



Chapter 2: Planning, Programming, Budgeting, and Execution

Section 2.12 – ICE Enforcement Fee Review and Guidance

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Introduction

In *A Glossary of Terms Used in the Federal Budget Process*, the Government Accountability Office (GAO) defines a user fee as a fee assessed to users for goods or services provided by the Federal Government. User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public.

When authorized, user fees allow U.S. Immigration and Customs Enforcement (ICE) to accomplish necessary functions while preserving discretionary annual appropriations used to support critical operations. This document establishes a governance and oversight structure for managing the following: 1) the biennial fee review, 2) unobligated carryover balances, 3) cost recovery, and 4) new fee proposal framework. This policy is established to ensure ICE documents processes for managing differences in collections and costs, establishes balance targets, conducts program reviews, and addresses identified deficiencies. The DHS Office of the Chief Financial Officer (OCFO), in coordination with the Fee Governance Council, will provide oversight and compile data from ICE that will provide Congress and other ICE stakeholders with the information necessary to ensure fee programs are operating effectively and efficiently.

Responsibilities

The **ICE Chief Financial Officer (CFO)** establishes, oversees, and updates all financial management activities including, but not limited to, financial policy development, budget formulation, asset and facilities management and internal controls consistent with the mission and strategic goals of the Department of Homeland Security.

The **ICE Office of Budget Planning and Performance (OBPP)** is responsible for coordinating the Biennial Fee Review (BFR) with ICE stakeholders.

The **ICE Budget Execution team** is responsible to brief the CFO and DCFO monthly on projected fee collections, spend plan and execution of fee accounts.

Policy

1. U.S. Immigration and Customs Enforcement Biennial Fee Review

1-1. Background

This section outlines the policy and procedures for conducting the biennial fee review (BFR) and reporting results, to include recommendations regarding ICE services and associated fees that convey special benefits to recipients beyond the general public.

Title 31, U.S. Code, Section 902(a)(8), and Office of Management and Budget (OMB) Circular Number A-25 require, on a biennial basis, ICE review existing fees, make recommendations on adjusting such fees, and review all other programs to determine

whether additional fees should be assessed for government services.

1-2. Process and Requirements

- a. The BFR shall be completed each even fiscal year by ICE. The BFR shall be designed to determine whether changes to existing fee levels are required; whether new fees need to be established; and identify any management and operational deficiencies.
- b. The ICE Office of Budget Planning and Performance is responsible for coordinating the BFR with ICE stakeholders, including user fee programs which have been granted fee authority, ICE Office of Regulatory Affairs and Policy (ORAP), ICE Office of the Principle Legal Advisor (OPLA_, and any other interested and impacted program office. (ICE is not responsible for conducting reviews on behalf of another federal agency for which ICE collects fees.).
- c. The DHS OCFO will establish a SharePoint collaboration site that includes guidance and a template for the BFR. The guidance and template will be updated as needed. The DHS OCFO will inform ICE stakeholders via email regarding updates or changes to the guidance and/or template.
- d. In coordination with ICE stakeholders, ICE OBPP shall conduct a review of all USER fee programs to determine if any adjustments to fees are necessary. Findings shall be documented in the template.
- e. The ICE OBPP shall conduct a review of all programs to determine if a new fee should be established and document findings in the template.
- f. The ICE OBPP compiles, assesses, and reports the biennial fee reviews, results and/or updates, deficiencies, and recommendations to ICE CFO.
- g. Upon ICE CFO's review and approval, ICE will submit BFR outcomes and approved recommended actions to DHS via the SharePoint collaboration site in accordance with the timeline established by DHS OCFO in advance of the cycle.
- h. The outcomes of the BFR and any approved actions will be included in the annual performance report, or other reporting mechanism, consistent with the CFO Act and OMB Circular A-25.
- i. The ICE OBPP will track and report to the Budget Director on the progress of the approved action, such as any legislative or regulatory action required to establish or adjust a fee (or fees) (see sections 4 and 5 in this chapter)
- j. The ICE Budget Execution Chief shall provide monthly briefings and

reporting on the fee projections, spend plan, and execution of fee accounts monthly to the CFO and DCFO by the 10th business day of each month.

- k. The ICE OCFO will also provide quarterly updates to DHS OCFO on progress.

1-3. Biennial Fee Review Template Procedures

To ensure an accurate review, ICE OBPP will coordinate with the subject matter expert(s) designated by each ICE stakeholder office to complete a BFR template for all existing fees or any new fee(s). See Appendix A for a sample template. The review shall document the following items:

- a. *Component*: the name of the ICE Component that has the authority to impose the fee(s) and the name of the beneficiary Component of the fee.
- b. *Fee/Program Name*: the name of the fee(s).
- c. *Point of Contact*: name, title, phone number, and email of the primary and secondary individuals who completed the fee review.
- d. *Review Date*: the month and year (e.g., December 2019) in which the review is submitted by ICE to DHS OCFO.
- e. *Previous Biennial Review Date*: the month and year (e.g., March 2014) in which the previous review was submitted to DHS OCFO.
- f. *Fee Description*
 - 1) *Spending Category*: indicate either “mandatory” or “discretionary” as defined in OMB Circular A-11, Section 21.3.
 - 2) *Authority*: the citation of the U.S. Code that provides ICE with authority to impose, collect, spend, or provide other disposition of the fee(s). The date such authority expires should be clearly stated in the document.
 - 3) *Regulation*: the citation of the Code of Federal Regulations (CFR) or other means by which ICE publishes the administrative details of the fee(s) to the regulated service recipient.
 - 4) *Service Provided*: a description of the Federal service that is provided to the regulated entity.
 - 5) *Service Recipient*: a description of the individual or entity that derives a special benefit from the Federal service.
 - 6) *Unit Rate*: the monetary amount of the fee(s) imposed per unit of service.

- 7) *Rate Setting Methodology*: brief description of the way the fee amount(s) was determined. The description must address whether the fee is intended to be a full-cost recovery.

g. Analysis

- 1) *Collections*: the annual amount of collections for the most recent full five fiscal years (FYs). For example, if the review is for FY 2018, provide annual collections for FYs 2013-FY 2017. Provide the five-year total of the collection amounts. The detailed information that supports the documented collections should be retained by ICE.
- 2) *Obligations & Expenses*: the annual amount of obligations and expenses for the most recent full five fiscal years in accordance with section 6(d) of OMB circular A-25. For example, if the review is for FY 2018, provide annual expenses for FYs 2013-FY 2017. Provide the five-year total of the expense amounts. Detailed information that supports the documented expenses should be retained by ICE.
- 3) *Unobligated Carryover*: the unobligated balances that are available from the prior fiscal year(s) in multi-year and no-year accounts. Indicate balances at the beginning and end of the fiscal year. See Section 2, *Unobligated Carryover Balance Guidance for Fee Accounts*, for detailed guidance.

h. Findings

- 1) *Deficiencies*: document any issues that were detected during the review. Such issues could include, but are not limited to: fee rate(s) that is (are) not properly recovering the full cost of the service(s) being provided, the shortage or excess of carryover revenue, expiring or altering fee authority, insufficient regulatory guidance, problem with the distribution or expenditure of fee revenue, court proceedings, etc.
- 2) *Recommendations*: document recommended actions to address identified deficiencies. If a recommended action requires regulatory action, confer with the Office of Regulatory Affairs and Policy to develop a regulatory outline and timeline for implementation.
- 3) *Other*: document any other information that is not already captured in the review ICE or the general public may need to formulate an overall assessment of the fee(s).

i. Cost Recovery (note: see Section 3 of this policy for detailed cost recovery guidance)

- 1) *Collections and expenses*: indicate the amount of fee collected and total eligible expenses over the five-year period.

- 2) *Cost Recovery Percentage*: the amount of fee collected divided by the total expenses eligible to be paid for by the fee for the most recent full five fiscal years.
- 3) *Date of last fee rate adjustment*: indicate month/year.
- 4) *Previous efforts to adjust the fee rate(s)*: document the methodology that was used to attempt to adjust the fee rate and provide a description of whether the efforts were successful and why/why not. If not, provide what actions are needed to address this shortfall, such as operational cutbacks, or a potential adjustment to the rate. Confer with Office of Regulatory Affairs and Policy for support in conducting a fee rate assessment.
- 5) *Explanation for why ICE and/or DHS should not pursue full cost recovery*: provide any information indicating why the full cost of the services/activities *should not* be recovered via fees, including descriptions of shortfalls and any cash flow implications associated with not receiving full cost recovery.

1-4. Deficiency and Recommendation Status

The ICE OBPP will meet with ICE stakeholders at least once a year to discuss and update the listing of deficiencies and recommendations, including any fees that do not achieve full cost recovery and to discuss best practices, lessons-learned, and challenges.

2. Unobligated Carryover Balance Guidance for Fee Accounts

2-1. Background

This section outlines strategies ICE can leverage to establish minimum and maximum carryover balance targets for fee accounts. This guidance applies to fee accounts that are established to directly fund or reimburse operations and those accounts that have the authority to carryover funds from one fiscal year to another until fully expended. Accounts comprised of revenue from fines are not subject to this policy.

2-2. Carryover Balance Targets

Carryover balance targets enable ICE officials to effectively monitor the status of fee accounts. It is important to develop and leverage accurate reports that can identify potential issues with carryover balances.

The SF-133 Report on Budget Execution is one tool ICE leverages to monitor carryover balances on a monthly basis. The SF-133 report depicts fee account operating profiles by presenting the beginning account balance, any recovery of prior year obligations, obligations/expenditures, fee collections, and other collections.

In addition, the DHS Fee Collections Scorecard is another tool that is available to DHS OCFO and Components that tracks a user fee’s carryover anticipated collections, and actual collections to allow senior leadership to regularly monitor the financial health trends of user fee programs.

For programs that rely heavily on fee collections to fund operations, it is critical that they maintain adequate available funds to meet daily obligation and outlay requirements. Unlike Federal programs financed by discretionary appropriations receiving annual Treasury warrants that establish a cash balance with Treasury after enactment of appropriations, many fee accounts possess a permanent, indefinite appropriation and warrant authority that allows immediate access to the fee collections. For no-year accounts, this allows unspent funds collected in previous FYs to be carried forward and used to support operating requirements in the current FY. Authority to incur obligations from new fee collections and carryover is subject to apportionments by OMB.

Maintaining sufficient cash balances will allow ICE to incur obligations throughout the FY to support ongoing operations, regardless of operating status or whether ICE is under a Continuing Resolution, for some period.

2-3. Managing the Carryover Balance

Assessment of carryover balance projections should be undertaken throughout the FY based on actual spending and fee revenue collections. The most basic projections can use historical monthly actuals to forecast obligations/expenditures, fee collections, prior-year recoveries, and other financial data deemed suitable. If feasible, projections should account for external drivers (i.e., fee filing seasonality, criminality rates, humanitarian relief efforts, policy changes, etc.) that impact spending and fee filing trends. By comparing planned spending to projected collections, ICE can evaluate projected surpluses/deficits to determine whether the accounts will maintain an appropriate level of funding to ensure continuity of operations from the end of the current FY into the succeeding FY, absent an enacted appropriation. Fee recipients should actively monitor the fiscal status of each account on a regular basis (i.e., monthly, quarterly, etc.), and act when the available balance is projected to either be too low or too high at year-end. Management and administration of ICE fee accounts should be carried out in a manner that ensures adequate carryover balances are generated and retained to:

- a. Sustain operations at the beginning of a new FY;
- b. Serve as contingency funding in the event of an unexpected decline in fee collections;
- c. Cover the start-up costs of new or expanded programs before sufficient revenues from such programs are collected;
- d. Cover the costs of processing all pending workload; and,

- e. Cover other valid contingencies.

Unless allowed by law, carryover fees should not be used to cover the start-up costs of new or expanded programs before sufficient revenues from such programs are collected.

In support of the management and administration of fee accounts, the following sections provide guidance on establishing minimum and maximum carryover balance targets.

2-4. Minimum Target

Fee programs should establish a minimum carryover balance target that, when combined with receipts, ensures fee account obligations do not exceed available funding. The minimum carryover target can vary for each individual fee account based on the seasonality of program obligations and the collection of the fees. The ICE OBPP should evaluate account cash flow patterns and fee collection trends to determine at what point or period during the FY (i.e., first quarter, first five months of FY, etc.) the available fee account funds should not be decreased below the minimum carryover target in order to avoid potential spending deficits. Below are three examples of methods to use to establish the minimum carryover target:

- a. *An average of actual first quarter (Q1) obligations during the last three FYs.* The minimum carryover balance would be equivalent to estimated first quarter obligations, assuming they are consistent with actual obligations over the last three FYs. This method would produce a larger reserve than may be needed as it does not factor in projected current year fee collections. In other words, it allows sufficient time for current year collections to be realized by Q2 without hindering operations in Q1.
- b. *An average of the actual Q1 difference between obligations and fee collections during the last three FYs.* The first quarter of each FY is a period when fee account obligations exceed fee collections (deficit). This approach would identify and cover any estimated deficits during that time period, thereby functioning as a contingency reserve.
- c. *An average of the actual largest periodic deficits during the last three FYs.* Comparing the seasonality of collections (inflows) to historical spending (outflows) can help mitigate risk for programs with irregular collection cycles. This approach would establish a carryover target at a level sufficient to cover any estimated deficits during the FY time period. For example, if a fee program typically experiences monthly deficits (obligations exceeding revenues) from January through March, an average deficit amount could be calculated through the end of that time period and that amount established as the minimum

carryover balance target. This approach would produce the largest reserve target as it assumes the significant seasonal low in fee collections experienced in prior FYs is confronted in future FYs. Some collections skew towards Q3 and Q4. In this instance, there can be a long period where fee account obligations exceed fee collections (deficit).

- d. *The planned total Q1 spending plus the annual net sequestration difference.* The Budget Control Act of 2011 established a Federal spending sequestration that is recalculated each new FY based upon the upcoming FY's appropriations and projected revenues. This approach would calculate the net difference between the sequestration of the prior FY and the upcoming FY. The net difference would then be added to the planned Q1 spending of the upcoming FY. This will produce a large minimum carryover target that would ensure Q1 obligations are met while providing sufficient time for the remaining quarters to be evaluated.

In cases where an initial analysis comparing the monthly revenue forecast to the monthly planned spending yields a larger planned deficit amount through the same period than the results of the methods discussed above, then consider adopting the planned deficit amount as its minimum target for the FY. If ICE anticipates a user fee falling below the minimum carryover balance targets the component must notify the DHS OCFO to discuss potential solutions in order to mitigate the risk of a violation of the Anti-Deficiency Act.

2-5. Maximum Target

Establishing a maximum target protects against accumulating an excessive fee account carryover balance, which may be an indicator that actual program operating costs are less than forecasted. The following examples, either alone or in combination depending on the requirements of the respective fee account, could lead to an excessive carryover balance:

- a. Actual carryover is more than necessary to complete all pending workload.
- b. Current fees are higher than necessary for a program to effectively process its workload while operating at a break-even level, resulting in fee collections that exceed spending (surplus).
- c. Actual carryover exceeds the contingency funding necessary to support operations (or other valid contingencies) in the event of an unexpected decline in fee collections.
- d. Actual carryover exceeds the start-up costs of new or expanded programs before sufficient revenues from such programs are collected.

Maximum carryover balance targets should be set for each fee account. For fee

accounts where revenue is specifically associated with processing a given workload, the maximum carryover balance target should be sufficient to cover the essential spending that is required to complete the processing and delivery of the pending workload. An exception shall be made for amortization projects, which are on a multi-year payment program and could increase the given fiscal year carryover target until the set amortization period has been expended. In other words, if the fee account were to stop receiving new fee collections, the available carryover balance must be sufficient to cover the necessary expenses to fully process the pending workload. This should be equivalent to the estimated deferred revenue balance on the general ledger, presuming that the fees collected represent the actual cost of processing the relevant workload and the deferred revenue balance is an accurate representation of the dollar value of the work needed to process the pending workload. Consequently, the maximum carryover balance target could fluctuate from FY to FY based on the status of the pending workload.

It is important to evaluate the correlation between underspending and pending workloads so to mitigate service delays and provide acceptable customer service. Consideration should also be given to whether a defined level of performance delay may be acceptable to fee-paying customers (i.e., 5% or 10% above the maximum level of pending workload). If there is tolerance for some level of service delay, then this could be considered when defining the maximum carryover target. Anything in excess of the acceptable performance delay threshold would not only cause carryover balances to increase, but likely signal that poor customer service was being provided. Other relevant factors should be taken into consideration depending on the nature of the fee account.

Requiring fee programs to establish a maximum carryover balance target can improve internal management of fee accounts as well as mitigate the risk of overcharging customers and recovering more than the full cost necessary to fund program operations. The active management of carryover balances will enable ICE to determine appropriate courses of action when balances are determined to be too high. Such actions may include lowering fees, deciding not to implement a recommended fee increase to draw down the carryover balance, increasing hiring to process new and pending workload within acceptable timeframes, identifying additional eligible expenses, or, in the case of statutory fees, advising DHS that a fee adjustment is necessary.

As previously noted, the periodic monitoring of carryover balances will help ICE OCFO officials to determine if corrective action is necessary. Depending on the timing and situation (i.e., duration of program lifecycle), when the carryover balance is near, or has fallen below, the minimum carryover balance target, ICE OCFO officials may be able to reduce or delay spending. In contrast, ICE OCFO officials may decide to investigate the root cause if the balance is growing and near or above the maximum carryover balance target.

3. Cost Recovery Guidance

3-1. Background

U.S. Immigration and Customs Enforcement should consult Circular A-25 when designing and managing their fee accounts; however, specific fee authorities set in statute take precedence over Circular A-25. Circular A-25 provides exceptions for programs that are not intended to fully recover costs, such as when fee levels are set in statute or when setting fees at a market price is appropriate.

The objective of this section is to ensure user fee programs set fees at a level that recovers full cost, unless an exception applies, by providing guidance for managing the difference between program costs and collections.

3-2. General Policy

U.S. Immigration and Customs Enforcement should take steps to recover the full cost of their activities, to the extent permitted by law. To comply with Circular A-25, ICE should assess and adjust fees, if necessary, to ensure they appropriately recover the full cost of providing the government services. Statutory authority will always take precedence over Circular A-25 when determining if a fee can or should be set to recover full cost.

Full cost recovery is defined as recovering all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service. To determine whether a fee-funded program recovers full cost, ICE will need to identify all costs associated with delivering the good, resource or service (including costs incurred by other Federal agencies with or without reimbursement). The percentage of cost recovery is the amount of collections per fiscal year divided by the costs associated with providing the good or service. ICE will strive to recover full cost unless statutory language provides restrictions, or if an exception is approved by OMB.

Cost Recovery = Annual Collections / Annual Eligible Expenses

Pursuant to Circular A-25, eligible costs for user fees include, but are not limited to:

- a. Direct and indirect compensation costs (to include retirement, healthcare benefits, base salaries, overtime, and premium pay).
- b. Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment.
- c. Management and supervisory costs.
- d. Costs of enforcement, collection, research, establishment of standards, and regulation, including any required environmental impact statements.

The following section (*3-3 Identifying Eligible Expenses*) defines possible methodologies for identifying eligible expenses.

In accordance with Circular A-25, whenever prudent (politically, operationally, practically), charges should be set as rates rather than fixed dollar amounts in order to adjust for changes in costs to the Government or changes in market prices of the good, resource, or service provided.

If a fee is set at a rate that does not achieve full cost recovery, fee programs must provide an explanation for the difference and recommendation for adjusting the fee(s). Fee programs must also document reasons (if any) for not pursuing the recommended actions. The process for determining whether to pursue a fee adjustment, or alternatively, not to pursue one when a shortfall is identified, requires discussion and agreement between the fee program, the Office of Regulatory Affairs and Policy, and other ICE stakeholders.

3-3. Identifying Eligible Expenses

According to Circular A-25, full cost should be determined or estimated from the best available records of the agency, and new cost accounting systems need not be established solely for this purpose. However, if a new system is being developed, an attempt should be made to implement managerial cost accounting functionality that enables determination of full cost through the accounting system.

ICE may use accounting systems that are used to generate the organization's statement of net cost, other cost accounting systems/software, or the accounting system of record. Eligible expenses must be mutually exclusive, such that an expense cannot be applied to multiple fees unless split by some percentage. The appropriate system of record may use activity-based costing to identify overhead, and support costs related to a user fee program. Where expenses are directly tied to a user fee, and the fee does not reimburse appropriated funding, ICE will identify eligible expenses associated with the fund. In this case, the fee program must ensure that there is sufficient financial oversight to verify that the expenses are valid for the user fee program. This process is accomplished through discussion with the appropriate ICE stakeholders which includes the fee program, Office of Regulatory Affairs and Policy, Office of Principle Legal Advisor, and any other interested and impacted program office.

3-4. Exceptions

ICE is not expected to achieve full cost recovery for fee programs where statutory or legislative language indicates otherwise. Further, there may be certain programs for which full cost recovery is not appropriate. For example:

- a. When fee programs are designed to create a penalty or fine as an incentive against certain behaviors.
- b. When collecting the fees in certain operational environments would create undue burden on established processes. For example, U.S. Customs and Border Protection (CBP) does not collect certain user fees from pedestrians entering the United States because the time taken to collect the fees in this environment would substantially increase CBP's processing times.
- c. When the statute that authorizes the fee sets it at (or limits it to) a specific dollar amount and does not permit the agency to adjust it.

Exceptions to achieving full cost recovery may apply. Programs identifying exceptions will be reviewed every two years to ensure that the rationale for granting the exception remains valid. In certain cases, a legislative proposal to adjust the fee and/or permit ICE to adjust it via regulation may be appropriate.

3-5. Review Requirements

The biennial fee review requires fee programs to complete the cost recovery portion of the template. The review should include an analysis of the five most recent fiscal years to determine the percentage of eligible expenses covered by fee collections. For any fee that is not achieving full cost recovery, fee programs should identify potential strategies to achieve full cost recovery, if not precluded by statute. Fee programs should also discuss previous or ongoing efforts to adjust the fee rate(s).

Any adjustments to existing user fee cost recovery rates and/or proposals for new fee programs should be incorporated into the budget formulation process to the extent possible. ICE should also consider any new fee proposals and whether those fees should achieve full cost recovery. ICE must take necessary steps to collaborate with their internal financial and legal offices, as well as DHS HQ offices, to initiate regulatory or legislative proposals if required to achieve full cost recovery. See Section 4, *Fee Proposal Framework*, for guidance and timelines.

4. Legislative Proposal Framework for New Fees

4-1. Background

This framework is intended to allow ICE latitude in operations and recognizes the variations in authorities for user fees while also providing structure and guidance in future user fee efforts. The framework provides guidance to developing fee proposals while promoting information sharing. It is an attempt to

establish governance policies for ICE user fees.

4-2. Process and Requirements

The following standards in the development of fee proposals:

- a. *Applicability.* This framework applies to any user fee proposal that will result in a new fee or a change to an existing fee.
- b. *Timing of Legislative Proposals.* User fee proposals, including proposals to establish a new fee, should be submitted to ICE OBPP at the same time as the Resource Allocation Plan (RAP) submission. Fee proposals must be in accordance with the requirements in OMB Circular A-19, *Legislative Coordination and Clearance* and DHS Management Directive (MD) 0420, *Legislative Procedures*. The items in the Checklist (see “Section 7-4 “Fee Proposal Checklist” below) should be submitted to ICE OBPP Program Analysis and Evaluation (PA&E) and the Formulation Unit as part of the RAP submission (generally in April of each FY). This will allow for consideration with all the other new initiatives.
- c. *Legislative Jurisdiction.* In order to have the best chance of success for adoption, fee proposals that require legislative action should fully consider legislative jurisdiction and should coordinate with the ICE congressional appropriations liaison, for the development of an enactment strategy. When necessary, DHS resources should be engaged as part of this strategy in order to optimize the potential for success.

When necessary, if legislative changes are part of the proposal, legislative language must be approved by ICE Office of Principle Legal Advisor (OPLA), coordinated with ICE congressional appropriations liaison, and included with the fee proposal.

- d. *Funding strategies.* When the authority exists to use fee revenue, user fees may allow for increased performance or capacity, which is beneficial to ICE, other federal agencies, the private sector, and the public at large. In many cases, specific user fees have their own budget submission requirements and Treasury Account Fund Symbols. OMB Circular A-25 provides general policy on determining the amount of user charges to assess.
- e. *Budget Presentation of Fees.* Standard exhibits and templates must be used to ensure that there is consistency as to what information about the fee programs is included in Congressional Justifications.

4-3. Timing of New Fee Proposals

The purpose of this section is to discuss the timing of when to submit a proposal to establish legislative authority for a new fee. User fee proposals should be submitted to DHS once the proposal is clearly defined and approved by the Director of ICE, and at

the same time as the RAP submission. Section 7-4 details the information that must be included in the packet that is submitted to the DHS Budget Division and DHS PA&E as part of the RAP submission. This will allow for consideration with all other new initiatives.

ICE fees must conform to the requirements of the Chief Financial Officers Act of 1990 (CFO Act). Section 205 of the CFO Act, specifically, 31 U.S.C. 902(a)(8), requires each agency's Chief Financial Officer to “review, on a biennial basis, the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect costs incurred by it in providing those services and things of value.” If, after completing a review, the fee program recommends adjusting user fees, the appropriate official must provide this information to ICE OBPP and OPLA in sufficient time to introduce this adjustment into the federal budgeting process, per OMB Circular A-19.

Fee programs need to sufficiently plan to incorporate the impact of establishing a new fee or adjusting existing fees into the budget formulation process. The fee program must estimate when a new fee or fee adjustment is likely to occur, including any administrative and regulatory time required. Budget projections based on a current operating plan (or spend plan) also must be available for the time period. If the biennial period is FY 2018/2019, the fee program normally will use FY 2017 as the base for a 3-year budget projection. However, based on the particular fee program being analyzed, a zero-based budget for the 2-year biennium may be appropriate instead of using the year before the biennium as a base. The intent is to inform DHS that a fee adjustment or establishment is being considered for its program. In most instances, the program will be required to show how much revenue is needed and why.

The fee program should use its existing processes to conduct fee reviews in order to determine how much revenue is needed or to what extent a fee will change as a result of a biennial review. If the fee program is denied the request to propose a fee adjustment, its next request should reflect this decision. For example, if the adjustment is a critical need but is denied in the FY 2018-2022 Resource Allocation Decision (RAD), ICE should resubmit its request in the subsequent budget cycle.

The nature of a BFR is to identify trends in anticipated workloads, costs to handle those workloads, and the anticipated necessary fee levels. According to the requirements discussed in OMB Circular A-25, the fee review should be planned such that the review will be completed, and the fee adjustment will be vetted with ICE stakeholders, ICE leadership, DHS, OMB, and Congress (as necessary) in time for DHS to publicize the fee adjustment on the same day the President's Budget is delivered to Congress. This will allow adequate time for implementation planning so that the new fee schedule will be in place on the first day of the appropriate fiscal year.

Fee proposals that require new or modified statutory authority should be submitted along with other legislative proposals. Programs should not include funds associated

with new or modified fee proposals in their RAPs, OMB Submissions, or Congressional Justifications until statutory changes have been enacted into law.

4-4. Implementing Legislative Fee Proposals

The purpose of this section is to establish a governance policy for user fee proposals that provides latitude and guidance and promotes information sharing. Specifically, this discussion will focus on providing an outline that may be used for drafting legislative fee proposals.

In establishing fee proposal guidance, programs can better leverage opportunities to attain the necessary fee resources to achieve important aspects of their mission. Increased commonality and information sharing can help to fully integrate and prioritize fee proposals consistent with the budget formulation process.

Legislative jurisdiction and legislative language are elements of any user fee proposal policy. Guidance in these areas is intended to provide enough latitude to promote a cohesive budget formulation process for both discretionary and mandatory resources. At a minimum the proposal should include:

- a. Legislative language that is necessary to impose a new fee or to alter an existing fee (see OMB Circular A-19 for guidance);
- b. Congressional committee(s) that are required (if applicable) to act regarding the proposed legislation;
- c. Integration into the budget formulation process as required. See Section 4-3 *Timing of Proposals* and Section 7 *Budget Presentation of Fees*.

Programs are responsible for the following:

- a. Maintaining a detailed knowledge of existing user fee authorizations. When possible, should fully utilize existing fee authorizations to establish or maintain user fees;
- b. Identifying integrated internal teams to develop new or revised fee authorities when current authorizations are insufficient. Subject matter experts from legal counsel, budget, finance, policy, legislative affairs, congressional relations, operational programs, public affairs, and industry engagement offices should be involved on these teams;
- c. The OBPP will ensure full coordination and approval of each proposal and submit to DHS.

The DHS Budget Director is responsible for:

- a. Coordination, review, and approval of the proposal with DHS and ICE counsel, budget, finance, policy, legislative affairs, operational programs,

- public affairs, and industry engagement offices;
- b. Department-wide prioritization of all DHS fee proposals;
- c. Submission of fee proposals to OMB and to the necessary Congressional committees;
- d. Acting as the liaison between ICE, OMB, and Congressional committees to respond to any questions or arrange for required meetings;
- e. Providing final resolution on the proposal to ICE.

5. Regulatory Actions for Fee Adjustments

5-1. Background

To the extent permitted by law, ICE should recover the full cost of its activities and services. If a fee rate assessment has determined that an existing fee does not meet that standard, ICE may conduct the regulatory actions required for a fee adjustment under the Administrative Procedure Act (APA) See 5 U.S.C. 553. The APA is the U.S. Federal statute that governs the way in which agencies may propose, establish, and modify regulations.

Within ICE, the Office of Regulatory Affairs and Policy (ORAP) is responsible for overseeing the rulemaking process. From start to finish, on average, a fee adjustment can take about two years or more to develop and implement, depending on complexity and implications. The regulatory process involves several critical steps that requires extensive collaboration with numerous stakeholders. Therefore, when contemplating a fee adjustment, program offices should confer with ORAP in the early stages of planning - when a fee rate assessment determines a fee adjustment may be appropriate – and throughout the process where a regulatory change is or may be required.

5-2. The Regulatory Process

The following summarizes the stages of the rulemaking process for fee adjustments.

- a. *Identify a Need:* ICE determines that an adjustment to an existing fee or a new fee is necessary and appropriate. This may involve coordinating with ORAP to conduct a preliminary analysis, collecting input from other ICE offices, and obtaining executive-level approval.
- b. *Draft Proposed Rule:* A Notice of Proposed Rulemaking (NPRM) is drafted to notify the public and solicit their comment on the proposed fee adjustment. This step includes developing supporting documentation, creating briefing documents, performing research, tasking information requests, and collecting fee data.
- c. *Conduct Regulatory Evaluation:* Once a draft NPRM is sufficiently developed,

an economist within ORAP will conduct a regulatory evaluation. The economist will analyze the economic, small entity, and paperwork reduction act impacts.

- d. *Clear within ICE:* The NPRM is tasked for internal ICE clearance and then sent to the Front Office for final review and clearance.
- e. *Obtain DHS OGC Clearance:* The cleared NPRM is sent to DHS Office of General Council (OGC) to review (60 days to review).
- f. *Office of Information and Regulatory Affairs (OIRA) Review:* The OGC sends significant NPRMs to the OMB OIRA for review and comment (90 days to review). The NPRM is also circulated to any impacted agencies for review.
- g. *Publish NPRM:* Once DHS, OMB, and impacted components have reviewed and commented, and any issues are addressed, ICE publishes the NPRM in the Federal Register.
- h. *Solicit Public Comments:* Once the NPRM is published, the public generally has 60 days to respond.
- i. *Address Comments:* Public comments are cataloged, sorted, reviewed and considered and then a Final Rule (FR) is drafted.
- j. *Obtain Final DHS OGC Clearance:* Once a draft FR is reviewed and cleared within ICE, it goes to DHS OGC for final review, (60 days to review).
- k. *Review by OMB:* OGC sends significant FRs to OMB for review and comment (90 days to review).
- l. *Publish FR:* The FR is published in the Federal Register and the fee goes into effect on the date specified in the rule.

6. Funding Strategies for Fees

6-1. Background

The main source of funding that allows ICE to finance federal programs or activities is funding from annual and other appropriations. However, funding may be authorized in the form of user fees, user charges, or excise taxes. User fees recover part or all the costs of these programs and activities – the cost of providing a benefit that is beyond what is normally available to or consumed by the general public – from the identifiable users/beneficiaries of those programs and activities. Since user fees represent a charge for a service provided by the government or for a benefit from a government program, payers expect and deserve a well-defined correlation between the fees imposed and the cost of providing the services or benefits, and they have expectations about the quality of the related services or benefits.

Statutes dictate whether user fee collections may be dedicated to a specific program

or, alternatively, whether they must be deposited into the General Fund of the Treasury where the collections remain available to fund general government expenditures. Where the governing statute is silent on the disposition of fee collections, they must be deposited as miscellaneous receipts into the general fund (see 31 U.S.C. 3302(b)).

User fees are collected either directly by ICE or by an outside party, such as a Department of Treasury lockbox service provider, and then are deposited in the appropriate Treasury account. User fee operating plans include estimated collections and allocate these amounts to fund eligible expenses as defined by the fee's statutory authorities on use of the funding.

7. Budget Presentation of Fees

7-1. Background

The purpose of this section is to establish a governance policy for presenting user fees in budget documentation, such as Congressional Justifications. This section focuses on what information should be included in budget documentation. In addition, this section presents the factors that should be considered in determining whether Congressional Justifications should be developed for individual fee programs.

7-2. Congressional Justifications

Congressional Justifications should be developed for all discretionary fee programs and mandatory fee programs that generate more than \$10 million in revenue annually. In addition, ICE should consider developing Congressional Justifications for mandatory fee programs that generate less than \$10 million in revenue where the program could be considered of particular interest or priority to the Congressional appropriations committees. If ICE believes that a user fee or collection does not warrant a Justification, ICE should document this rationale for DHS Budget approval and concurrence.

At a minimum, the Congressional Justifications should include the following information for all fee programs:

- a. *Fee Statutory Authority:* The legislative language authorizing the fee along with a plain language description of what the legislative language authorizes.
- b. *Fee Uses:* A description of what the statute authorizes in terms of activities and expenditures.
- c. *Change Mechanism:* A discussion of how changes will be made to the fee program. If changes can be made through the regulatory process, the Congressional Justifications should provide estimates of the timeframes and necessary stages associated with the regulatory process. If changes can be made only through the statutory process, the justification should include the

names of the Congressional committees that have jurisdiction over such legislation.

- d. *Previous Changes*: A discussion of the last time that changes were made to the fee program and how that change was attained.
- e. *Recovery Rate*: The Congressional Justification should include a discussion of whether or not the fee is designed to recover the full cost of the program services provided and whether or not those fees are designed to achieve full-cost recovery are achieving it. Additionally, for those fee programs that are not achieving full-cost recovery, an estimate should be provided of the actual recovery rate.

7-3. Terminology

For mandatory fees or other fees over which the appropriations committees have no jurisdiction, Congressional Justifications should avoid the terminology “Budget Request.” The word “request” implies that the committee has jurisdiction in setting fee levels and is misleading and inaccurate. Use of the term “request” in mandatory fee budget documents has caused displeasure with members of the appropriations committee staffs in the past. Budget documents should use the terminology “Budget Estimate” in lieu of “Budget Request.” The DHS Budget Division will modify all Congressional Justification table templates to ensure that column headers appropriately use the word “Estimate” instead of “Request.”

7-4. Fee Proposal Checklist

At a minimum, any fee proposal should include the following information and provide answers to the following questions:

- a. Name of Fee.
- b. Administration or objective that fee supports.
- c. Existing or proposed fee rate.
- d. Proposed change (if any).
- e. Background on who currently is charged the fee and discussion of any proposed changes.
- f. Are there any other ICE fees charged to the same industry segment? (Have you done an economic impact analysis that factors in other fees assessed against the same user population?)
- g. What is the duration of the fee?

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- h. What Congressional committee will have (or has) jurisdiction?
- i. What is the problem/challenge that you are trying to address?
- j. What is the proposed legislation (if applicable)?
- k. What is your strategy for gaining support on behalf of the fee proposal?
- l. Has there been any OMB, Congressional, or public feedback/support on the possibility of this fee increase?
- m. Coordination, if any, with other Executive Branch departments for free implementation matters (e.g., collection and reimbursement mechanisms).
- n. Contact person for further information.
- o. Nominating official.

Procedures and Internal Controls

The U.S. Immigration and Customs Enforcement has developed and implemented oversight procedures and internal controls to comply with DHS Financial Management Policy Manual Section 2.12, *DHS Fee Review and Guidance*.

Authorities and References

Authorities

Public Law 101-576, *Chief Financial Officers Act of 1990*

Title 31 U.S. Code, Section 902(a)(8), “Authority and functions of agency Chief Financial Officers”

5 U.S.C. 553, “Rule making”

31 U.S.C. § 9701 (1952), “Fees and charges for Government services and things of value”

OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*

OMB Circular No. A-19, *Legislative Coordination and Clearance*

OMB Circular No. A-25, *User Charges*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996

References

DHS Management Directive 0420, *Legislative Procedures*

Government and Accountability Office, *DHS Management – Enhanced Oversight Could Better Ensure Programs Receiving Fees and Other Collections Use Funds Efficiently* (GAO-16-443)

Government Accountability Office, *Federal User Fees: A Design Guide* (GAO-08-386SP)

Government Accountability Office, *Federal User Fees: Key Design Considerations for Designing and Implementing Regulatory Fees* (GAO-15-718)

Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process* (GAO-05-734SP)

DHS Financial Management Policy Manual Section 2.12, Subsection 3, “Cost Recovery Policy”

DHS Fee Governance Council Charter (2020.12.18)

DHS Fee Governance Council Charter Appendix I: Fee/Collection Catalog

Appendix A: Biennial Fee Review Template

***Directions:** ICE is to complete the data fields outlined in this template for each user fee/program. Delete all italicized instructions before submitting to DHS.*

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT Fee/Program Name

Point of Contact: *Name; Title; Phone Number; Email*

Current Review Date: *Identify Month/Year*

Previous Biennial Review Date: *Identify Month/Year*

Part A. Fee Description

Spending Category: *Indicate either “Mandatory” or “Discretionary” as defined in OMB Circular A-11, Section 21.3*

Authority: *Identify the citation of the U.S. Code that provides ICE with authority to impose, collect, spend or provide other disposition of the fee.*

- **Expiration Date:** *Provide the date for which the authority expires*

Regulation: *Identify the citation of the Code of Federal Regulations (CFR) or other means by which ICE publishes the administrative details of the fee(s) to the regulated service recipient.*

Description of Service: *Provide a description of the Federal service that is provided to the regulated entity.*

Service Recipient: *Provide a description of the individual or entity that derives a special benefit from the Federal service.*

Unit Rate: *Indicate the monetary amount of the fee(s) imposed per unit of service.*

Rate Setting Methodology: *Provide a brief description of the way the fee amount(s) is (are) determined. The description must address whether the fee is intended to be a full-cost recovery.*

Part B. Analysis

(\$ in thousands)							
	FY13	FY14	FY15	FY16	FY17	TOTAL	Average
Collections						-	#DIV/0!
Obligations & Expenses	-	-	-	-	-	-	-
Pay						-	#DIV/0!
Non-Pay						-	#DIV/0!
Unobligated Carryover Balance at Beginning of FY						-	#DIV/0!
Unobligated Carryover Balance at End of FY						-	#DIV/0!

Update the table above to summarize the annual amount of Collections, Obligations & Expenses (Pay vs Non-Pay), and Beginning of Year Carryover balances for the most recent full five fiscal years (FYs). Double-click into the table in order to edit the cells (If there are issues, please copy and paste data from the excel template that can be found on SharePoint). Obligations & Expenses should be in accordance with OMB Circular A-25, Section 6(d). Fee program should retain the detailed information that supports the documented expenses.

NOTE: The “Collections” data in the above table should match the collections data in the “Historical Collections” table of the OMBJ / CJ.

Projected costs for the biennial period (FY 2022/2023):

- FY 2022:
- FY 2023:

Projected revenue for the biennial period (FY 2022/2023):

- FY 2022:
- FY 2023:

NOTE: The above projected revenue and project costs data should match the projections in the FY 2023 OMBLJ. Please footnote any deviations between the above projections and those in the FY 2023 OMBJ.

Part C. Findings

Deficiencies: Document any issues that were detected during the review. Such issues could include, but are not limited to:

- Fee rate(s) that is (are) not properly recovering the cost of the service(s) being provided
- The shortage or excess of carryover revenue
- Expiring or altering fee authority
- Insufficient regulatory guidance
- Problem with the distribution or expenditure of fee revenue, court proceedings, etc.

Recommendations: Document recommendations to address identified deficiencies along with the actions that have been accomplished by fee program since the deficiency was identified. Document the remaining recommendations that are necessary to mitigate the deficiency.

Other: Document any other information that is not already captured in the review that DHS or the general public may need to formulate an overall assessment of the fee(s). This can include information on exemptions, future regulatory or statutory changes, etc. If fee program would like to attach existing background information, reports, please identify in Part D of this template and upload to the SharePoint site accordingly.

Part D. Cost Recovery

(\$ in thousands)						
	FY13	FY14	FY15	FY16	FY17	TOTAL
Amount of Fee Collected						-
Total of Eligible Expenses						-
Cost Recovery %	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!

Update the table above to calculate the Cost Recovery Percentage for the most recent full five fiscal years. Double-click into the table in order to edit the cells (If issues, please copy and paste data from excel template that can be found on SharePoint). Consult the DHS Financial Management Policy Manual Section 2.12, Subsection 3 – “Cost Recovery Policy” and OMB Circular A-25 to determine eligible expenses.

NOTE: The “Amount of Fee Collected” data in the above table should match the collections data from Part B, which should match the “Historical Collections” table of the OMBJ / CJ. Please footnote any deviations between “Collections” and “Amount of Fee Collected”.

Date of Last Fee Rate Adjustment: Insert Month/Year

Previous efforts to adjust the fee rate(s):

- If none, write “N/A” and proceed to the next section
- Document the methodology that was used to attempt to adjust the fee rate(s).
- Provide a description on whether the efforts were successful, and why/why not.
- If currently in the process, please provide a status (i.e., working with Legal Counsel, working with DHS, have submitted proposal to OMB, etc.)

Explanation for why the ICE and/or DHS should not pursue full cost recovery:

- Provide any information indicating why the full cost of the services/activities should not be recovered via fees, to include descriptions of:
- How any shortfalls have been addressed thus far.
 - How shortfalls can be mitigated by other funding sources, if applicable.
 - Any cash flow implications associated with not achieving full cost recovery.

Challenges and Solutions to Achieving Full Cost Recovery: *Identify possible roadblocks to achieving full cost recovery and possible solutions to these roadblocks.*

Did fee program submit a proposal in their Resource Allocation Plan to adjust this fee during the FY 2023-2027 Program and Budget Review? *Indicate Yes or No, and please provide a brief explanation of what changes are being proposed.*

Part E. Attachments

- *If applicable, list any attachments that the fee program may be providing as supporting documentation. Upload files to the SharePoint site in your folder. If not applicable, please delete this section.*

Appendix B: ICE Fees

Immigration Inspection User Fee*

Description: The Immigration Inspection User Fee is collected from foreign passengers arriving on commercial aircraft and vessels at U.S.-operated ports of entry. These fees finance a portion of the Department’s costs to deter, detect, detain, adjudicate, and remove passengers attempting to make an unauthorized landing or bring aliens unlawfully into the U.S. through ports of entry.

Student and Exchange Visitor Program Fees*

Description: The Student and Exchange Visitor Program Fees, which are derived from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Immigration Examination Fee authorities, supports the Student and Exchange Visitor Program (SEVP) which certifies schools seeking to enroll nonimmigrant alien students in F and M visa classifications; oversees the SEVP-certified schools’ continuing eligibility; and monitors the academic (F) students, vocational (M) students, and the dependents of these students. The SEVP uses the Student and Exchange Visitor Information System (SEVIS) to monitor schools, track F and M nonimmigrant alien students, and their dependents during their stay in the United States.

****Subject to DHS Biennial Fee Review***

Glossary

The following tables contain definitions of the acronyms and terms used in this policy.

Acronym	Definition
CBP	U.S. Customs and Border Protection
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FMPM	Financial Management Policy Manual
FR	Final Rule
FY	Fiscal Year
GAO	Government Accountability Office
ICE	U.S. Immigration and Customs Enforcement
IOAA	Independent Offices Appropriations Act of 1952
MD	Management Directive
NPRM	Notice of Proposed Rulemaking
OBPP	Office of Budget Planning and Performance
OCFO	Office of the Chief Financial Officer
OGC	Office of General Counsel
ORAP	Office of Regulatory Affairs and Policy
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OPLA	Office of the Principal Legal Advisor
PA&E	Program Analysis and Evaluation
RAD	Resource Allocation Decision
RAP	Resource Allocation Plan
SEVP	The Student and Exchange Visitor Program
SF	Standard Form
U.S.C.	United States Code

Term	Definition
Resource Allocation Decision (RAD)	The Secretary's formal approval of ICE RAPs at the close of the Program Review. The RAD is issued after the Program Review Board deliberates on the RAP. RADs will set resource allocation guidance for ICE for the Future Years Homeland Security Program and become the basis for the budget submission to OMB.

<p>Resource Allocation Plan (RAP)</p>	<p>U.S. Immigration and Customs Enforcement annually develops proposed programs consistent with the Integrated Planning Guidance. These programs, expressed in the RAP, reflect systematic allocation of resources required to achieve missions, objectives, and priorities, and potential alternative methods of accomplishing them. Resource requirements reflected in RAPs are translated into time-phased funding requirements. RAPs must account for long-term requirements and resources including human capital, construction, and investments, operating and maintenance, and potential disposal or termination costs, and program performance goals. RAPs are submitted to PA&E in late March and initiate the annual Program Review.</p>
<p>User Fee</p>	<p>A fee assessed to users for goods or services provided by the Federal Government. User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public. User fees normally are related to the cost of the goods or services provided. Once collected, they must be deposited into the general fund of the Treasury, unless the agency has specific authority to deposit the fees into a special fund of the Treasury. An agency may not obligate against fees collected without specific statutory authority.</p>

Summary of Changes

Revision Type: Moderate

Changes:

- Updated content of document to be consistent with DHS Style Guidance.
- Updated Glossary to add additional acronyms and definitions used in the policy [*Glossary*].
- Expanded and/or modified Policy section language to be consistent with DHS Chapter:
 - sections 2-2 concerning the Fee Collection Scorecard.
 - 2-4 added example 4 and recommendation language.
 - 4-3 changed title to same as DHS to “Fee Proposals”.
 - 7-1 added “In addition, this section presents the factors that should be considered in determining whether Congressional Justifications should be developed for individual fee programs”.
 - From DHS, 7-2 added “ In addition, programs should consider developing Congressional Justifications for mandatory fee programs that generate less than \$10 million in revenue where the program could be considered of particular interest or priority to the Congressional appropriations committees. If ICE believes that a use fee or collection does not warrant a Justification, ICE should document this rationale for DHS Budget approval and concurrence.” and changed c. and e. to DHS language [*Policy*].
- Updated Authorities and References to include current links and applicable references in the Chapter reflect DHS format and content [*Authorities and References*].
- Updated Appendix A to reflect additional DHS language and updated fiscal years [*Appendix A*].
- Updated formatting throughout to be consistent with the ICE FMPM Style Guide.