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Committee on Regulation
April 25, 2011 Committee Meeting
Comment of Professor Peter Strauss

Hi Reeve --

In case I do not get to join the conversation in time for this, I thought I should send my reactions to the draft recommendation. On the whole, I find them so mild that I wonder if they are worth making. In any event, they are properly identified by the introduction as a set of "best practices," and for that reason I believe the Recommendation should be entitled "Best Practices for Rulemaking Comments," and the introduction should drop even the slightest suggestion of command. Rather than "... the recommendations leave agencies with appropriate discretion ...," it should say "... the listing of 'best practices' recognizes agency discretion ... ," and similar changes should be made throughout.

- 1) Advice to the public concerning comment practices
- 2) Length of comment period
- 3) Posting of comments
- 4) Anonymous comments
- 5) Treatment of Late Comments
- 6) Reply comments
- 7) Treatment of protracted rulemakings

You'll notice that these are in a different numerical order, roughly corresponding to the order in which these issues would arise in a rulemaking. In my judgment, such an order would aid comprehension; and the order also make dramatic some issues that are not addressed -- in particular, the posting of [agency] supporting materials and OIRA interventions. Agency posting of supporting materials is required to inform rulemaking comments. OIRA comments are a particularly important type of rulemaking comment. The failure to treat issues such as these is part of what I find disappointing in this recommendation. As currently worded, I would urge its rejection; but the following suggests revisions that would make it more acceptable in my judgment.

Particulars, in the order of your draft:

- 1) I'd cast my lot with 1", which is appropriately put forward as a "best

practice." But then the text of the recommendation should be on the order of "Best agency practice is to adopt minimum comment periods ...

2) Similarly, the recommendation should be on the order of "Best practice is for agencies to post public comments to the Internet at the earliest time consistent with any necessity for screening, in order to facilitate appropriate response, and to publish with each comment the dates of its submission and posting." The following quoted passages are to the same end.

3) "Best practice, where not inconsistent with needs for immediate action, is for agencies to facilitate opportunities for commenters to respond to the comments of others, as by providing a publicized brief period for reply comments once posting of comments to the Internet is complete. [Whether or not reply comments are specifically provided for, best practice is for agencies to adopt a policy respecting late-filed comments, publicize it appropriately, and then adhere to it.]"

Note that the discussion here does not tie the reply period to the completion of the on-line docket, as it should.

4) "When post-comment rulemaking consideration has been unusually prolonged, best practice is for agencies to consider such mechanisms as supplemental notices, to permit the refreshing of the rulemaking record.

5) "Best practice is for agencies to establish and publish prominently on their websites policies regarding the submission of anonymous comments. The managers of regulations.gov might consider whether a general policy on this matter is appropriate for its site, and how to give notice of any such agency policies there.

Publish where? There are at least two places where publication ought to happen, and if ACUS is going to suggest publication it should address both.

6) Why? This unexplained recommendation does not persuade me.

7) "The Administrative Conference recommends that the managers of regulations.gov develop, in consultation with the most active rulemaking agencies and with the guidance of OIRA, suggestions regarding the characteristics of effective comments. Best practice would be for agencies

to display these suggestions prominently on their own rulemaking websites, with such amendments as their particular circumstances may suggest."

This is not a "let a hundred flowers bloom" setting, and I would oppose the recommendation as written. While some agencies might wish to vary such general guidance on this question as could be centrally produced, it would ultimately be confusing to have different guidance given at each agency website -- and in any event less frequent rulemakers will do best with a template, unaltered. ACUS could produce the template, too, and I even suppose it should -- but it could not do that in time for the June plenary. Bear in mind, also, that commenters may come to the agency either from regulations.gov or from the agency's own website. So advice needs to be in both places. Regulations.gov advice could easily enough add "You may wish to check the website of the agency proposing the rule on which you wish to comment for additional guidance."

8) In my judgment, this should not be a separate recommendation, and if anything more needs to be said than is in #3, it should be added there. See the bracketed phrase at the end of #3. Once again, however, attention should be paid to the bifurcated routes by which commenters may find out about such policies, and the possible need of regulations.gov to publicize them and accommodate to them.

Committee on Regulation

April 25, 2011 Committee Meeting

Comment of ACUS Special Counsel Jeff Lubbers

Hi Reeve—Unfortunately the Regulation Committee meeting conflicts with my (last) class, so I won't be able to attend, but I thought I would give you my comments in writing.

First of all, I think you did a great job of preparing all the documents for the meeting.

Here goes:

Preamble:

Second line—I suggest adding the word “written” before “views.”

Recommendation 1: Nice job of setting out the alternatives. I think I prefer 1'

In any event, there is a slight problem with the drafting of 1.—The bolded line in the first alternative could be read as saying agencies should not have minimum comment periods in their rulemakings. I think it would be better read to say something like: “Neither Congress nor the President should require an across-the-board minimum comment period in rulemaking.”

As for 1''—I think it is a bit too complicated and it presumes the continued existence of the E.O. 12,866 definition.

As for 1' I think I prefer option A—though it is always dicey to open up the APA for amendments. In option B I would leave out “of course” and maybe substitute “; however . . .”

In whichever one that is chosen it may be necessary to drop a footnote to 93-4 and 95-4.

Recommendation 2:

In the second non-bolded line, instead of “when comments will be posted” I would say “how soon comments will be posted.” This wording issue also leads me to ask whether it is worth saying something about “how long” comments will remain posted as well. I suspect agencies have divergent practices on this. I hope comments will be available long after the rulemaking is completed.

Also instead of “currently” how about “as contemporaneously with their submission as possible”?

Recommendation 3:

The first non-bolded sentence seems a bit ambiguous to me. Are you saying agencies should consider promulgating a general policy on reply comments that they should consider this on a rule-by-rule basis?

Recommendation 5:

Maybe this is implied, but how about “are or are not appropriate”?

Recommendation 8:

Concerning agency acceptance of late-filed comments, this is perhaps my most substantive comment. I’ve always been troubled by the possibility that agencies might accept some late comments (e.g., the ones they agree with) and not others. Therefore I would suggest adding something like the following to Recommendation 8:

“However, when considering whether to consider late-filed comments in a particular rulemaking, agencies should take care not to do so in a selective manner, unless the selection is based on neutral considerations such as the date received.”

I also don’t think you need footnote 7. These examples are useful, but are so transitory that they will be dated quickly. The background “report” for this recommendation will presumably consist of Prof. Balla's report (perhaps revised to include his latest memo) and your memo—which will have these citations.

Feel free to circulate this to the committee and bring them up at the appropriate time in the meeting

Good luck!

Jeff

Committee on Regulation
April 25, 2011 Committee Meeting
Comment of Bob Anthony

Hi Reeve,

I appreciated your very helpful memo on issues raised at the March meeting of the Regulation Committee.

Unfortunately, my attendance at the Committee's meeting on Monday is not feasible. But I am very interested in the subject, and would like to participate by telephone. Could you please call or e-mail me with the call-in number and any other relevant information? My (home) telephone is 540-428-7036. Thanks.

Here are a few thoughts on the draft provisions, which you may certainly circulate to the Committee if you wish to do so.

Paragraph 1. I would treat this as a matter of best practices, not as grist for APA amendment. I suggest beginning with the last sentence of draft paragraph 1 (Agencies should set comment periods that consider . . .). Then adapt the text of 1", possibly encouraging findings a la 1' Option A.

Paragraphs 2, 3 and 8. I realize that it may be hard to incorporate anything into the text, but I wonder if these formulations take adequate account of commenters' practice of hanging back strategically and filing at the last minute in order to minimize opponents' chances to rebut. I would think that a robust discussion of this knotty central problem might yield some refinements. Do I correctly understand that, under the last sentence in paragraph 3, the time for public opportunity to comment on previously submitted comments would not count in the 30- or 60- etc. day period encouraged by paragraph 1?

Paragraph 5. I've forgotten whether Steve Balla's report (not at hand) or the Committee's discussions in March considered the effects of the Trade Secrets Act, 18 U.S.C. § 1905, which prohibits the disclosure of trade secrets information submitted to the government, on pain of fine, imprisonment or removal from federal employment.

Best wishes,

Bob

Committee on Regulation
April 25, 2011 Committee Meeting
Comment of Neil Eisner

Reeve,

Thanks for the opportunity to review this recommendation. I think it is very good. Going through each recommendation –

1. I would vote for the 1st option. I don't see a real problem on this issue. I think the APA can already be read to require a "reasonable" comment period and EOs 12866 and 13563 generally require 60 days unless a shorter period is justified. One additional concern I have with a mandated number is that, in some instances, agencies have justification for no comment period but provide a very short period because they have time to do so. A mandatory minimum would result in no comment period in those situations. I would also stress the concerns many have that asking for legislation could lead to something other than is requested.
2. I have no problem with this. I believe we already do it.
3. We already do this, also. I think it is good policy. An ACUS recommendation would help. But some may be concerned that reply comment periods could be used to submit new comments. You should think about adding ", and limited to," at the end of the 4th line, after "input on..."
4. I also agree with this recommendation. But I think the phrase "opening of a rulemaking" is too broad and somewhat vague. The measurement should be from the end of the comment period on the last stage of the rulemaking. Up to that point, the record should not be stale. I would also delete the phrase "agency believes that" in the last sentence. The agency should be pushed to consider the record and not just state a belief. They have an incentive to not have to do another round of comments.
5. This is the only one I disagree with. The presumption should be reversed. The agency should permit anonymity unless there is a reason it would not be appropriate. I believe, as written, it cannot effectively be enforced. What is the difference between an unsigned comment and one with a name, if we do not know the name. How do I even know that the official stationery of a large corporation is that of the corporation and the signer is indeed an official there. If we say we need signatures, will they be legible, will the signer just make up a name? We must also consider the negative affect this could have on using web 2.0 technology, such as blogs where some use made up monikers. Most importantly, the comment should be judged on its merits rather than the name. If anonymous, I may not give it the same consideration as I would to a known expert, but if they are correct in their point and provide proof that our proposal would cause harm, would we have to ignore it because it was unsigned?
6. Very good idea. We already do this, and I know others do.
7. Ditto. But fn 7 relies on an EIS document. I would recommend using a proposed rule

Please let me know if you want to discuss this further.

Neil

**Administrative Conference Committee on Regulation
Rulemaking Comments Project, Meeting April 25, 2011
Comment Submitted by Joseph P. Whalen**

I hope that ACUS is aware of DHS' propensity to "hide comments". ICE is especially bad about this. DHS as a Department has suffered embarrassment of late due to the Associated Press' coverage on its problems with political hacks slowing FOIA and deliberately withholding certain emails from the FOIA officer that were later released by some more honest employees.

A case in point is:

OMB Control No: 1653-0019	ICR Reference No: 201102-1653-001
Status: Received in OIRA	Previous ICR Reference No: 201001-1653-001
Agency/Subagency: DHS/USICE	Agency Tracking No:
Title: Emergency Federal Law Enforcement Assistance	
Type of Information Collection: Extension without change of a currently approved collection	
Type of Review Request: Regular	Date Submitted to OIRA: 03/04/2011

Above found at: http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201102-1653-001

This information collection is only one current example of ICE's duplicity. I submitted the attached comment in response to their 30 day notice. ICE changed its supporting statement A and simply did not acknowledge ANY comments being received for the 30 day notice but did specifically state that they did not get any for the 60 day comment. They did not post the comment that I submitted at www.regulations.gov or at www.reginfo.gov on the above webpage if you follow the link to the supporting docs, there is a place to post comments. It is blank and a search of www.regulations.gov yields no comments either. (No comments posted since 2009---IS THAT EVEN A POSSIBILITY?).

USCIS on the other hand has only just started to "hide" comments. They had been fairly regularly posting on www.regulations.gov but have begun to hide the more embarrassing comments on www.reginfo.gov instead. USCIS has also gotten VERY slow at posting comments lately. Compare the USCIS handling of:

AGENCY: DHS-USCIS	OMB CONTROL NUMBER: 1615-0091
RECEIVED DATE: 03/16/2011	ICR REFERENCE NUMBER: 201103-1615-008
TITLE: Application for Replacement Naturalization/Citizenship Document	

They hid this embarrassing comment on this much lesser known website. I submitted a comment on December 23, 2010, for the 60 day comment period and then they published the 30 day Notice on March 3, 2011 and said that they got no comments. I resubmitted my comment by forwarding my previous submission and they then posted the comment on www.reginfo.gov and addressed it in a new supporting statement A posted on March 8, 2011.

Various other agencies are still unknown quantities. FNS, USSC, NASA, and more are still

living in the stone-age in rulemaking and like to use snail-mail. Many agencies need help getting their acts together. Your work should be welcomed by many that are floundering, and feared by the duplicitous.

Best wishes in this initiative!

I have not bothered to confront ICE about its duplicity.

--

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OMB Desk Officer for:
U.S. Immigration and Customs Enforcement
Department of Homeland Security

Submitted by: Joseph Whalen
joseph.whalen774@gmail.com
January 29, 2011

Via e-mail to: oira_submission@omb.eop.gov

RE: Comments on 76 FR 4931 published January 27, 2011, File No. OMB-6, Emergency Federal Law Enforcement Assistance; OMB Control No. 1653-0019.

The present information collection was previously published in the Federal Register on November 5, 2010, as 75 FR 68371 which allowed for a 60 day comment period. No comments were received during that period. The purpose of the present notice is to allow an additional 30 days for public comments. The Notice stated that comments are encouraged and will be accepted for thirty days until February 28, 2011.

The Notice concerns the financial reimbursement for Emergency Federal Law Enforcement Assistance to State, Local or Tribal Government under Section 404(b) of the Immigration and Naturalization Act which provides for the reimbursement to States and localities (which would include Tribal Governments) for assistance provided in meeting an immigration emergency. A copy of the specified section of law is appended to this response as are at least some of the regulations.

Upon searching for the implementing regulations, I could not find any at first. Certain immigration enforcement regulations are found in 8 C.F.R. which are leftovers from the INS-DOJ days since before DHS was created and officially came into existence on March 1, 2003.

I started with 8 C.F.R. and then looked for the customs title. *I found the empty part of Title 19 which is reserved for ICE.* Then I searched for the supporting documentation at www.regulations.gov but only found the Federal Register Notice which appears to be a rehash of the same thing that has been submitted over and over again for the past several years merely with different dates and contact information.

Of the available information at www.reginfo.gov of the numerous DHS actions concerning regulatory updates and changes (rulemaking) the vast majority are by USCIS at 59, CBP has issued 32 of which 18 are INA related with the rest being strictly customs related, even the U.S. Coast Guard addressed citizenship documentation in its Merchant Mariner Rule under DOT which it considerably amended after it became part of DHS. ICE, on the other hand has no rulemakings of its own posted at the official regulations website other than items leftover from INS-DOJ or done for them by USCIS, everything else appears to be “pending” to TBD (to be determined). The Office of the Secretary, FEMA and TSA are also well represented in the regulatory information website.

The supporting statement for this Notice at www.reginfo.gov , while a very basic OMB proscribed formulaic document did provide further procedural information, excerpts below. In addition there was a supplementary item posted at that website concerning this rule which is a one page word document of unofficial instructions (appended) which cites 28 C.F.R. § § 65.83, 65.85(a) and (c) which further cross-references § § 65.81 and 65.84. ICE does have a number of more routine items such as official form updates and is making advances such as e-bond capability, which is admirable.

From the required Supporting Statement (SS) under “Justification” at A.1, in part:

“.....Section 404(b) authorizes an annual appropriation to maintain a balance of \$35,000,000 in an Immigration Emergency Fund to provide for an increase in border patrol or other enforcement activities of the Department of Homeland Security, and to reimburse States and localities for providing assistance as requested by the Secretary of Homeland Security. *While the existing regulations reference the Department of Justice and Attorney General, the Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 transferred the immigration enforcement functions from the former INS in the Department of Justice to DHS.* There are various sections within the HSA applicable to ICE’s authority to maintain this collection. Among these are Section 402 (regarding the Secretary’s responsibility in carrying out the immigration enforcement functions carried by the former Commissioner of the INS), Section 441 (transfer of functions pertaining to specific programs), and Section 442 (establishment of ICE).”
[Emphasis added.]

The INA states at § 404 (b) (2) (B) that “Not more than \$20,000,000 shall be made available for all localities under this paragraph.” That limitation was not made clear to the intended audience.

At item A.3, ICE pointed out that OMB has caused some delays in this information collection:

“The use of this collection format currently provides the most efficient means for collecting and processing the required data. In this case Immigration and Customs Enforcement (ICE) does not employ the use of information technology in collecting and processing information. ICE does not have any immediate plans in place to convert the submission of this information to an automated format. *This is due to the question raised during previous reviews by OMB regarding DHS/ICE authority to collect this information; DHS/ICE is requesting that OMB research its own records to verify that the Immigration Emergency Fund account (which is associated with this collection) was officially transferred from DOJ to DHS.* While we have provided citations in the SS where the authority was transferred from DOJ to DHS for immigration issues, OMB is in fact the entity that would hold the record on where this account is actually assigned to date.” *[Emphasis added.]*

The SS also states at A.17:

“If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

ICE is seeking approval to **not display** the expiration date of OMB approval of this information collection because this information collection is not taken using a standardized collection instrument.”

The INA states at § 404 (b) (2) (D) states that “A decision with respect to an application for reimbursement under subparagraph (A) shall be made by the **Attorney General** within 15 days after the date of receipt of the application.” Although, the amount of money involved in the Immigration Emergency Fund, at only \$35 million per year, it is relatively small in comparison to the overall annual ICE budget of, for example, \$5.7 billion in FY 2010 (see below).

The amount available for financial reimbursement for Emergency Federal Law Enforcement Assistance to State, Local or Tribal Government is even smaller, at only \$20 million per year. ICE should go to the trouble of investing more time and professionalism into an official form *or at least a brochure or informational booklet* for distribution to law enforcement agencies when the need arises. It could easily be a one-time investment for a regulatory change and accompanying form or informational material that should suffice until such time, if ever, that the statute is changed.

FROM: <http://www.scribd.com/doc/24704564/ICE-Fact-Sheet-FY2010-Budget-11-5-09>

“U.S. Immigration and Customs Enforcement (ICE) is the largest investigative agency in the Department of Homeland Security (DHS). With more than 20,000 employees in over 400 offices nationwide and around the world, ICE is a key component of the DHS layered defense approach to protecting the United States. ICE has an annual budget of more than \$5.7 billion, with Fiscal Year 2010 (FY10).....”

As for the Code of Federal Regulations, Title 8 is shared by **DHS** (primarily USCIS but has applicability to CBP, ICE, HHS-regarding refugees, and DOS) and **EOIR**. The DHS Secretary also has Title 6, Domestic Security. Upon further searching, **Title 19** has sections designated for CBP, **ICE** and U.S. International Trade Commission. ***Title 19, Vol. 3, Chapter IV, 400-599 is set aside for ICE.*** CBP has already promulgated some new and re-worked regulations.

This Notice, however relates to Title 28, Judicial Administration under the Department of Justice which pertains to INS and is somewhat confusing to interpret and seems to relate to DHS, ICE, CBP, USCG and USCIS. ICE, undoubtedly is the lead agency, but does rely on USCG and CBP at the border and interdiction at sea. The availability of funding also relates to the number of asylum applications received by USCIS or even filed with EOIR following parole by CBP.

Anybody even vaguely familiar with the rulemaking process knows that it is a cumbersome and lengthy process but it is something that should not be ignored. ICE has been around long enough to have at least started to tackle the task but I couldn't find evidence of that.

The old regulations are difficult to interpret because they still refer to the old agency names and titles of officials. Attorney General in most, if not all, instances will translate to Secretary of Homeland Security. Commissioner of INS might be changed to Secretary or could refer to the Undersecretary over ICE (or is it Director now?). District Director may refer to the ICE or the USCIS Official. If it is USCIS, with regard to asylum, is it the Asylum Office Director, the Associate Director for Refugee, Asylum and International Operations, the Office of Field Operation Associate Director, a District Director or a USCIS Field Office Director?

The above and other items require clarification. A simple form or informational guide is called for and outlined by 28 C.F.R. 65.85:

- (a) “to submit to the **Attorney General** an application for [] reimbursement...” and
- (c) The chief executive of a State or local government shall **submit an application in writing** to the **Attorney General**, and shall file a copy with the **Commissioner of INS**. The **application shall set forth** in detail the following information:
- (1) The name of the jurisdiction requesting reimbursement;
 - (2) All facts supporting the application;
 - (3) The nature of the assistance which the State or local government has provided or will provide, as required by the **Attorney General**, for which funding is requested;
 - (4) The dollar amount of the funding sought;
 - (5) A justification for the amount of funding being sought;
 - (6) The expected duration of the conditions requiring State or local assistance;
 - (7) Information about whether funding is sought for past costs or for future costs;
 - (8) The name, address, and telephone number of a contact person from the requesting jurisdiction.

Selected CFR Parts:

TITLE 19--Customs Duties

PART 0—TRANSFERRED OR DELEGATED AUTHORITY

Appendix to 19 CFR Part 0—Treasury Department Order No. 100–16

Delegation from the Secretary of the Treasury to the Secretary of Homeland Security of general authority over Customs revenue functions vested in the Secretary of the Treasury as set forth in the Homeland Security Act of 2002.

Treasury Department, Washington, DC,

May 15, 2003.

By virtue of the authority vested in me as the Secretary of the Treasury, including the authority vested by 31 U.S.C. 321(b) and section 412 of the Homeland Security Act of 2002 (Pub. L. 107–296) (Act), it is hereby ordered:

§ 0.1 Customs revenue function regulations issued under the authority of the Departments of the Treasury and Homeland Security.

(a) *Regulations requiring signatures of Treasury and Homeland Security.* (1) By Treasury Department Order No. 100–16, set forth in the appendix to this part, the Secretary of the Treasury has delegated to the Secretary of Homeland Security the authority to prescribe all CBP regulations relating to customs revenue functions, except that the Secretary of the Treasury retains the sole authority to approve such CBP regulations concerning subject matters listed in paragraph 1(a)(i) of the order. Regulations for which the Secretary of the Treasury retains the sole authority to approve will be signed by the Secretary of Homeland Security (or his or her DHS delegate), and by the Secretary of the Treasury (or his or her Treasury delegate) to indicate approval.

(2) When a regulation described in paragraph (a)(1) of this section is published in the Federal Register, the preamble of the document accompanying the regulation will clearly indicate that it is being issued in accordance with paragraph (a)(1) of this section.

(b) *Regulations with respect to which the Department of Homeland Security is authorized to sign for the Department of the Treasury.* (1) By Treasury Department Order No. 100–16, set forth in the appendix to this part, the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority to prescribe and approve regulations relating to customs revenue functions on behalf of the Secretary of the Treasury when the subject matter of the regulations is not listed in paragraph 1(a)(i) of the order. Such regulations are the official regulations of both Departments notwithstanding that they are not signed by an official of the Department of the Treasury. These regulations will be signed by the Secretary of Homeland Security (or his or her DHS delegate).

(2) When a regulation described in paragraph (b)(1) of this section is published in the Federal Register, the preamble of the document accompanying the regulation will clearly indicate that it is being issued in accordance with paragraph (b)(1) of this section.

§ 0.2 All other CBP regulations issued under the authority of the Department of Homeland Security.

(a) The authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to section 403(1) of the Homeland Security Act of 2002. Such regulations are signed by the Secretary of Homeland Security (or his or her delegate) and are the official regulations of the Department of Homeland Security.

(b) When a regulation described in paragraph (a) of this section is published in the Federal Register, the preamble accompanying the regulation shall clearly indicate that it is being issued in accordance with paragraph (a) of this section.

CHAPTER I--U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF THE TREASURY

§ 101.5 CBP preclearance offices in foreign countries.

[CBP Dec. 09-45, 74 FR 64601, Dec. 8, 2009]

§ 101.6 Hours of business.

[CBP Dec. 08-25, 73 FR 40726, July 16, 2008] etc...

**CHAPTER IV--U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;
DEPARTMENT OF HOMELAND SECURITY--[RESERVED]**

There is nothing there.

But then I found the following page of Instructions at www.reginfo.gov [on next page].

<p>U.S. Department of Homeland Security</p> <p>U.S. Immigration and Customs Enforcement</p>	<p>Emergency Federal Law Enforcement Assistance</p>	<p>OMB No. 1653-0019</p> <p>Exp: 02/28/2010</p>
-----------------------------------------------------------------------------------------------------------	------------------------------------------------------------	---------------------------------------------------------------

<p>Who must comply?</p>	<p>Chief Executives of State and Local governments.</p>
<p>What is this collection about?</p>	<p>The collection of information provides states and localities with a means to request reimbursement from the Department of Homeland Security for expenses incurred in responding to an immigration emergency.</p>
<p>Where do I find the requirements for this information?</p>	<p>Title 28 C.F.R. §65.85(a) contains the general requirements of this collection. The specifics regarding the required information that is being collected is located at Title 28 C.F.R. §65.85(c).</p>
<p>When must information be submitted to U.S. Immigration and Customs Enforcement?</p>	<p>When the Chief Executive of a state or locality determines that his or her jurisdiction qualifies based upon the criteria established in Title 28 C.F.R. §65.83.</p>
<p>How is the information submitted?</p>	<p>The respondent should contact U.S. Immigration and Customs Enforcement to consult regarding submitting a formal request in writing via U.S. Postal Service, or special courier.</p>
<p>What happens when complete information is received?</p>	<p>U.S. Immigration and Customs Enforcement will make a determination as to whether the request is appropriate according to the requirements spelled out in the regulation.</p>
<p>For additional information, contact--</p>	<p>Additional information can be requested in writing or via email at:</p> <p>U.S. Immigration and Customs Enforcement Office of Principal Legal Advisor 500 12th Street, S.W. Washington, D.C. 20536 Forms.ice@dhs.gov</p>

Additional Related Code of Federal Regulations (CFR):

TITLE 28--Judicial Administration

CHAPTER I--DEPARTMENT OF JUSTICE

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

[Subpart S—Immigration and Naturalization Service](#)

[§ 0.105 General functions.](#)

[§ 0.106 Certificates for expenses of unforeseen emergencies.](#)

[§ 0.107 Representation on committee for visit-exchange.](#)

[§ 0.108 Redlegation of authority.](#)

[§ 0.109 Implementation of the Treaty of Friendship and General Relations Between the United States and Spain.](#)

[§ 0.110 Implementation of the Convention Between the United States and Greece.](#)

CHAPTER I--DEPARTMENT OF JUSTICE

PART 65—EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE

[Subpart I--IMMIGRATION EMERGENCY FUND](#)

- [§65.80](#)** General.
- [§65.81](#)** General definitions.
- [§65.82](#)** Procedure for requesting a Presidential determination of an immigration emergency.
- [§65.83](#)** Assistance required by the Attorney General.
- [§65.84](#)** Procedures for the Attorney General when seeking State or local assistance.
- [§65.85](#)** Procedures for State or local governments applying for funding.

§ 65.81 General definitions.

As used in this part:

Assistance means any actions taken by a State or local government directly relating to aiding the **Attorney General** in the administration of the immigration laws of the United States and in meeting urgent demands arising from the presence of aliens in the State or local government's jurisdiction, when such actions are taken to assist in meeting an immigration emergency or under any of the circumstances specified in section 404(b)(2)(A) of the INA. Assistance may include, but need not be limited to, the provision of large shelter facilities for the housing and screening of aliens, and, in connection with these activities, the provision of such basic necessities as food, water clothing, and health care.

Immigration emergency means an actual or imminent influx of aliens which either is of such magnitude or exhibits such other characteristics that effective administration of the immigration laws of the United States is beyond the existing capabilities of the **Immigration and Naturalization Service ("INS")** in the affected area or areas. Characteristics of an influx of aliens, other than magnitude, which may be considered in determining whether an immigration emergency exists include: the likelihood of continued growth in the magnitude of the *influx*; an apparent connection between the influx and increases in criminal activity; the actual or imminent imposition of unusual and overwhelming demands on law enforcement agencies; and other similar characteristics.

Other circumstances means a situation that, as determined by the **Attorney General**, requires the resources of a State or local government to ensure the proper administration of the immigration laws of the United States or to meet urgent demands arising from the presence of aliens in a State or local government's jurisdiction.

§ 65.83 Assistance required by the Attorney General.

The **Attorney General** may request assistance from a State or local government in the administration of the immigration laws of the United States or in meeting urgent demands where the need for assistance arises because of the presence of aliens in that State or local jurisdiction, and may provide funding to a State or local government relating to such assistance from the Immigration Emergency Fund or other funding available for such purposes, without a Presidential determination of an immigration emergency, in any of the following circumstances:

(a) An **INS district director** certifies to the **Commissioner of INS**, who shall, in turn, certify to the **Attorney General**, that the number of **asylum applications filed in that INS district** during the relevant calendar quarter exceeds by at least 1,000 the number of such applications filed in that **district** during the preceding calendar quarter. For purposes of this paragraph, providing parole at a **point of entry in a district** shall be deemed to constitute an **application for asylum** in the **district**.

(b) The **Attorney General** determines that there exist circumstances involving the administration of the immigration laws of the United States that endanger the lives, property, safety, or welfare of the residents of a State or locality.

(c) The **Attorney General** determines that there exist any other circumstances, as defined in §65.81 of this subpart, such that it is appropriate to seek assistance from a State or local government in administering the immigration laws of the United States or in meeting urgent demands arising from the presence of aliens in a State or local jurisdiction.

(d)(1) If, in making a determination pursuant to paragraph (b) or (c) of this section, the **Attorney General** also determines that the situation involves *an actual or imminent mass influx of aliens arriving off the coast or near a land border* of the United States and presents urgent circumstances requiring an immediate Federal response, the **Attorney General** will formally declare that a mass influx of aliens is imminent or occurring. The determination that a mass influx of aliens is imminent or occurring will be based on the factors set forth in the definitions contained in §65.81 of this subpart. The **Attorney General** will determine and define the time period that encompasses a mass influx of aliens by declaring when such an event begins and when it ends. The **Attorney General** will initially define the geographic boundaries where the mass influx of aliens is imminent or occurring.

(2) Based on evolving developments in the scope of the event, the **Commissioner of the INS** may, as necessary, amend and redefine the geographic area defined by the **Attorney General** to expand or decrease the boundaries. This authority shall not be further delegated.

(3) The **Attorney General**, pursuant to section 103(a)(8) of the INA, 8 U.S.C. 1103(a)(8), may authorize any State or local law enforcement officer to perform or exercise any of the powers, privileges, or duties conferred or imposed by the Act, or regulations issued thereunder, upon officers or employees of **the Service**. Such authorization must be with the consent of the head of the department, agency, or establishment under whose jurisdiction the officer is serving.

(4) Authorization for State or local law enforcement officers to exercise *Federal immigration law enforcement authority* for transporting or guarding aliens in custody may be exercised as necessary beyond the defined geographic boundaries where the mass influx of aliens is imminent or occurring. Otherwise, *Federal immigration law enforcement authority* to be exercised by State or local law enforcement officers will be authorized only within the defined geographic boundaries where the mass influx of aliens is imminent or occurring.

(5) State or local law enforcement officers will be authorized to exercise *Federal immigration law enforcement authority* only during the time period prescribed by the **Attorney General** in conjunction with the initiation and termination of a declared mass influx of aliens.

[Order No. 1892-94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601-2002, 67 FR 48360, July 24, 2002]

§ 65.85 Procedures for State or local governments applying for funding.

(a) In the event that the chief executive of a State or local government determines that any of the circumstances set forth in §65.83 of this subpart exists, he or she may pursue the procedures in this section to submit to the **Attorney General** an application for a reimbursement agreement, grant, or cooperative agreement as described in §65.84 of this subpart.

(b) The **Department** strongly encourages chief executives of States and local governments, if possible, to consult informally with the **Attorney General** and the **Commissioner of INS** prior to submitting a formal application. This informal consultation is intended to facilitate discussion of the nature of the assistance to be provided by the State or local government, the requirements of the **Attorney General**, if any, for such assistance, the costs associated with such assistance, and the **Department's** preliminary views on the appropriateness of the proposed funding.

(c) The chief executive of a State or local government shall submit an application in writing to the **Attorney General**, and shall file a copy with the **Commissioner of INS**. The application shall set forth in detail the following information:

- (1) The name of the jurisdiction requesting reimbursement;
- (2) All facts supporting the application;
- (3) The nature of the assistance which the State or local government has provided or will provide, as required by the **Attorney General**, for which funding is requested;
- (4) The dollar amount of the funding sought;
- (5) A justification for the amount of funding being sought;
- (6) The expected duration of the conditions requiring State or local assistance;
- (7) Information about whether funding is sought for past costs or for future costs;
- (8) The name, address, and telephone number of a contact person from the requesting jurisdiction.

[Order No. 1892-94, 59 FR 30522, June 14, 1994, as amended by Order No. 2601-2002, 67 FR 48361, July 24, 2002]

Immigration and Nationality Act (INA)

INA Sec. 404. [8 U.S.C. 1101, note] **AUTHORIZATION OF APPROPRIATIONS**

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act (other than chapter 2 of title IV). [*This refers to refugee resettlement.*]

(b)

(1) There are authorized to be appropriated (for fiscal year 1991 and any subsequent fiscal year) to an immigration emergency fund, to be established in the Treasury, an amount sufficient to provide for a balance of \$35,000,000 in such fund, to be used to carry out paragraph (2) and to provide for an increase in ***border patrol*** or ***other enforcement activities*** of the **Service** and for reimbursement of State and localities in providing assistance as requested by the **Attorney General** in meeting an immigration emergency, except that no amounts may be withdrawn from such fund with respect to an emergency unless the President has determined that the immigration emergency exists and has certified such fact to the Judiciary Committees of the House of Representatives and of the Senate.

(2)

(A) Funds which are authorized to be appropriated by paragraph (1), subject to the dollar limitation contained in subparagraph (B), shall be available, by application for the reimbursement of States and localities providing assistance as required by the **Attorney General**, to States and localities whenever-

(i) a **district director of the Service** certifies to the **Commissioner** that the number of ***asylum applications*** filed in the respective **district** during a calendar quarter exceeds by at least 1,000 the number of such applications filed in that district during the preceding calendar quarter,

(ii) the lives, property, safety, or welfare of the residents of a State or locality are endangered, or

(iii) in any other circumstances as determined by the **Attorney General**.

In applying clause (i), the providing of ***parole*** at a **point of entry** in a district shall be deemed to constitute ***an application for asylum*** in the district.

(B) Not more than \$20,000,000 shall be made available for all localities under this paragraph.

(C) For purposes of subparagraph (A), the requirement of paragraph (1) that an immigration emergency be determined shall not apply.

(D) A decision with respect to an application for reimbursement under subparagraph (A) shall be made by the **Attorney General** within 15 days after the date of receipt of the application.