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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 126

[Docket No. DHS–2022–0039]

RIN 1601–AB09

Procedures of the Transportation Security Oversight Board Review Panel Concerning Federal Aviation Administration Airman Certificates

AGENCY: Office of the Secretary, DHS

ACTION: Final rule.

SUMMARY: In this final rule, DHS codifies in final form the procedures that apply to appeals before the Transportation Security Oversight Board concerning Federal Aviation Administration Airmen Certificates. The final rule addresses comments stakeholders submitted in response to an interim final rule DHS published on August 9, 2022, on the same topic. DHS amends the IFR rule text to permit parties to consent to electronic service of documents, include a definition of the standard of review that applies to the proceedings, and provide a process to seek remand for good cause shown.

DATES: This rule is effective May 13, 2024.

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SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

ALJ—Administrative Law Judge
ALPA—Air Line Pilots Association,
International

AOPA—Aircraft Owners and Pilots
Association

ATSA—The Aviation and Transportation
Security Act of 2001

CFR—Code of Federal Regulations

DHS—Department of Homeland Security
FAA—Federal Aviation Administration
FRAP—Federal Rules of Appellate Procedure
Pt.—Part
§—Section
SES—Senior Executive Service
SL—Senior Level
SSI—Sensitive Security Information
Stat.—United States Statutes at Large
Subt.—Subtitle
TSA—Transportation Security
Administration
TSOB—Transportation Security Oversight
Board
U.S.C.—United States Code

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I. Background and Purpose

A. Statutory History

Section 601(a) of the Vision 100—Century of Aviation Reauthorization Act (Vision 100 Act), Public Law 108–176, 117 Stat. 2490, 2561 (Dec. 12, 2003) (codified at 49 U.S.C. 46111(a)) requires the FAA Administrator to issue an order amending, modifying, suspending, or revoking all or part of an FAA certificate issued under title 49 of the U.S. Code when notified by the Administrator of the TSA that the certificate holder poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety. The FAA Administrator may also hold in abeyance or deny an application for a certificate based on a Determination of Security threat, in accordance with 14 CFR 3.205. Following the FAA’s issuance of such an order, abeyance, or denial, an adversely affected U.S. citizen may challenge the TSA’s determination that they pose or are suspected of posing such a risk (called a Determination of Security Threat) at a hearing on the record before an ALJ. 49 U.S.C. 46111(b)–(c). Any party to the proceedings before the ALJ may appeal the ALJ’s decision to a Review Panel appointed by the TSOB. 49 U.S.C.

46111(d). Any person who is substantially affected by the TSOB Review Panel’s action may seek review by an appropriate U.S. Court of Appeals. 49 U.S.C. 46110(a) and 46111(e). The TSA Administrator may seek such review if it is determined that the Review Panel’s action will have a significant adverse impact on carrying out 49 U.S.C. Subt. VII, Pt. A, which establishes Federal programs to ensure safety in aviation and air commerce.

Section 102(a) of the Aviation and Transportation Security Act of 2001 (ATSA), Public Law 107–71, 115 Stat. 597, 604 (Nov. 19, 2001) (codified at 49 U.S.C. 115) established the TSOB. The Secretary of Homeland Security, or the Secretary’s designee, serves as the Chairperson of the TSOB. 49 U.S.C. 115(b)(2). The other statutory members of the TSOB are the Secretaries of Transportation, Defense, and the Treasury, the Attorney General, the Director of National Intelligence, or their designees, and one individual appointed by the President to represent the National Security Council. 49 U.S.C. 115(b)(1).

When the TSOB receives an appeal from an ALJ’s decision regarding a TSA Determination of Security Threat, it must establish a Review Panel to review the decision. 49 U.S.C. 46111(d). The members of the Review Panel may not be TSA employees, and they must hold an appropriate security clearance. 49 U.S.C. 46111(d)(1) and (2). A TSOB Review Panel may affirm, modify, or reverse the ALJ’s decision. 49 U.S.C. 46111(d)(3).

B. TSA Vetting Process and Redress for Determinations of Security Threat

Following the terrorist attacks of September 11, 2001, Congress recognized the need for an entirely new and comprehensive regulatory regime focused on securing the transportation system. Congress enacted many laws requiring TSA to conduct security threat assessments (STAs) of individuals who perform security functions in or have access to the transportation system. At present, TSA conducts STAs for more than 28 million individuals every day. The vetted populations include airport workers, airline employees, air cargo handlers, FAA certificate holders, individuals seeking airspace waivers, drivers hauling hazardous materials in commerce, merchant mariners and

longshoremen working in ports and on vessels, trusted travelers, flight students, chemical facility employees, and others. In accordance with governing statutes and fundamental principles of due process, TSA developed these vetting programs to collect ample biographic information to verify the identity of the applicant, conduct informed evaluations of the vetting results, and provide robust redress to protect against incorrectly designating an individual as a threat to national or transportation security, or of terrorism.

Of the approximately 30 million individuals TSA vets daily, over 5 million hold FAA certificates. To conduct this vetting, TSA uses the biographic information the FAA collects from applicants and certificate holders and compares it against several intelligence and law enforcement databases. As part of this vetting, TSA is required to ensure that individuals “are screened against all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government before being certificated” by the FAA.¹ TSA’s intelligence analysts review any derogatory information generated during the vetting to determine whether the individual poses or is suspected of posing a security threat. If TSA believes the individual poses, or is suspected of posing, a security threat, TSA issues a Determination of Security Threat, notifies the FAA of the Determination of Security Threat, and asks the FAA to amend, modify, suspend, or revoke the individual’s certificates. Once the FAA takes action, the individual, if a U.S. citizen, may appeal the Determination of Security Threat underlying FAA’s action to an ALJ.

The ALJs who hear these appeals are experienced judges who are frequently called upon to review TSA’s eligibility determinations for other transportation worker populations and who possess the appropriate security clearance to review classified or otherwise protected information and evidence. The ALJs receive and assess information and evidence; hold and regulate the course of hearings; dispose of procedural motions; and examine witnesses. The ALJ conducts a *de novo* hearing, reviews the evidence and testimony presented (including the information on which TSA based its Determination of Security Threat), and issues a decision based on that review. Either party may appeal the ALJ’s decision to the TSOB Review Panel.

C. TSOB Review Panel Procedures for FAA Certificate Appeals

Following the first FAA certificate appeal to the TSOB Review Panel in 2010, the TSOB Chairperson issued procedures in May 2011 for use in all such appeals. DHS provided these written procedures directly to litigants when they file an appeal of the ALJ’s decision. All of the 2011 procedures governing briefs and motions, the conduct of proceedings, the treatment of sensitive documents, and the standard of review were closely aligned with the Federal Rules of Appellate Procedure (FRAP) and administrative practice procedures. The 2011 procedures ensured that parties have adequate time to seek review, prepare briefs, respond to opposing party assertions, request extensions of time, and request hearings. The 2011 procedures established the standard of review, substantial evidence on the record, for the Review Panel to apply when reviewing evidence and reaching a decision.

D. Summary of the IFR

DHS determined it would be best to codify the appeal procedures to provide full transparency and consistency of process for all potential litigants and Review Panel members, and published the IFR in August 2022.² DHS based this decision on the likelihood of increasing numbers of appeals and to ensure all TSOB Review Panels apply consistent standards and procedures.³

Requests for review of Determinations of Security Threat are on the rise. From 2011 to November 30, 2021, the TSOB received only one additional appeal, which was resolved by decision of the TSOB Review Panel on September 23, 2021. However, currently there are four Determinations of Security Threat regarding U.S. citizens pending review by an ALJ, and an additional six U.S. citizens have timely initiated the redress process in response to a Determination of Security Threat. Overall, TSA’s caseload with respect to Determinations of Security Threat increased by over 100% between Fiscal Year 2019 and Fiscal Year 2022, in significant part due to rising investigations of domestic terrorism-related cases in which affected certificate holders may seek review of Determinations of Security Threat by an ALJ and then the TSOB. Given this

trend, codifying the procedures helps ensure optimal transparency in the process for affected individuals, clear understanding of the procedures, and consistency in the application of the standards and procedures.

Under the Administrative Procedure Act (APA), rules involving “agency organization, procedure, or practice” like the TSOB Review Panel procedures, do not require advance notice and the opportunity to comment before becoming final.⁴ The IFR was procedural within the meaning of the APA because it merely codified current practice and did not alter the rights of or substantive standards applied to an individual appearing before the TSOB Review Panel, such as whether the individual poses or is suspected of posing a threat. Nevertheless, DHS agrees with the views of the Administrative Conference of the United States (ACUS) that public comment serves a critical role in the development of sound policy, and that agencies should solicit comment when it is possible to do so.⁵ Consequently, DHS requested comments on the IFR from the public.

The IFR generally codified the written 2011 TSOB Review Panel procedures with certain updates and clarifications where necessary for full transparency. The rule addressed appeals to the TSOB Review Panel from an ALJ’s decision concerning TSA’s Determination of Security Threat and did not apply to other matters that the TSOB oversees. The IFR established requirements for TSOB Review Panel members and the docket clerk; the standard of review applicable to appeals; timelines for appeals and responses; filing and supplementing the record; entry of appearance; motions, briefs, and the administration of hearings; procedures for the use of classified materials, sensitive security information, and other protected information; and the effect of the TSOB Review Panel action.⁶

II. Response to Comments on the IFR

DHS received comments on the IFR from two organizations: the Air Line Pilots Association, International (ALPA) and the Aircraft Owners and Pilots Association (AOPA). ALPA represents the safety and security interests of over 66,000 professional airline pilots flying

⁴ See 5 U.S.C. 553 (b)(A). See also 87 FR 48431, 48436–37 for a full discussion of the use of procedural rules.

⁵ See ACUS Recommendation 92–1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, (December 18, 1992).

⁶ See 87 FR 48431, 48433–36 for an explanation of the IFR rule text.

² See Procedures of the Transportation Security Oversight Board Review Panel Concerning Federal Aviation Administration Airman Certificates, 87 FR 48431 (August 9, 2022).

³ In 2021, the TSOB Review Panel chose to apply a *de novo* standard of review rather than the substantial evidence standard required in the appeal procedures.

¹ 49 U.S.C. 44903(j)(2)(D)(i).

for 41 airlines in the United States and Canada. AOPA represents 300,000 members who operate 85% of all general aviation aircraft operating in the United States. Over 72,000 members of AOPA participate in AOPA's Pilot Protection Services, which provides legal services to individuals who are subject to FAA and TSA enforcement actions. The comments relate to some general matters and several specific topics, including the use of electronically/electronic service for service of documents; standard of review the TSOB Review Panel applies; process for non-governmental counsel to have access to protected information; precedential nature of TSOB Review Panel decisions; publication of TSOB Review Panel decisions; and the treatment of constitutional issues.

A. General Matters

ALPA suggested that DHS include in this response to comments a full discussion of the procedures that currently apply to the appeal of an FAA certificate holder to an ALJ following revocation, suspension, or modification of the certificate. TSA provides each affected certificate holder actual notice of those procedures by letter when the certificate action is taken by the FAA. Also, TSA is in the process of amending its regulations to codify those procedures in 49 CFR part 1540. Because this rule concerns procedures applicable to an appeal to a TSOB Review Panel, we believe a full discussion of the current appeal process to an ALJ in this document is unnecessary and may be confusing to the public.

AOPA encourages DHS to periodically reexamine and update these regulations. For any future amendments to these rules, AOPA also encourages DHS to continue its practice of seeking public comment on procedural rules. DHS and its components periodically review all regulations in accordance with Executive Orders⁷ and sound regulatory policy. This review may result in changes to existing rules, the development of new standards, or terminating standards that are no longer necessary. DHS will follow that same

⁷ See Exec. Order No. 13610, 77 FR 28467 (May 10, 2012); Exec. Order No. 13563, 76 FR 3821 (Jan. 18, 2011); see also, Periodic Retrospective Review, 86 FR 36075 (Jul. 8, 2021); Learning from Regulatory Experience, 82 FR 61738 (Dec. 29, 2017); Retrospective Review of Agency Rules, 79 FR 75114 (Dec. 17, 2014); Review of Existing Agency Regulations, 60 FR 43108 (Aug. 18, 1995).

process with this rulemaking and revise the language as necessary.

B. Use of Electronic Service of Documents

AOPA supports filing and serving documents electronically, as permitted by § 126.13 of this rule, and suggests that the rule also address how to consent to electronic service, how to establish evidence of electronic service, and how to compute time when documents are filed or served electronically. Also, AOPA recommends that the rule establish a presumption of consent to future electronic service when a document is transmitted electronically and there is evidence to confirm its successful transmission. AOPA encourages the TSOB Review Panel to consider providing automated receipts in response to electronic filings made to the TSOB Docket Clerk. AOPA suggests adding the following language to § 126.13(b): 'A party may consent to service via electronically/electronic service by filing a document expressly stating such a preference with the TSOB Docket Clerk and serving a copy on all other parties.' AOPA asks DHS to adopt language from the Federal Rule of Appellate Procedure (FRAP) 26, Computing and Extending Time, for use in the procedures before the TSOB Review Panel.

DHS Response: DHS agrees with adding the suggested language to § 126.13(b) to provide a method by which parties may consent to service of documents electronically. Therefore, we have revised the text in § 126.13(b) to state that a party may consent to electronic service by filing a document that expressly states such a preference with the TSOB Docket Clerk, and serving a copy on all other parties.

DHS is not inclined at this time to establish a presumption of consent to future electronic service when a document is transmitted electronically and there is evidence to confirm its successful transmission. To the extent we have individuals who initiate an appeal without counsel and use electronic means to do so, they may have no knowledge of the presumption this establishes for future service of documents. Generally, parties should knowingly and affirmatively consent to changes in service, not by presumption. Moreover, the new language in § 126.13(b) creates a simple process by which individuals may elect to establish a presumption of consent to future electronic service at any time.

DHS is not inclined to revise the rule text identifying the filing date and computation of time for documents filed through electronically/electronic

service. The existing rule text in § 126.13(c) establishes that service of all documents, regardless of transmittal method, occurs on the date on which the TSOB Docket Clerk receives the document. We believe the Docket Clerk is in the best position to determine whether it is necessary to set up automated electronic receipts for documents filed through electronically/electronic service or whether another kind of action is preferable.

We believe adopting the FRAP Rule 26 for TSOB Review Panel proceedings is not advisable at this time. Rule 26 defines terms used in the text of the FRAP on time computation, including *next day*, *last day*, and *legal holiday*. These terms are not used in the TSOB Review Panel rulemaking, and thus, there is no need to define them. Also, the FRAP Rule 26 explains that Saturdays, Sundays, and legal holidays must be counted when computing timelines. We believe there is no need to add this language because the TSOB Review Panel rule does not suggest or provide exceptions for these days when computing time. The FRAP Rule 26 provides procedures that apply when the Clerk's Office is inaccessible; given the extensive use of electronically/electronic service for service of documents today, we believe there is little need to provide for circumstances when the "Clerk's Office" is inaccessible for TSOB Review Panel proceedings. The TSOB Review Panel does not rely on a typical "Clerk's Office" that has a stationary presence in courthouses and handles a high volume of judicial proceedings. Rather, the rule establishes that an individual from within the DHS Office of the General Counsel serves as the TSOB Docket Clerk, available to receive documents electronically at virtually any time. For all of these reasons, we believe the TSOB Review Panel rule text is sufficiently clear on the computation of time and changes are unnecessary.

C. Standard of Review

Section 126.9(a) establishes that the standard of review the TSOB Review Panel applies is substantial evidence, and in paragraph (b) states that the Review Panel will not consider the constitutionality of any statute, regulation, Executive Order, or order issued by TSA. Both ALPA and AOPA commented on this section. AOPA seeks confirmation that while the TSOB Review Panel gives deference to an ALJ's factual findings supported by substantial evidence in the record, the Review Panel reviews legal determinations made by the ALJ using the *de novo* standard of review. Also,

AOPA suggests that DHS either remove § 126.9(b) or amend it to include a statement that parties must raise constitutional issues at the agency level to preserve them for judicial review.

ALPA states that the substantial evidence standard of review is not indicated or required by 49 U.S.C. 46111(d). ALPA asserts that this standard of review is too restrictive to provide adequate procedural and substantive right protections. Also, ALPA suggests that because the rule does not include a definition of substantial evidence, it is open to interpretation by each TSOB Review Panel. ALPA asserts that DHS should amend § 126.9 to follow or incorporate the standard of review the National Transportation Safety Board (NTSB) uses in its Rules of Practice in Air Safety Proceedings, codified at 49 CFR 821.49. Those procedures apply to the NTSB review of ALJ decisions that affirm, modify, amend, or reverse FAA Certificate actions related to safety issues. The NTSB procedures permit the Board to consider if the “findings of fact are supported by a preponderance of reliable, probative, and substantial evidence.”

DHS Response: DHS is adding a definition of the term “substantial evidence” to the rule to make certain there is no room for confusion or interpretation as to what the standard means. It is a term that is widely used and generally not subject to varying interpretations, but a definition of it in the rule text provides optimum clarity for all parties associated with TSOB Review Panel proceedings. The definition is “substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” This is the standard of review that is applied in administrative review proceedings like those of the TSOB Review Panel.

In practical terms, the substantial evidence standard is more deferential to the decision below than the preponderance of the evidence standard of review. A preponderance of the evidence means there is a greater than 50% chance an assertion or decision is true, and typically applies to civil court cases. The substantial evidence standard does not require a reviewing body to find that the decision below is more likely than not to be true, but that the decision is reasonable given all of the information presented. The NTSB procedural rule that ALPA urges DHS to use for this rule requires the Board to find that the ALJ’s findings of fact are supported by “a preponderance of reliable, probative, and substantial evidence,” which is a hybrid standard

that combines preponderance of the evidence with substantial evidence and probative evidence.

DHS does not wish to apply the NTSB standard to TSOB Review Panel cases. DHS agrees with ALPA’s statement that 49 U.S.C. 46111(d) does not reference or require the substantial evidence standard of review for TSOB Review Panel proceedings. However, use of the substantial evidence standard for appellate review of administrative proceedings at the Federal level is commonplace.⁸ The use of this standard for reviewing an ALJ’s decision recognizes the significant expertise ALJs bring to the Federal administrative process. ALJs handle a variety of subject matters, legal issues, motions, witness testimony, statutory and regulatory interpretation, and matters advanced by *pro se* appellants as well as those represented by counsel. Most ALJs have very active dockets that require sound and timely decision-making. To require a reviewing body like the TSOB Review Panel to use the less deferential *de novo* standard for reviewing ALJ proceedings would increase the time and resources needed to resolve appeals, with scant justification that is it necessary. Congress and agencies would not authorize the use of the substantial evidence standard of review so widely if evidence existed demonstrating that proceedings before ALJs were insufficient or wrought with problems.

In addition to the factors discussed above, it is important to note that § 126.7 of the current IFR authorizes the TSOB Review Panel to remand a matter to the ALJ to “address particular issues or consider additional testimony or evidence.” Thus, if the TSOB Review Panel has concerns about the outcome reached at the ALJ level or cannot reach a decision on appeal, it can send the matter back to the ALJ with instructions on examining issues and obtaining additional testimony or evidence. This section enables the TSOB Review Panel to seek correction or clarification of issues that are vague, questionable, or

⁸ See, e.g., 29 CFR 24.110(b), which mandates the use of the substantial evidence standard by the Department of Labor Administrative Review Board (ARB) when reviewing an ALJ decision. See also, *Stone & Webster Constr., Inc. v. U.S. Dep’t of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012), in which the court details the effect of the standard’s codification on later appeals (“As a result, we now show less deference to an ARB that disturbs the factual findings of an ALJ.”); 33 U.S.C. 921(b)(3) and 20 CFR 802.301(a), Department of Labor Benefits Review Board; 42 CFR 3.548(h), Department of Health and Human Services Departmental Appeals Board; 32 CFR 200.2021(h), Defense Health Agency; 42 U.S.C. 405(g), Social Security Administration; 12 U.S.C. 1848, Federal Reserve Board; 49 CFR 386.67(b), Federal Motor Carrier Safety Administration.

unsupported by the record, and essentially to correct the kind of procedural and substantive shortcomings ALPA expressed concern about in its comments. Also, ALPA suggests DHS amend § 126.19 to permit the TSOB Review Panel to remand the case to the ALJ for additional proceedings upon motion of the parties and “a showing of good cause.” DHS sees value in this suggested revision to the IFR and is adding this language as new § 126.19(b)(3). This addition to the rule text further minimizes the need to require a higher standard of review such as a preponderance of the evidence or the hybrid standard the NTSB uses in its appellate procedures.

D. Review of ALJ Legal Determinations and Objections to Prejudicial Errors

Both ALPA and AOPA submitted comments asserting that an ALJ’s legal determinations and prejudicial errors of law and procedure should receive special treatment by the TSOB Review Panel. AOPA seeks confirmation that while the TSOB Review Panel gives deference to an ALJ’s factual findings based on substantial evidence in the record, the Review Panel applies *de novo* review to any legal determinations the ALJ makes. ALPA asserts that § 126.23(a)(2) should be revised to state that a party’s objections to an ALJ’s prejudicial errors of the law or procedure are reviewable by the TSOB Review Panel.

DHS Response: DHS confirms that appellate courts and administrative review panels such as the TSOB Review Panel apply the substantial evidence standard to factual issues, but apply essentially a *de novo* review of legal determinations an ALJ makes. Reviewing panels and courts retain the authority to review and determine purely legal questions to determine if they are erroneous as a matter of law when raised on appeal, without deference to the lower court. In FAA certificate holder cases appealed to the TSOB Review Panel, the sustainability of the underlying security threat determination is based on a factual determination, subject to the substantial evidence standard of review.

DHS is not inclined to revise § 126.23(a)(2) to state that a party’s objections to an ALJ’s prejudicial errors of law or procedure are reviewable by the TSOB Review Panel because it is unnecessary. The current language in § 126.23(a)(2) states the appellant must “enumerate the appellant’s objections to the ALJ’s decision” in the appellant’s brief perfecting the appeal. This language is broad and permits the

appellant to raise perceived prejudicial errors of law or procedure in the appeal.

E. Access to Protected Information

AOPA and ALPA commented on the need for the appellant and counsel to have access to protected information during the TSOB Review Panel proceeding. Both organizations recommend DHS create a process for non-government counsel representing non-government parties in TSOB Review Panel actions to request designation as having a “need to know,” be appropriately vetted, and once designated, have access to classified and other protected information, and SSI.

The IFR rule text in § 126.17 addresses procedures for the use of classified, sensitive security, and other protected information. The rule defines “other protected information” as information the government is authorized to withhold under statute, regulation, or Executive Order. Paragraph (b) in § 126.17 prohibits the TSOB Review Panel from disclosing classified or other protected information to a non-government party or counsel, and prohibits disclosing SSI to those individuals unless TSA determines the party had a preexisting need to know specific SSI as a covered person under 49 CFR 1520.7 and 1520.11.

DHS Response: DHS believes it is inadvisable to establish a process for non-government individuals to have access to classified or other protected information during TSOB Review Panel proceedings. There is longstanding precedent on the need for strict controls over classified and protected information, and we do not find sufficient justification here to alter those policies and procedures. We believe unintended and serious consequences may occur as the circle of individuals with access to this information grows, particularly where there is very little ability to track or prevent additional sharing of the information. However, in accordance with the SSI regulations codified at 49 CFR part 1520, appellants and their counsel may have access to SSI that is associated with their TSOB Review Panel case. In other words, § 126.17(b) neither expands nor contracts a party’s authorization to receive SSI in accordance with 49 CFR part 1520.

E. Publication and Precedential Nature of Decisions

AOPA recommends that DHS revise § 126.27 to include a method for publishing TSOB Review Panel decisions in such a way as to protect an affected individual’s identity. Also, AOPA recommends DHS revise

§ 126.29(b) to state that TSOB Review Panel actions are precedential for future ALJ decisions and TSOB Review Panel actions. AOPA asserts that providing precedential value to TSOB Review Panel decisions will bring greater consistency and efficiency to the process, and assist potential appellants in making litigation decisions.

DHS Response: DHS does not believe it is advisable or necessary to publish decisions or amend the rule to state that the decisions serve as precedent for future ALJ and TSOB cases. The number of cases is very low and the fact patterns so unique that it is difficult to see how one case could be precedential for another. Also, as security threats evolve over time, the factors that contribute to determining whether an individual poses a security threat may also evolve. Attaching precedential authority to older decisions may result in improper or incongruous results. Since DHS is not inclined to publish decisions at this point in time, it is not necessary to address AOPA’s recommendation for a process to protect the identity of an affected party when publishing a decision.

F. Challenging TSOB Panel Membership

AOPA recommends that DHS provide a mechanism for a party to file a motion to disqualify a TSOB Review Panel member due to conflict of interest concerns.

DHS Response: DHS does not believe there is sufficient justification for this recommendation. There are checks in the TSOB appointment process that minimize the risk that a Panel member would have a conflict of interest concerning a specific case. Panel members must be a member of the Senior Executive Service or a Senior Level employee, which typically means the individual has a longstanding career in the government and is subject to strict standards of ethics. Panel members also may not be employed by the FAA or TSA. These two requirements minimize the chance that a Panel member has a conflict related to a specific FAA certificate revocation or suspension.

G. Add Court of Appeals Filing Deadline

ALPA recommends that DHS revise § 126.29 to include the Court of Appeals filing deadline, which is 60 days from the date the TSOB Review Panel issues its decision, under 49 U.S.C. 46110.

DHS Response: DHS is amending § 126.29 to state that an appeal of the TSOB Review Panel must be done in accordance with the requirements of 49 U.S.C. 46110, which allows for 60 days. This provides litigants with the

information necessary to ensure timely appeals, and if the statute changes in the future, there would be no need to also amend this regulation.

H. Constitutional Issues

AOPA recommends that DHS remove paragraph 126.9(b) or revise it to state that constitutional issues must be raised before the agency in order to be preserved for judicial review.

DHS Response: DHS is not inclined to remove or revise paragraph (b). The language states that a TSOB Review Panel will not review the constitutionality of any statute, regulation, Executive Order, or order issued by TSA. This sufficiently puts litigants on notice that constitutional matters do not fall within TSOB Review Panel authority, but we do not believe it necessary to provide litigants information on when or where those issues must be raised outside of the TSOB Review Panel proceedings.

III. Discussion of the Final Rule and Summary of Changes

The language below describes the rule text as it appears in the IFR and where DHS is changing the rule text in response to comments received.

§ 126.1 Purpose and Scope

Section 126.1 describes the general purpose and scope of part 126, which is to establish procedures by which a TSOB Review Panel is appointed and reviews an appeal from an ALJ’s decision regarding a TSA Determination of Security Threat. The procedures apply to appeals involving applications for certificates that are denied or held in abeyance as well as orders to amend, modify, suspend or revoke FAA certificates. Congress left to DHS’s discretion the development of detailed procedures for TSOB review of an appeal from an ALJ’s decision.

§ 126.3 Definitions

Section 126.3 provides definitions of important terms that are used in the rule. The 2011 procedures did not include a definition section, but based on the experience DHS has gained in prior TSOB Review Panel cases and other administrative review programs DHS and its components administer, establishing definitions of key terms aids all parties engaged in the review process. These definitions are taken from existing statutory, regulatory, or Executive Order language, or reflect common usage meanings. DHS is adding a definition of the term “substantial evidence” as discussed in II.C. above.

‘Classified information’ has the same meaning the term has in Executive

Order 13526, *Classified National Security Information*, or its successor Executive Order. The term ‘communication technology’ means telephone or videoconferencing platform. The term ‘Sensitive Security Information’ (SSI) is information described in 49 CFR 1520.5. The rule defines ‘other protected information’ as any other information that the government is authorized by statute, regulation, or Executive Order to withhold. The rule defines ‘Transportation Security Oversight Board (TSOB)’ as the board established pursuant to 49 U.S.C. 115. Finally, ‘Transportation Security Oversight Board (TSOB) Review Panel’ is defined as the panel established pursuant to 49 U.S.C. 46111(d) to consider an appeal from a decision of an ALJ as the result of a hearing under 49 U.S.C. 46111(b).

§ 126.5 Appointment of TSOB Review Panel and TSOB Docket Clerk

Section 126.5(a) provides that TSOB members must designate individuals who meet specific criteria to serve in a pool of potential Panel members for a period of two years. The criteria for nominees are listed in paragraphs (a)(1) through (5). The nominee must be a member of the Senior Executive Service (SES) or a Senior Level (SL) employee to ensure that he or she possesses the appropriate level of experience to evaluate the issues and record before the Panel. The nominee must hold the appropriate security clearance to ensure that he or she can effectively review an administrative record that contains classified material. Nominees may not be employees of TSA or FAA, which ensures an unbiased review of TSA’s security threat determination. Although 49 U.S.C. 46111(d) excludes only TSA employees from membership on a TSOB Review Panel, the TSOB Chairperson has determined that FAA employees should also be excluded. Exclusion of both TSA and FAA employees from participation in the TSOB Review Panel pool avoids the possible appearance of impartiality or lack of independent review. To the extent practicable, the nominee will have a legal background and be engaged in the practice of law on behalf of the U.S. government. Although these qualifications were not included in the 2011 procedures, through experience in this and other administrative appeal programs, DHS has found that individuals with this background enhance a Review Panel’s ability to efficiently and accurately assess the legal arguments the parties assert during the appeal, and to prepare cogent decisions. Finally, to the extent practicable, a nominee will be familiar

with transportation security issues. This factor was not included in the 2011 procedures, but DHS has found that such a background enhances the efficiency and accuracy of the review process.

Paragraph (b) provides that TSOB members must designate officials for the TSOB Review Panel when each two-year period expires. Paragraph (c) states that the General Counsel of the Department of Homeland Security, or the General Counsel’s designee, will appoint an individual from within the Office of the General Counsel to serve as the TSOB Docket Clerk. The TSOB Docket Clerk serves as the Review Panel’s point of contact for the public and the parties to ALJ proceedings. Paragraph (d) states that when the TSOB Docket Clerk receives a properly and timely filed appeal from an ALJ’s decision, the TSOB Chairperson will select at least three individuals from the Review Panel pool to serve on a Review Panel to review the ALJ’s decision. The TSOB Chairperson has discretion to choose which individuals from the pool will serve on a TSOB Review Panel. In making selections for a TSOB Review Panel, the TSOB Chairperson will, to the extent practicable, select at least one person with a legal background to serve as a Panel Member. A three-member Review Panel allows for appropriate deliberation and the exercise of independent judgment, and is similar to the size of other Federal Government administrative review panels and the panels that hear cases in the U.S. Courts of Appeals.⁹

§ 126.7 Function of TSOB Review Panel

Section 126.7 requires a TSOB Review Panel to review an ALJ’s decision and affirm, modify, or reverse that decision, or remand the matter to the ALJ for reconsideration.

§ 126.9 Scope and Standard of Review

Section 126.9(a) states that the standard of review a TSOB Review Panel uses in considering an ALJ’s decision is whether the decision is supported by substantial evidence in the record. The term “standard of review” refers to the degree of deference a reviewing court gives to the court below. The 2011 procedures stated that the standard of review is whether the ALJ’s decision reasonably supports the conclusion that the FAA certificate holder does or does not pose a security

threat, which is equivalent to “substantial evidence in the record.” Substantial evidence means “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”¹⁰ In contrast, the ALJ applies a *de novo* standard of review to TSA’s Determinations of Security Threat for FAA certificate holders. A “*de novo*” standard of review applies the least amount of deference to the court below; the reviewing court examines the evidence as though it is being considered for the first time, allowing the reviewing court to substitute its own judgment about the application of the law to the facts.

Generally, the substantial evidence standard of review is used in civil cases relating to administrative decisions at the Federal level. TSA administers several vetting programs with robust redress processes that, like the TSOB Review Panel procedures, include multiple levels of review. One transportation-related example is the review process for the Transportation Worker Identification Credential (TWIC) and Hazardous Materials Endorsement (HME) programs found at 49 CFR 1515.5 through 1515.11. TWIC and HME applicants undergo an STA that includes criminal, immigration, terrorist, and other database checks. See 49 CFR part 1572. If TSA determines a TWIC or HME applicant poses a security threat, TSA issues a written preliminary determination of threat assessment that includes information on how to appeal the assessment to TSA. TSA reviews all documents the applicant provides in the appeal, essentially providing *de novo* review of the case, and issues a final determination based upon its review of all relevant information available to TSA. The applicant may then appeal the final determination to an ALJ, and the ALJ applies the substantial evidence standard of review. An unsuccessful applicant may then appeal the ALJ’s decision to the TSA Final Decision Maker, who also applies the substantial evidence standard of review. These regulations, issued through notice-and-comment rulemaking along with the corresponding STA requirements, have been in use for over a decade.

Cases that reach the TSOB Review Panel have undergone multiple levels of review within TSA and have been reviewed by an ALJ. TSA has access to all of the factual and intelligence information generated during the vetting of the FAA certificate holder, and the expertise to evaluate whether the information supports a security threat

⁹ See 28 U.S.C. 46(b) (providing for three-judge panels to hear and determine cases in the U.S. Courts of Appeals); 49 CFR 1108.6 (providing for a three-member panel of arbitrators for the Surface Transportation Board).

¹⁰ See *Richardson vs. Perales*, 402 U.S. 389 (1971).

determination. Then, the ALJ applies a *de novo* standard of review to determine whether TSA correctly applied its standard on whether an individual poses or is suspected of posing a security threat. This *de novo* review includes the review of information and evidence; examining witnesses and weighing the veracity and probity of their testimony; and determining whether a preponderance of the evidence supports the security threat determination. Consequently, the TSOB Review Panel ought to apply the more deferential substantial evidence standard of review, not a *de novo* standard. This standard of review requires the Panel to determine whether a reasonable person might accept the evidence presented as adequate to support the ALJ's conclusion.

The 2011 and 2021 Review Panels relied on the 2011 procedures but applied different standards of review. Codifying procedures in this rule avoids future panels using different standards of review.

Paragraph (b) states that a TSOB Review Panel will not consider the constitutionality of any statute, regulation, Executive Order, or order issued by TSA. A TSOB Review Panel is an administrative body that lacks the authority or expertise to decide constitutional questions.¹¹ Constitutional claims or questions must be addressed by an appropriate U.S. Court of Appeals reviewing the TSOB Review Panel's action. When making its decisions, the Review Panel considers the entire record of the proceedings before the ALJ. The Review Panel may also consider additional materials that are properly added to the record through a duly filed motion, as permitted in § 126.19(b).

§ 126.11 Counsel

Section 126.11(a) gives all parties to proceedings before a TSOB Review Panel the right to be represented by counsel. Because Review Panel proceedings are civil proceedings that cannot result in a party's incarceration, the Federal Government is not required to provide legal counsel to represent a party who is unable to pay for an attorney. Thus, parties appearing before a TSOB Review Panel must obtain counsel at their own expense. TSA will

designate legal counsel from among the attorneys in the DHS Office of the General Counsel who cover TSA's programs and issues on a daily basis, to represent TSA in Review Panel proceedings. This section also states that counsel for TSA must hold a security clearance commensurate with the information in the record on appeal. This requirement was not explicitly listed in the 2011 procedures, but has always been required for TSOB and similar administrative appeal procedures.

Section 126.11(b) provides that the General Counsel of DHS, or the General Counsel's designee, will appoint legal counsel who, in the General Counsel's discretion, has the requisite knowledge and experience to effectively assist a TSOB Review Panel reach a sound decision. The Review Panel's counsel facilitates communication between the Docket Clerk and the Review Panel, and assists with legal research, drafting documents, and similar tasks consistent with typical legal support. Appointed counsel must hold a security clearance that enables access to all materials in the record under review.

§ 126.13 Notice of Appeal and Service

Section 126.13 instructs parties on how to request TSOB review of an ALJ's decision and how to serve notice on all other parties. Any party to proceedings before the ALJ may file a notice of appeal with the TSOB via certified mail or electronically/electronic service. DHS strongly encourages parties to file all documents and consent to service via electronically/electronic service to the TSOB Docket Clerk. Allowing parties to file a notice via electronically/electronic service will expedite the receipt of documents and the review process.

Section 126.13(a) provides that a notice of appeal must be filed within 60 calendar days of the date of issuance of the ALJ's decision. This time limit is drawn from Rule 4 of the FRAP, which generally allows parties to a civil action in U.S. District Court 60 days to file a notice of appeal with an appropriate U.S. Court of Appeals in a case in which the United States or a Federal agency is a party.

Section 126.13(b) provides the addresses for the TSOB Docket Clerk and instructions for filing any document with a TSOB Review Panel. As discussed in II.B above, DHS is adding language to this paragraph to permit litigants to expressly state a preference for service by electronically/electronic service.

Section 126.13(c) specifies the date on which a document is deemed filed. The date of filing is the date that the

document is received by the TSOB Docket Clerk.

Section 126.13(d) provides that a TSOB Review Panel generally must reject and summarily dismiss a notice of appeal that is filed after the expiration of the 60-day deadline for appealing an ALJ's decision. The Review Panel, in its discretion, may accept the untimely notice upon a written showing of good cause for failing to meet the deadline.

Section 126.13(e) provides that if a party files a notice of appeal but fails to perfect the appeal by timely filing a supporting brief, a TSOB Review Panel may dismiss the appeal.

Section 126.13(f) explains that if an appeal is dismissed in accordance with paragraph (d) or (e), the ALJ's written decision becomes final. This provision did not appear in the 2011 procedures, but DHS is adding this to ensure all parties understand the practical effect of a dismissal.

§ 126.15 Entry of Appearance

Section 126.15 requires parties and counsel to enter appearances in writing before a TSOB Review Panel within 15 calendar days of being served with a notice of appeal. This requirement was not part of the 2011 procedures, but DHS is adding it to ensure efficiency and timeliness in the review process based on prior experience in TSOB. Also, the requirement to file an entry of appearance is consistent with Rule 12 of the FRAP.

§ 126.17 Procedures for Classified Information, Sensitive Security Information (SSI), and Other Protected Information

Section 126.17 provides the procedures for handling classified information, SSI, and other protected information during proceedings before a TSOB Review Panel. This section did not appear in the 2011 procedures, but the processes outlined here reflect the current practice of the review panels. The procedures are consistent with the statutory provisions regarding the use of classified evidence in hearings pursuant to 49 U.S.C. 46111(g), and the protection of SSI set forth in 49 CFR 1520.9. This section sets deadlines for TSA with respect to protected information to aid efficiency and transparency in the process. Section 126.17(a) provides that TSA must file a notice of protected information within 30 calendar days of filing or being served with a notice of appeal. The notice of protected information must indicate whether the record of proceedings before the ALJ contains classified information or SSI. This notice will alert a TSOB Review Panel to take appropriate steps to

¹¹ See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (“[W]e agree that adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.”); *Mont. Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975) (“[F]ederal administrative agencies have neither the power nor the competence to pass on the constitutionality of statutes.”).

protect the record from disclosure to non-government parties or the public. The TSOB Review Panel will review materials in the record containing classified information or SSI in camera or during an ex parte proceeding with TSA.

Section 126.17(b) provides that a TSOB Review Panel may not disclose classified information or SSI, except to government parties and government counsel who have the appropriate security clearance and a need to know the information to be disclosed.

§ 126.19 Filing and Supplementing the Record

Section 126.19(a) requires TSA to file a complete record of administrative proceedings, including a certified and un-redacted transcript of all proceedings before the ALJ and all material filed with the ALJ, with the TSOB Review Panel within 30 calendar days after filing or being served with a notice of appeal. The TSOB Review Panel needs the full record in order to conduct a comprehensive review of the ALJ's decision. To ensure that non-government parties have access to a redacted copy of the transcript of proceedings before the ALJ, this subsection permits non-government parties to file a motion requesting a redacted copy of any part of the full administrative record that they do not possess.

Section 126.19(b) permits a party to supplement the record presented to the TSOB Review Panel when (i) anything relevant to an issue on appeal occurs or is created after the ALJ issues a decision, or (ii) the party can show good cause for failing to submit material for the record at an earlier stage of the administrative proceedings. As discussed in II.C. above, DHS is adding paragraph (b)(3) to permit the TSOB to remand the case to the ALJ for additional proceedings upon motion of the parties and "a showing of good cause."

§ 126.21 Motions

Section 126.21(a) provides the procedures for filing a motion with a TSOB Review Panel. The requirements are the same as those for filing a brief, which are modeled on Rule 28 of the FRAP.

Section 126.21(b) explains the duty to confer with all other parties before filing any motion. If a party seeks relief from a TSOB Review Panel (for example, extension of a deadline), that party must file a motion requesting the relief. Before filing the motion, the party seeking relief must first confer, or make reasonable, good-faith efforts to confer,

with all other parties in an effort to obtain their consent to the relief requested. The 2011 procedures do not include this section, but DHS added it to improve efficiency and communications. It is consistent with Rules 26(c)(1) and 37(a)(1) of the Federal Rules of Civil Procedure. After conferring or attempting to confer, the party seeking relief may file the motion with the TSOB Review Panel. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts made to confer. The moving party shall also state in the motion the other parties' positions with regard to the relief requested. If no party opposes the relief requested in a motion, the moving party shall include "Unopposed" in the motion's title.

These provisions are modeled on Local Rules of Practice adopted by many U.S. District Courts, including, for example, the Rules of the United States District Court for the District of Columbia, Local Rule 7(m) (September 2015), Local Rules for the United States District Court, Eastern District of Virginia, Local Civil Rule 7 and Local Criminal Rule 47 (December 1, 2020). They are designed to promote cooperation between the parties and help resolve issues quickly and efficiently.

Section 126.21(c) provides for motion hearings using communication technology. As defined in this rule, "communication technology" means telephone or a videoconferencing platform. Using videoconferencing to conduct motion hearings allows a TSOB Review Panel to efficiently resolve motions without burdening the parties. The Review Panel will consider the availability of adequate security protocols in making determinations concerning motions hearings.

Section 126.21(d) gives a TSOB Review Panel discretion to grant or deny a motion at any time after it is filed. This provision allows a Review Panel to quickly and efficiently resolve routine motions (for example, motions for an extension of a deadline) without waiting for all parties to file a response.

Section 126.21(e) permits a TSOB Review Panel to establish additional procedural requirements regarding motion practice in response to the exigencies of a particular appeal. Additional procedural requirements apply on a case-by-case basis. For example, if a motion raises an unusually complex issue, a Review Panel may find it appropriate to allow the non-moving parties to file a response that is longer than the default 35-page limit. Section 126.21(e) gives the Review Panel the discretion to modify the page limit. This discretion is crucial to establishing an

efficient review process. Section 126.21(e) provides two other examples of additional procedural requirements that a Review Panel may wish to adopt in a particular case: time periods for filing responses and replies to motions and a deadline for concluding all motion practice. These examples are illustrative and not intended as an exhaustive list of permissible additional procedural requirements for motion practice. Section 126.21(e) only concerns basic procedural requirements regarding motion practice, and it does not afford a TSOB Review Panel discretion to adopt procedural requirements unrelated to motion practice or to fundamentally change the review process prescribed in this part. A TSOB Review Panel will communicate specific additional procedural requirements regarding motion practice to the parties during proceedings or by serving them with orders.

§ 126.23 Briefs

Section 126.23(a) and (b) enumerate the procedures and deadlines for filing briefs with a TSOB Review Panel. These subsections are modeled after Rule 28 of the FRAP. A party appealing the ALJ's decision (an appellant) must perfect the appeal by filing a brief within 60 calendar days after the date on which the TSA files the administrative record. An appellant's brief must contain a specific list of objections to the ALJ's decision. This requirement is modeled after Rule 28(a)(9) of the FRAP, which requires appellants to clearly list and describe their contentions. A party not appealing the ALJ's decision (an appellee) may file a brief in response to an appellant brief within 30 calendar days after being served with the appellant brief.

Section 126.23(c) provides the specific form for submitting briefs to a TSOB Review Panel. The specifications are modeled on Rule 28 of the FRAP, and they are intended to facilitate an efficient process with the least amount of burden to the parties and the Review Panel.

§ 126.25 Oral Argument

Section 126.25 provides for oral argument. A TSOB Review Panel will decide whether to grant oral argument upon receipt of a request for an oral argument contained in a brief pursuant to § 126.23(c)(5). The TSOB Review Panel has discretion to grant or deny a request for oral argument. The Review Panel may also order oral argument on its own initiative if it determines that oral argument is necessary to clarify the parties' arguments or that oral argument will improve the Panel's understanding

of legal or factual issues material to the appeal.

If oral argument is held, the TSOB Review Panel has discretion to choose the method and location. Oral argument will typically be heard in Washington, DC, or via teleconference or videoconference. The TSOB Review Panel will consider expense and inconvenience to the parties, the need for information security, the quality and reliability of available communication technology, and concern for the efficient administration of proceedings when choosing the method and location of oral argument.

Section 126.25(c) provides that the TSOB Review Panel may also establish any necessary procedural rules to ensure the efficient administration of oral argument. This allows the Review Panel to adjust to the exigencies of a particular appeal. For example, the Review Panel may want to grant the parties a longer amount of time for argument if an appeal is complex and involves a large amount of evidence.

Section 126.25(d) provides that classified information and SSI may not be disclosed during oral argument, and that a Review Panel may hold *ex parte* proceedings to allow TSA to present such information.

§ 126.27 Deliberations and Action

Section 126.27 provides the procedures by which a TSOB Review Panel resolves an appeal. A Review Panel will consider the transcript of the ALJ's hearing, all material that the ALJ considered as part of the record for decision, any properly filed supplemental material, the parties' briefing, and, if applicable, oral argument. The Review Panel's deliberations are closed to the public, and any materials created by Panel members, the TSOB Docket Clerk, and the Panel's appointed counsel for use in deliberations are not part of the final administrative record and may not be disclosed to the public.

A TSOB Review Panel may affirm, reverse, or modify the ALJ's decision. It may also remand the matter to the ALJ with instructions to address particular issues or consider additional testimony or evidence. A TSOB Review Panel requires a simple majority to decide an action. A Review Panel is required to prepare a written explanation of its action and serve it on the parties. The Review Panel will endeavor to act to resolve an appeal and serve a written explanation within 60 calendar days after the last of the following events: (1) receipt of a timely filed appellant brief; (2) receipt of a timely filed appellee brief; or (3) oral argument. If a Panel

member disagrees with the Panel's action or reasoning, that member may write a dissenting report to be served with the written explanation. A Review Panel must redact all classified information and SSI from the written explanation before serving it on non-government parties. The written explanation will not be made available to the public through publication.

§ 126.29 Effect of TSOB Review Panel Action

Section 126.29 explains the effect of a TSOB Review Panel action. After the TSOB Review Panel acts to resolve an appeal and serves a written explanation of its action, any person substantially affected by the action, or the TSA Administrator if he decides that the Panel's action will have a significant adverse impact on Federal programs to ensure safety in aviation and air commerce, may obtain judicial review of the action in an appropriate U.S. Court of Appeals. If judicial review is not obtained, the action of the TSOB Review Panel is final and binding on the parties for the purpose of resolving the particular matter under review. As discussed in II. G. above, DHS is adding the statutory citation of 49 U.S.C. 46110 here, which establishes when an appeal must be filed so that litigants have that information.

§ 126.31 Administration of Proceedings

Section 126.31(a) describes the authority of a TSOB Review Panel to adopt additional procedures consistent with those established in this part. This ensures that a Review Panel has the flexibility to adjust to the exigencies of a particular appeal. Additional procedures apply on a case-by-case basis, and a Review Panel will communicate specific additional procedures to the parties during proceedings or by serving them with orders. For example, if a party or a party's counsel suffers from poor health that renders participation in proceedings difficult, a Review Panel may find it appropriate to adopt additional procedures to accommodate such needs. Section 126.31(a) gives the Review Panel the discretion to make the necessary accommodations. This discretion is crucial to establishing an efficient review process. Other examples of exigencies that may necessitate the adoption of additional procedures include unexpected changes to the TSOB office facilities and technical issues that make communication between the parties and a Review Panel difficult. These examples are illustrative and not intended as an exhaustive list

of permissible additional procedures. The discretion afforded by § 126.31(a) is similar to that afforded by § 126.21(e) above in that it also does not empower a TSOB Review Panel to fundamentally change the review process prescribed in this part.

Section 126.31(b) provides that proceedings before a TSOB Review Panel are rendered moot and closed if TSA withdraws its Determination of Security Threat. If TSA withdraws its Determination, TSA will notify the TSOB Review Panel of the withdrawal within five calendar days.

Section 126.31(c) provides that TSOB Review Panel proceedings are generally closed to the public. DHS is adding this provision to protect sensitive panel deliberations and discussions, and other kinds of sensitive or protected information from disclosure, including information regarding the conduct of individuals impacted by a Determination of Security Threat and witnesses to that conduct that may adversely impact these respective individuals' privacy interests. The Review Panel may, at its discretion, decide to open its proceedings to the public. No classified information, SSI or other protected information will be released during an open hearing.

IV. Regulatory Analyses

A. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has not designated this rule a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by OMB.

To evaluate properly the benefits and costs of regulations, it is important to define the baseline. DHS evaluates the impacts of this rule against both a no action and pre-statutory baseline. According to OMB Circular A-4, the no action baseline is what the world would

be like if the rule is not adopted.¹² The pre-statutory baseline is what the world would be like if the relevant statute(s) had not been adopted.

Relative to the pre-statutory baseline, the IFR and this final rule increase costs. The statute mandates that an appeal from a decision of an ALJ is made to the TSOB Review Panel. The law provides the benefits of appeal, but it also requires government time to manage and execute the panel's responsibilities, time of the parties to the appeal, and time and potential associated legal fees for the appellant. The government also incurred costs in 2011 developing the procedures for use by the TSOB Review Panel. As of the date of this publication, the panel has reviewed two requests for appeal. The 2011 and 2021 Review Panels relied on the 2011 procedures, but applied different standards of review.

Without the IFR or this final rule, the TSOB still has the authority and duty to review appeals. As discussed above, a TSOB Review Panel has issued two decisions based upon the 2011 procedures. Significant attorney time and resources were spent developing the procedures used in those cases. In the absence of a codified set of procedural rules, this developmental process might need to be repeated each time an appeal is filed with the TSOB. While DHS believes the IFR did not impose any new costs (given that TSOB Review Panels would continue to issue decisions even if this rule was not promulgated), publication of the IFR did provide several benefits which are discussed qualitatively below.

Codifying TSOB Review Panel procedures before the conclusion of presently pending and future ALJ proceedings eliminate the need to rely on the 2011 procedures. In addition, codifying TSOB Review Panel procedures serves the public's interest in government transparency, consistency in administrative review processes, and certainty of expectations regarding government operation. In the absence of codified procedures, the public would not have notice of the details regarding how a TSOB Review Panel is selected and operates, and U.S. citizens who may be adversely affected by FAA certificate action would not have a complete picture of the administrative process by which they may challenge TSA's Determination of Security Threat. Codified procedures allow the public to be informed about the operation of the Federal Government. Codification also provides

certainty to U.S. citizens who may be adversely affected by FAA certificate action. This allows them to make informed decisions about whether to challenge TSA's Determination, instill confidence that they will have a full and fair opportunity to be heard, and plan for the entire administrative review process. Codified procedures provide the public with confidence that all appeals will be reviewed in the same manner.

In addition, in this final rule, DHS makes four changes to the IFR in response to public comment. DHS is adding a citation to establish when an appeal must be filed, which will provide litigants with the information necessary to ensure timely appeals. DHS is adding a definition of the term "substantial evidence," which will provide clarity for all parties on the standard of review. DHS is adding language to establish how allow litigants may consent to service via electronically/electronic service, which will make it easier for litigants to do so. Finally, DHS is adding language to provide a process to seek remand for a "showing of good cause." Ensuring there is good cause to grant a motion to supplement the record through remand to the ALJ will ensure that additional proceedings are undertaken only when there is substantive reasoning for them.

B. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, title II, 110 Stat. 847, 857–74, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. However, when a rule is exempt from APA notice and comment requirements the RFA does not require an agency to prepare a regulatory flexibility analysis. Because this rule does not trigger APA notice and comment requirements, DHS is exempt from preparing a regulatory flexibility analysis for this rule. DHS does note, however, that this rule regulates individuals, and individuals are not small entities as contemplated by the RFA.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small

governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

E. Executive Order 13132

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

F. Executive Order 12988 Civil Justice Reform

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

G. Paperwork Reduction Act Assessment

This interim final rule does not call for a collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.* This rule falls under the category of an administrative action or investigation involving an agency against specific individuals or entities and is therefore excluded from Paperwork Reduction Act requirements. 44 U.S.C. 3518(c)(1)(B) and 5 CFR 1320.4(a).

List of Subjects in 6 CFR Part 126

Administrative practice and procedures, Appeals, Penalties, Reporting and recordkeeping requirements, Security measures.

The Amendments

For the reasons set forth in the preamble, the Department of Homeland Security adds part 126 to Title 6, Code of Federal Regulations, to read as follows:

¹² https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.

PART 126—TRANSPORTATION SECURITY OVERSIGHT BOARD REVIEW PANEL PROCESS AND PROCEDURES

- Sec.
- 126.1 Purpose and scope.
 - 126.3 Definitions.
 - 126.5 Appointment of TSOB Review Panel and TSOB Docket Clerk.
 - 126.7 Function of TSOB Review Panel.
 - 126.9 Scope of review.
 - 126.11 Counsel.
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 - 126.15 Entry of appearance.
 - 126.17 Procedures for classified information, Sensitive Security Information (SSI), and other protected information.
 - 126.19 Filing and supplementing the record.
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 - 126.23 Briefs.
 - 126.25 Oral argument.
 - 126.27 Deliberations and action.
 - 126.29 Effect of TSOB Review Panel action.
 - 126.31 Administration of proceedings.

Authority: 49 U.S.C. 115, 46111; Department of Homeland Security Delegation No. 7071.1.

§ 126.1 Purpose and scope.

This part establishes the procedures by which a Transportation Security Oversight Board (TSOB) Review Panel reviews and acts to resolve an appeal from an Administrative Law Judge (ALJ) decision regarding a Determination of Security Threat made by the Administrator of the Transportation Security Administration (TSA).

§ 126.3 Definitions.

Classified information has the meaning given to that term in Executive Order 13526 or any successor Executive Order.

Communication technology means telephone or a videoconferencing platform.

Other protected information means other information that the government is authorized by statute, regulation, or Executive order to withhold.

Sensitive Security Information (SSI) means information described in 49 CFR 1520.5.

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Transportation Security Oversight Board (TSOB) means the board established pursuant to 49 U.S.C. 115.

Transportation Security Oversight Board (TSOB) Review Panel means the panel established pursuant to 49 U.S.C. 46111(d) to consider an appeal from a decision of an administrative law judge as the result of a hearing under 49 U.S.C. 46111(b).

§ 126.5 Appointment of TSOB Review Panel and TSOB Docket Clerk.

(a) Upon request by the Chairman of the TSOB, TSOB members will designate at least one official who meets the criteria in paragraphs (a)(1) through (5) of this section to participate in a TSOB Review Panel pool for a period of two years. The Review Panel nominees must—

(1) Be a member of the Senior Executive Service (SES) or a Senior Level (SL) employee;

(2) Hold a security clearance commensurate with the record under review;

(3) Not be employed by TSA or the Federal Aviation Administration (FAA);

(4) To the extent practicable, have a legal background and be engaged in the practice of law on behalf of the United States Government; and

(5) To the extent practicable, be familiar with transportation security issues.

(b) Upon the expiration of each two-year period, TSOB members will again designate officials to participate in the TSOB Review Panel pool.

(c) The General Counsel of the Department of Homeland Security, or the General Counsel's designee, will appoint an individual from within the Office of the General Counsel to serve as the TSOB Docket Clerk. The TSOB Docket Clerk will serve as the TSOB Review Panel's point of contact for both the public and the parties to ALJ proceedings.

(d) When the TSOB Docket Clerk receives a properly and timely filed appeal from an ALJ's decision, the TSOB Chairperson selects at least three individuals from the TSOB Review Panel pool to serve on a Review Panel to review the ALJ's decision. The TSOB Chairperson has discretion to choose which individuals from the pool will serve on a TSOB Review Panel. In making selections for a TSOB Review Panel, the TSOB Chairperson will consider selecting at least one person with the qualifications set out in paragraph (a)(4) of this section to serve as a Panel Member, and will consider, based upon the composition of the pool as well as the issues raised in the appeal, appointing more than one person with the qualifications set out in paragraph (a)(4) to the TSOB Review Panel.

§ 126.7 Function of TSOB Review Panel.

A TSOB Review Panel reviews an ALJ's decision regarding a Determination of Security Threat issued by the TSA Administrator and may affirm, modify, or reverse the ALJ's decision. The TSOB Review Panel also

may remand the matter to the ALJ with instructions to address particular issues or consider additional testimony or evidence.

§ 126.9 Scope of review.

(a) A TSOB Review Panel reviews an ALJ's decision to address whether the decision is supported by substantial evidence in the record before the TSOB Review Panel.

(b) A TSOB Review Panel will not consider the constitutionality of any statute, regulation, Executive order, or order issued by the TSA.

§ 126.11 Counsel.

(a)(1) Parties to proceedings before a TSOB Review Panel may be represented by an attorney who is in good standing with the bar of any State, district, territory, or possession of the United States. Parties desiring representation must obtain such representation at their own expense.

(2) TSA will designate counsel to represent TSA before a TSOB Review Panel. The attorney must hold a security clearance that enables access to all materials related to the appeal.

(b) The General Counsel of the Department of Homeland Security, or the General Counsel's designee, will appoint legal counsel to assist a TSOB Review Panel. Counsel appointed to assist the TSOB Review Panel will facilitate communication between the TSOB Docket Clerk and the TSOB Review Panel, and assist with legal research and drafting for the Panel, as needed. Appointed counsel must hold a security clearance that enables access to all materials related to the appeal.

§ 126.13 Notice of appeal and service.

(a) *Notice of appeal.* A party seeking review of the ALJ's decision must file a notice of appeal with the TSOB Docket Clerk electronically at *TSOB_docket@hq.dhs.gov* or via certified U.S. mail at ATTN: TSOB Docket Clerk, Office of the General Counsel, Department of Homeland Security, Washington, DC, 20528-0485. A notice of appeal must be filed within 60 calendar days of the date of issuance of the ALJ's written decision.

(b) *Service.* To file any document with a TSOB Review Panel, a party must send the document to the TSOB Docket Clerk electronically at *TSOB_docket@hq.dhs.gov*, or via certified U.S. mail at ATTN: TSOB Docket Clerk, Office of the General Counsel, Department of Homeland Security, Washington, DC, 20528-0485. Parties are strongly encouraged to file all documents and consent to electronic service. A party may consent to electronic service by

filing a document expressly stating such a preference with the TSOB Docket Clerk and serving a copy on all other parties. Any document filed with the TSOB Docket Clerk (except a notice of protected information, the administrative record, ex parte motions, and documents containing classified information, Sensitive Security Information (SSI), or other protected information that accompanies a motion to supplement the record) must also be served on all other parties by certified U.S. mail or electronically/electronic service.

(c) *Filing date.* For purposes of all deadlines in this part, the date of filing of a notice of appeal or any document filed with a TSOB Review Panel is the date on which the document is received by the TSOB Docket Clerk.

(d) *Untimely appeals.* A TSOB Review Panel must reject and summarily dismiss a notice of appeal that is filed more than 60 calendar days after the date of issuance of the ALJ's written decision. A TSOB Review Panel may, in its discretion, accept an untimely notice of appeal upon a written showing of good cause for failure to meet the filing deadline.

(e) *Failure to perfect the appeal.* A TSOB Review Panel may dismiss an appeal, on its own initiative or upon motion of any party, when a party has filed a notice of appeal but failed to perfect the appeal by timely filing a brief in accordance with § 126.23.

(f) *Effect of dismissal of appeal.* Where an appeal is dismissed in accordance with paragraphs (d) or (e) of this section the ALJ's written decision becomes final.

§ 126.15 Entry of appearance.

(a) All parties to a proceeding before a TSOB Review Panel must enter their appearances in writing with the TSOB Docket Clerk within 15 calendar days after filing or being served with a notice of appeal. A party's written notice of entry of appearance must identify counsel, if applicable.

(b) Counsel beginning representation of a party after that party has already entered an appearance must file a separate notice of entry of appearance within 15 calendar days of beginning representation.

§ 126.17 Procedures for classified information, Sensitive Security Information (SSI), and other protected information.

(a) *Notice of protected information.* Within 30 calendar days of filing or being served with a notice of appeal, TSA must file a notice of protected information indicating whether the record of proceedings before the ALJ

contains classified information, SSI, or other protected information. The notice of protected information must be filed with the TSOB Docket Clerk in accordance with § 126.13(b). If the TSA presented classified information, SSI, or other protected information to the ALJ at an ex parte proceeding or provided such information for in camera review during the ALJ proceedings, then the TSOB Review Panel will also consider that information at an ex parte proceeding or in camera.

(b) *Access to protected information.* A TSOB Review Panel may not disclose Classified Information or other protected information to any non-government party or counsel. A TSOB Review Panel may not disclose SSI to any non-government party or counsel unless the TSA has determined that the party had a preexisting need to know specific SSI as a covered person pursuant to 49 CFR 1520.7 and 1520.11.

§ 126.19 Filing and supplementing the record.

(a) *Filing the record.* The TSA must file a complete record of administrative proceedings, including a certified and unredacted transcript of all proceedings before the ALJ (including ex parte proceedings) and all material filed with the ALJ (including material containing classified information, SSI, or other protected information that was reviewed by the ALJ in camera), with the TSOB Docket Clerk within 30 calendar days after filing or being served with a notice of appeal. Upon motion filed by the TSA, or on its own initiative, the TSOB Review Panel may extend the time to file the record. The TSOB Docket Clerk notifies all parties of the date when the record is filed. Within 30 calendar days of the date the record is filed, non-government parties may file a motion requesting that the TSA provide them with a redacted copy of any part of the record (excluding ex parte proceedings and materials reviewed in camera) that they do not possess. The TSA redacts classified information or other protected information from any part of the record it provides to non-government parties, except to the extent that the TSA has determined that the party had a preexisting need to know specific SSI as a covered person pursuant to 49 CFR 1520.7 and 1520.11.

(b) *Supplementing the record.* (1) A party may file a motion to supplement the record when anything relevant to an issue on appeal occurs after the ALJ issued a decision, or the party can show good cause, as determined by the TSOB Review Panel, for failing to submit material for the record at an earlier stage of the administrative proceedings. When

the TSA seeks to supplement the record with material that contains classified information, SSI or other protected information, it may file a motion to supplement the record ex parte.

(2) A TSOB Review Panel may grant a motion to supplement the record when it finds that the supplemental material is relevant to an issue on appeal and that a condition described in paragraph (b)(1) of this section applies.

(3) A TSOB Review Panel may grant a motion to supplement the record by remanding the case to the ALJ for additional proceedings, where good cause is shown.

§ 126.21 Motions.

(a) *Form of motions.* (1) A motion filed with a TSOB Review Panel must comply with the requirements set forth in § 126.23(c)(1) through (4).

(2) Motions must be filed with the TSOB Docket Clerk and served on all parties in accordance with § 126.13(b). The TSOB Docket Clerk provides all motions to the TSOB Review Panel.

(b) *Duty to confer.* Before filing any motion, a party must confer or make reasonable, good-faith efforts to confer with all other parties to resolve the issues that are the subject of the motion. The moving party must state in the motion, or in a certificate attached to the motion, the specific efforts made to comply with this duty to confer. The moving party must also state in the motion the other parties' positions with regard to the relief requested. If no party opposes the relief requested in a motion, the moving party includes "Unopposed" in the motion's title. TSA does not have a duty to confer before filing an ex parte motion, but must provide notice to all parties that it has made an ex parte filing.

(c) *Motion hearings.* Upon request of any party, or on its own initiative, a TSOB Review Panel may order the parties to appear for a hearing on any motion that was not filed ex parte. Motion hearings may be conducted via communication technology unless all parties agree to appear in person or the TSOB Review Panel in its discretion determines that an in person appearance is necessary for efficient administration of the hearing. The Review Panel considers expense and inconvenience to the parties, the importance of information security, and the quality and reliability of available communication technology when making these determinations.

(d) *Disposition.* A TSOB Review Panel may, consistent with the requirements of due process and after providing the opposing party with an opportunity to

review and respond, grant or deny a motion at any time after it is filed.

(e) *Additional procedural requirements for motion practice.* A TSOB Review Panel has discretion to establish via order served on the parties, additional procedural requirements regarding motion practice in response to the exigencies of a particular appeal. Such requirements may include, for example, time periods for filing responses and replies, a deadline for concluding all motion practice, and page limitations different from the default 35-page limit established in § 126.23(c)(3). A TSOB Review Panel may not require disclosure of classified information, SSI, or other protected information.

§ 126.23 Briefs.

(a) *Appellant brief.* (1) A party appealing the ALJ's decision must perfect the appeal by filing an appellant brief with the TSOB Docket Clerk and serving that brief on all other parties in accordance with § 126.13(b) within 60 calendar days after the date on which TSA files the record in accordance with § 126.19(a), unless all parties consent to an extension of the filing deadline and provide notice of such agreement to the TSOB Docket Clerk or the TSOB Review Panel extends the filing deadline upon a motion by the appellant.

(2) The appellant brief must enumerate the appellant's objections to the ALJ's decision.

(b) *Appellee brief.* Within 30 calendar days after being served with an appellant brief, a party may file an appellee brief in response with the TSOB Docket Clerk. Any such brief must be served on all other parties in accordance with § 126.13(b) at the same time it is filed with the TSOB Docket Clerk. The parties may consent to an extension of the filing deadline and provide notice of such agreement to the TSOB Docket Clerk or the TSOB Review Panel may extend the deadline for filing an appellee brief upon a motion by the appellee.

(c) *Brief requirements.* A brief submitted to a TSOB Review Panel must adhere to the following specifications:

(1) The brief must be typewritten in Times New Roman, 12-point font, double-spaced, and, if submitted as a hard copy via certified U.S. mail, must be printed single-sided on 8 1/2-by-11 inch paper;

(2) The brief must set forth the name, address, email address, and telephone number of the party or attorney filing it;

(3) The brief must contain no more than 35 pages of text (excepting any tables, appendices, or cover sheets) unless prior permission to file excess

pages has been granted by the TSOB Review Panel after consideration of a duly filed motion showing good cause as determined by the TSOB Review Panel;

(4) If submitted as a hard copy via certified U.S. mail, the brief must be bound in any manner that is secure, does not obscure the text, and permits easy reproduction; and

(5) If oral argument is desired, the brief should contain a request for oral argument that explains why oral argument will contribute substantially to the development of an issue on appeal.

§ 126.25 Oral argument.

(a) Upon receipt of a request from any party contained in a brief or in a motion, or on its own initiative, a TSOB Review Panel may order the parties to present oral argument. The Review Panel orders oral argument if it determines that oral argument will contribute substantially to the development of an issue on appeal.

(b) A TSOB Review Panel has discretion, within the requirements of all relevant statutory and regulatory provisions for information security, to choose the method and location of oral argument. The Review Panel will consider expense and inconvenience to the parties, the importance of information security, the quality and reliability of available communication technology, and concern for the efficient administration of proceedings when establishing the method and location of oral argument.

(c) A TSOB Review Panel has discretion to structure and establish procedural rules for oral argument via order served on the parties. Such rules may include time limits for argument and the order in which parties present argument.

(d) Classified information, SSI, or other protected information may not be disclosed during oral argument. A TSOB Review Panel may hold ex parte proceedings to allow for the presentation of classified information, SSI, or other protected information.

§ 126.27 Deliberations and action.

(a) *Deliberations.* TSOB Review Panel deliberations are closed proceedings. Any materials created by Review Panel members, the TSOB Docket Clerk, and the Review Panel's appointed counsel for use in deliberations are not part of the final administrative record.

(b) *Action.* A TSOB Review Panel may affirm, modify, or reverse the ALJ's decision. It may also remand the matter to the ALJ with instructions to address

particular issues or consider additional testimony or evidence.

(1) A TSOB Review Panel requires a simple majority to decide an action.

(2) In case of a disagreement among TSOB Review Panel members, a dissenting report may be served with the written explanation of the Review Panel's action. A dissenting report must be prepared in accordance with the requirements for the Review Panel's written explanation.

(c) *Written explanation.* A TSOB Review Panel will explain its action in writing to the maximum extent permitted by prudent concern for the national security interests of the United States and applicable laws and regulations governing information disclosure. If necessary, the Review Panel may prepare its written explanation in both a protected format (which may contain classified information, SSI, and other protected information) and a non-protected format (which must not contain classified information, SSI, and other protected information). The Review Panel serves non-government parties with the non-protected written explanation and government parties with the protected written explanation. The Review Panel is prohibited from providing the protected written explanation to non-government parties; however, the protected written explanation, if any, is part of the final administrative record that TSA must submit to a U.S. Court of Appeals in the event that a party seeks judicial review of the Review Panel's action.

(d) *Timing.* A TSOB Review Panel endeavors to resolve an appeal and issue a written explanation of its action to the parties no later than 60 calendar days after the last of the following events:

(1) Receipt of a timely filed appellant brief;

(2) receipt of a timely filed appellee brief; or

(3) Oral argument.

§ 126.29 Effect of TSOB Review Panel action.

(a) Any person substantially affected by a TSOB Review Panel's action, or the TSA Administrator when he or she decides that the Panel's action will have a significant adverse impact on carrying out 49 U.S.C. subtitle VII, part A, may obtain judicial review in an appropriate U.S. Court of Appeals in accordance with 49 U.S.C. 46110. The Administrators of the FAA and TSA must be made parties to any civil action filed in a U.S. Court of Appeals seeking review of a TSOB Review Panel action.

(b) If judicial review is not obtained, the action of the TSOB Review Panel is final and binding on the parties for the purpose of resolving the particular decision under review.

§ 126.31 Administration of proceedings.

(a) A TSOB Review Panel has authority to govern the conduct of its proceedings and internal operations by establishing any additional rules or procedures that are not inconsistent with this part.

(b) If TSA withdraws its Determination of Security Threat at any time after a notice of appeal has been filed pursuant to § 126.13(a), the proceedings before the TSOB Review Panel are rendered moot and closed. TSA must file a notice of withdrawal of the Determination of Security Threat with the TSOB Docket Clerk within five calendar days of such withdrawal.

(c) TSOB Review Panel proceedings will generally be closed to the public. A TSOB Review Panel may, in its discretion, open its proceedings to the public. Classified information, SSI, or other protected information shall not be disclosed during administrative proceedings, in accordance with § 126.25(d).

Alejandro Mayorkas,

Secretary, U.S. Department of Homeland Security.

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CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part X

Consumer Financial Protection Circular 2024-01: Preferencing and Steering Practices by Digital Intermediaries for Consumer Financial Products or Services

AGENCY: Consumer Financial Protection Bureau.

ACTION: Consumer financial protection circular.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) has issued Consumer Financial Protection Circular 2024-01, titled, “Preferencing and steering practices by digital intermediaries for consumer financial products or services.” In this circular, the Bureau responds to the question, “Can operators of digital comparison-shopping tools or lead generators violate the Consumer Financial Protection Act (CFPA) by preferencing products or services based on financial or other benefits to the operator?”

DATES: The Bureau released this circular on its website on February 29, 2024.

ADDRESSES: Enforcers, and the broader public, can provide feedback and comments to Circulars@cfpb.gov.

FOR FURTHER INFORMATION CONTACT:

George Karithanom, Regulatory Implementation & Guidance Program Analyst, Office of Regulations, at 202-435-7700 or at: <https://www.reginquiries.consumerfinance.gov/>

. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

Question Presented

Can operators of digital comparison-shopping tools or lead generators violate the Consumer Financial Protection Act (CFPA) by preferencing products or services based on financial or other benefits to the operator?

Response

Yes. Operators of digital comparison-shopping tools can violate the prohibition on abusive acts or practices if they distort the shopping experience by steering consumers to certain products or services based on remuneration to the operator. Similarly, lead generators can violate the prohibition on abusive practices if they steer consumers to one participating financial services provider instead of another based on compensation received. Where consumers reasonably rely on an operator of a digital comparison-shopping tool or a lead generator to act in their interests, the operator or lead generator can take unreasonable advantage of that reliance by giving preferential treatment to their own or other products or services through steering or enhanced product placement, for financial or other benefits.

Background

For many households, the process of shopping for a financial product or service now includes interactions with digital intermediaries. These intermediaries include websites, applications, or chatbots that operate as comparison-shopping tools, which consumers turn to for help with researching, comparing, and selecting consumer financial products or services. Offering a comparison-shopping tool for financial companies can and sometimes do operate as distinct business models, and for the purposes of this circular, comparison-shopping tools and lead generators are discussed separately. However, consumers often interact with

them in similar ways and many digital intermediaries operate as both, presenting themselves as consumer-serving comparison-shopping tools while simultaneously increasing profits by directing leads based on financial benefit. Digital intermediaries commonly receive remuneration or other benefits, sometimes referred to as “bounties” by market participants.

Digital Comparison-Shopping Tools

Consumers are increasingly using digital comparison-shopping tools to find consumer financial products or services that fit their interests.¹ These tools facilitate comparison shopping by presenting information about the costs, features, or other terms for a set of comparable financial products or services, such as credit cards, student loans, and savings accounts, offered by different providers. In addition to presenting options offered by third-party providers of financial products and services, some operators of digital comparison-shopping tools offer their own financial products and services and include their own options in the comparison-shopping tool.

Comparison-shopping information can be presented in a static or interactive format. In the latter case, some operators allow people who use the tool to sort options based on different criteria or to otherwise customize the presentation of information and options (sometimes after a default presentation). Also, some operators collect information from consumers and then purport to provide a list of options tailored to the consumers’ particular circumstances or preferences. In other cases, operators just present an ordered list of recommended providers. Increasingly,

¹ As used in this circular, the term “digital comparison-shopping tools” includes both tools that overtly recommend certain products as well as tools that have the effect of affirmatively influencing consumers’ likelihood of selecting or engaging with information about various consumer financial products and services. The term encompasses “Digital Mortgage Comparison-Shopping Platforms,” which are addressed in a recent advisory opinion regarding the Real Estate Settlement Procedures Act. *See* Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 FR 9162 (Feb. 13, 2023). The term also encompasses some “digital marketing providers,” which are discussed in a recent interpretive rule regarding the CFPA definition of “service providers.” *See* Limited Applicability of Consumer Financial Protection Act’s “Time or Space” Exception with Respect to Digital Marketing Providers, 87 FR 50556 (Aug. 17, 2022). The scope of this circular, however, is different than the scope of either of those prior documents. This circular addresses all digital comparison-shopping tools that provide recommendations for or comparisons among any consumer financial products or services and addresses potential violations under the abusive prong of the CFPA.