decisions in those cases where the former INS (now DHS) had determined that an alien should not be released during the period of time necessary for DHS to pursue an expedited appeal to the Board.

Indeed, the immediate circumstances of the fall of 2001 were not the only impetus for promulgation of the interim rule. The interim rule was but one means to contend with the enormous growth of the immigration-related administrative caseload, which in recent years has swelled dramatically and has continued to mount since the issuance of the interim rule: From fiscal year 2001 to fiscal year 2004, the number of new cases before the immigration judges grew from 282,000 to approximately 300,000, and the number of cases received by the Board jumped from 28,000 to 43,000. Since the interim rule was promulgated in 2001, the Attorney General has taken other steps to improve the processes for the Board's adjudicatory functions and the timeliness of the Board's disposition of pending matters in general. *See, e.g., Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 FR 54878 (Aug. 26, 2002). Moreover, as suggested by the Supreme Court's analysis in *Vermont Yankee* and *Lopez* v. *Davis*, and in the face of such growing pressures on the adjudicatory process, the Attorney General is free to use the rulemaking process to make certain determinations on a categorical basis regarding the stay process and is not required to obligate the Board to expend its energies engaging in individualized, case-by-case determinations regarding the granting or the length of discretionary stays pending review by the Board in every case. Such case-by-case adjudications of discretionary stay motions can often be time consuming, labor intensive, and disruptive of the adjudicatory process. Rather, the Attorney General has reasonably determined that the Board's energies are better spent in focusing on the merits of the custody appeals themselves.

Even though the process established in the interim rule is sound and is a measured response to maintain an orderly adjudicatory system involving multiple levels of administrative review and a challenging caseload, the Department has determined to make several modifications in the automatic stay process, as discussed above. Among other things, these changes limit the duration of the automatic stay in several respects, and highlight the need for DHS to obtain a discretionary stay under the provisions of § 1003.19(i)(1) in those cases where, for whatever reason, a custody appeal to the Board cannot be resolved within the time allowed for an automatic stay.

Suggestions for a Narrower Stay Rule

As a related point, several commenters suggested that the Attorney General should have implemented a more limited automatic stay measure in lieu of the provisions set forth in the interim rule. Specifically, the commenters suggested implementing a stay procedure that is triggered by notice to the immigration judge, with DHS having only until close of business the next day to file a motion to stay with the Board.

One commenter suggested that the provision be more limited in time and should follow the model of section 236A of the INA, as enacted by the PATRIOT Act—specifically, that it be triggered only by personal authorization of the Attorney General or Deputy Attorney General.

In response, the Department has considered the alternative suggestions of the commenters but declines to adopt them for the same reasons that have already been explained in prior portions of this supplementary information. The obligation for DHS to file a case-by-case motion for stay within one day of an immigration judge's decision, after having provided notice to the immigration judge of DHS's intent to seek a stay, would potentially be even more onerous than the preexisting case-by-case process that the Attorney General sought to address by implementing the interim rule amending the automatic stay provision. Requiring personal consideration of stay issues by the Attorney General or the Deputy Attorney General in every case would be impracticable as well as completely unnecessary, given that the purpose of the automatic stay rule is to provide a means for DHS to seek an expedited review of custody decisions *by the Board* before being obligated to release certain detained aliens whom DHS has strong reason to believe should not be released. The automatic stay rule provides a separate process in connection with the rare instances of the Attorney General's review of custody decisions by the Board, and this final rule also implements a refinement in that process to tailor the duration of the automatic stay.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule extends the scope of the existing automatic stay provision to cover cases in which DHS has denied release of an alien pending the completion of removal proceedings or has set a bond of $10,000 or more, in order to allow DHS to maintain the status quo while it pursues an expedited appeal of an order to release the alien from custody. This rule does not affect small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of

1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB).

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

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

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 1003

Administrative practice and procedure, Immigration, Organization and functions (government agencies).

■ Accordingly, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1229, 1229a, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Section 1003.6 is amended by adding new paragraphs (c) and (d), to read as follows:

§ 1003.6 Stay of execution of decision.

* * * * *

(c) The following procedures shall be applicable with respect to custody appeals in which DHS has invoked an automatic stay pursuant to 8 CFR 1003.19(i)(2).

(1) The stay shall lapse if DHS fails to file a notice of appeal with the Board within ten business days of the issuance of the order of the immigration judge. DHS should identify the appeal as an automatic stay case. To preserve the automatic stay, the attorney for DHS shall file with the notice of appeal a certification by a senior legal official that—

(i) The official has approved the filing of the notice of appeal according to review procedures established by DHS; and

(ii) The official is satisfied that the contentions justifying the continued detention of the alien have evidentiary support, and the legal arguments are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing precedent or the establishment of new precedent.

(2) The immigration judge shall prepare a written decision explaining the custody determination within five business days after the immigration judge is advised that DHS has filed a notice of appeal, or, with the approval of the Board in exigent circumstances, as soon as practicable thereafter (not to exceed five additional business days). The immigration court shall prepare and submit the record of proceedings without delay.

(3) The Board will track the progress of each custody appeal which is subject to an automatic stay in order to avoid unnecessary delays in completing the record for decision. Each order issued by the Board should identify the appeal as an automatic stay case. The Board shall notify the parties in a timely manner of the date the automatic stay is scheduled to expire.

(4) If the Board has not acted on the custody appeal, the automatic stay shall lapse 90 days after the filing of the notice of appeal. However, if the Board grants a motion by the alien for an enlargement of the 21-day briefing schedule provided in § 1003.3(c), the Board's order shall also toll the 90-day period of the automatic stay for the same number of days.

(5) DHS may seek a discretionary stay pursuant to 8 CFR 1003.19(i)(1) to stay the immigration judge's order in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay. DHS may submit a motion for discretionary stay at any time after the filing of its notice of appeal of the custody decision, and at a reasonable time before the expiration of the period of the automatic stay, and the motion may incorporate by reference the arguments presented in its brief in support of the need for continued detention of the alien during the pendency of the removal proceedings. If DHS has submitted such a motion and the Board is unable to resolve the custody appeal within the period of the automatic stay, the Board will issue an order granting or denying a motion for discretionary stay pending its decision on the custody appeal. The Board shall issue guidance to ensure prompt adjudication of motions for discretionary stays. If the Board fails to adjudicate a previously-filed stay motion by the end of the 90-day period, the stay will remain in effect (but not more than 30 days) during the time it takes for the Board to decide whether or not to grant a discretionary stay.

(d) If the Board authorizes an alien's release (on bond or otherwise), denies a motion for discretionary stay, or fails to act on such a motion before the automatic stay period expires, the alien's release shall be automatically stayed for five business days. If, within that five-day period, the Secretary of Homeland Security or other designated official refers the custody case to the Attorney General pursuant to 8 CFR 1003.1(h)(1), the alien's release shall continue to be stayed pending the Attorney General's consideration of the case. The automatic stay will expire 15 business days after the case is referred to the Attorney General. DHS may submit a motion and proposed order for a discretionary stay in connection with referring the case to the Attorney General. For purposes of this paragraph and 8 CFR 1003.1(h)(1), decisions of the Board shall include those cases where the Board fails to act on a motion for discretionary stay. The Attorney General may order a discretionary stay pending the disposition of any custody case by the Attorney General or by the Board.

■ 3. Section 1003.19 is amended by revising paragraph (i), to read as follows:

§ 1003.19 Custody/bond.

* * * * *

(i) *Stay of custody order pending appeal by the government—*

(1) *General discretionary stay authority.* The Board of Immigration Appeals (Board) has the authority to stay the order of an immigration judge redetermining the conditions of custody of an alien when the Department of Homeland Security appeals the custody decision or on its own motion. DHS is entitled to seek a discretionary stay (whether or not on an emergency basis) from the Board in connection with such an appeal at any time.

(2) *Automatic stay in certain cases.* In any case in which DHS has determined that an alien should not be released or has set a bond of $10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR–43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR–43 is subject to the discretion of the Secretary.

Dated: September 25, 2006.

Alberto R. Gonzales,

Attorney General.

[FR Doc. E6–16106 Filed 9–29–06; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 420

RIN 1904–AB63

State Energy Program

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is publishing a final rule that amends the State Energy Program regulations to incorporate certain changes made to the DOE-administered formula grant program by the Energy Policy Act of 2005 (EPACT 2005).

DATES: This rule is effective November 1, 2006.

FOR FURTHER INFORMATION CONTACT: Eric W. Thomas, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, State Energy Program, EE–2K, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–2242, e-mail: *eric.thomas@ee.doe.gov,* or Chris Calamita, Esq., U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–1777, e-mail: *Christopher.Calamita@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 123 of the Energy Policy Act of 2005 (EPACT 2005) (Pub. L. 109–58) amended Title III, Part D of the Energy Policy and Conservation Act (EPCA) (Pub. L. 94–163), which pertains to State energy conservation plans. The submission of such plans is required for participation in the DOE State Energy Program for providing formula grants to States for a wide variety of energy efficiency and renewable energy initiatives. This final rule amends the DOE State Energy Program regulations in Part 420 of Title 10 of the Code of Federal Regulations to incorporate the EPACT 2005 amendments.

Section 123 of EPACT 2005 amended section 362 of EPCA (42 U.S.C. 6322) to provide, in a new subsection (g), that the Secretary of Energy shall, at least once every three years, invite the Governor of each State that has submitted a State energy conservation plan to DOE to review and, if necessary, revise the State plan. EPACT 2005 provides that in conducting this review, the Governor should consider the energy conservation plans of other States within the region, and identify opportunities and actions that may be carried out in pursuit of common energy conservation goals. With the issuance of this final rule, DOE amends 10 CFR 420.13 to include a new paragraph (d) that sets forth this new statutory requirement.

Section 123 of EPACT 2005 also amended section 364 of EPCA (42 U.S.C. 6324) to provide that the energy conservation goal in State plans must call for a 25 percent or more improvement in the efficiency of State energy use in calendar year 2012 as compared to calendar year 1990. Previously, EPCA required a State energy conservation plan goal consisting of a 10 percent or more improvement in energy efficiency in calendar year 2000, as compared to calendar year 1990. DOE is amending 10 CFR 420.13(b)(3) to include the new efficiency goal.

II. Rationale for Final Rulemaking

DOE is issuing today's action as a final rule, without prior notice and opportunity for public comment, because DOE is incorporating the EPACT 2005 revisions to the State Energy Program without substantive change and this action is non-discretionary. In this circumstance, the provision of notice and an opportunity for comment is unnecessary.

III. Procedural Requirements

A. Review Under Executive Order 12866, ''Regulatory Planning and Review''

This final rule is not a ''significant regulatory action'' under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking,* 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, (68 FR 7990) to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. The Department has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.* Because this final rule consists of regulatory amendments for which a general notice of proposed rulemaking is not required, the Regulatory Flexibility Act does not apply.

C. Review Under the Paperwork Reduction Act of 1995

This rulemaking will impose no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

DOE has determined that this rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of Appendix A to Subpart D, 10 CFR