November 6, 2026

U.S. Immigration and Customs Enforcement
Student and Exchange Visitor Program
U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20536-5901

Submitted via https://www.regulations.gov

Re: Optional Practical Training Fees (DHS Docket No. ICEB-2026-0100), 91 Fed. Reg. 64566 (Oct. 8, 2026)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) respectfully submit the following comments in response to the Optional Practical Training Fees Notice of Proposed Rulemaking (NPRM) published by the Department of Homeland Security (Department or DHS), through U.S. Immigration and Customs Enforcement (ICE), in the Federal Register on October 8, 2026.[1] We refer to this NPRM as the "Proposed Rule" or "Rule" throughout this comment.

Established in 1946, AILA is a voluntary bar association of nearly 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws and protect the legal rights of noncitizens. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act (INA) and its implementing regulations. Our collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

AILA and the Council oppose the Proposed Rule, as it would require a Student and Exchange Visitor Program (SEVP)-certified school to pay a fee of $70,000 before its Designated School Official (DSO) may recommend an F-1 student for an initial period of Optional Practical Training

[1]Optional Practical Training Fees, 91 Fed. Reg. 64566 (Oct. 8, 2026) (to be codified at 8 C.F.R. Part 214).

(OPT), and a fee of $30,000 before the DSO may recommend a student for any subsequent OPT (including the up to 24-month OPT STEM extension). Although framed as a fee, the Rule would impose charges so large that they would function as a prohibition or deterrent, significantly diminishing the viability of the OPT program. Departing from past practice in all its previous fee rules, DHS does not tie the fee amounts to any cost of administering OPT; instead, the Rule candidly embraces deterrence and a dramatic reduction in OPT participation as its objectives.[2] For the reasons discussed below, the Proposed Rule exceeds DHS's statutory authority, is contrary to the intent of Congress, and is arbitrary and capricious under the Administrative Procedure Act (APA). In summary:

I. The proposed fees exceed DHS's statutory authority. The statutory provisions that DHS relies upon to justify the new fees do not authorize DHS to impose a charge that is unrelated to the cost of a service, confers no specific benefit on the party that pays it, is deposited in the general Treasury, and is designed to deter use of a lawful program. The fees are an unlawful tax mirroring the $100,000 H-1B payment that federal courts have enjoined.

II. The Proposed Rule's justification is arbitrary and capricious. The justification for the Rule rests on a handful of press releases, a media report, and a video announcement to document the claimed fraud risk; it offers no fraud data or methodology; it imposes the fee on schools even though the fraud it describes is overwhelmingly attributed to a few bad actor-employers; its rationale is internally inconsistent; it fails to explain why the $260.5 billion in DHS appropriations already authorized by the One Big Beautiful Bill Act of 2025 (Pub. L.119-21) and the Secure America Act of 2026 (Pub. L.119-98) are insufficient to meet its fraud investigation and enforcement needs, and it fails to address the substantial reliance interests of schools, students, and employers.

III. DHS failed to consider reasonable alternatives. DHS dismissed the two alternatives it considered without thorough analysis and ignored numerous obvious, less burdensome, and more effective measures drawn from its own record, including, but not limited to: employer verification, expanded E-Verify use, targeted, risk-based enforcement using Student and Exchange Visitor Information System (SEVIS) data, and existing sanctions.

IV. DHS's economic analysis is deficient and ignores the Rule's harm to the U.S. economy. DHS assumes, without support, that the fees will not reduce international enrollment or the number of STEM graduates, and it fails to quantify the Rule's substantial costs to U.S. institutions, U.S. students, innovation, and the U.S. economy, despite independent research available to the contrary.

V. The 30-day comment period does not provide stakeholders a meaningful opportunity to comment. The truncated comment period is insufficient to address the scope, impact, and complexity of the Proposed Rule. The short comment period deprives stakeholders of a meaningful opportunity to comment and will produce an inadequate administrative record.

Accordingly, DHS should withdraw the Proposed Rule and refrain from implementing the fees it proposes.

[2] *See* 91 Fed. Reg. 64566, 64574-77 (Oct. 8, 2026).

I. THE PROPOSED FEES EXCEED DHS'S STATUTORY AUTHORITY

An administrative agency "literally has no power to act . . . unless and until Congress confers power upon it."[3] Under the APA, a reviewing court must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,"[4] and the court, not the agency, must independently determine the best reading of the statute that the agency invokes.[5] No statute authorizes DHS to impose the fees described in the Proposed Rule. The fees are modeled on presidential proclamations setting a $100,000 fee, the collection of which federal courts have enjoined; they find no support in DHS's immigration fee-setting authority; they fail every requirement of the government-wide user fee statute; and DHS's own words confirm that their purpose is deterrence, not the recovery of any cost of providing a service. Rather than an authorized user fee, this payment being levied on U.S. universities is an unauthorized tax.

a. The Proposed OPT Fees Are Another Unlawful Tax

The NPRM is ultra vires as it seeks to impose a revenue generating tax, rather than a user fee that recovers administrative costs. The Supreme Court has repeatedly distinguished permissible user fees from broader revenue-raising measures. In *Nat'l Cable Television Ass'n, Inc. v. United States*, the Court held that an agency may not simply calculate the total cost of a regulatory enterprise and then "contrive a formula" requiring selected parties to reimburse that amount where some of those costs reflect services furnished to the public rather than benefits provided to the payer.[6] The same concern appears in *Fed. Power Comm'n v. New England Power Co.*, where the Court explained that federal user fees must correspond to a sufficiently identifiable benefit conferred on the payer rather than general governmental services.[7] The Court has also emphasized that Congress must clearly indicate when it authorizes executive agencies to impose financial burdens designed to recover administrative costs that do not directly benefit the regulated parties.[8]

DHS has not based the fees on administrative costs of providing the benefit, such as the costs of adjudicating EAD applications, and it has not based the fees on a benefit to the payer. In explaining the purpose of the fees, the Proposed Rule makes no mention of ICE's historical costs of administering OPT through SEVP.[9] The Rule's tables projecting future costs to schools and to DHS do not reference any congressional report or budget document documenting SEVP's actual costs of administering OPT to date. Without any such baseline, DHS cannot demonstrate that the fee amounts bear any relationship to the costs of the service. Instead, the fees resemble the kind of revenue measure discussed in *National Cable* and *New England Power* rather than a fee for a specific adjudicative service.

The question of value to the person or entity paying the fees is dispositive here. A grant of OPT is plainly a thing of value to the student who receives it and to the employer who hires that student. But neither the student nor the employer pays the proposed fees. The Rule places the obligation

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[3] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).
[4] 5 U.S.C. § 706(2)(C).
[5] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).
[6] 415 U.S. 336, 343–44 (1974).
[7] 415 U.S. 345, 349–51 (1974).
[8] *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223–24 (1989).
[9] *See* 91 Fed. Reg. 64566, 64574-76 (Oct. 8, 2026).

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on the institution of higher education whose DSO makes the recommendation.[10] While the general availability of OPT is part of what makes U.S. colleges and universities attractive to international students, the grant of OPT employment authorization to a particular graduate confers no direct benefit on the school that recommended the student, and certainly no benefit approaching $70,000 or $30,000 per recommendation.

b. The Proposed Fees Are Modeled on the Enjoined $100,000 H-1B Tax

The Proposed Rule describes the proposed fees of $70,000 for initial OPT and $30,000 for any OPT extension as "comparable to the fee for H-1B visas."[11] That is a reference to the $100,000 payment imposed on certain H-1B petitions for beneficiaries outside the United States who will obtain visas through consular processing. USCIS implemented the $100,000 payment which was created by Presidential Proclamation 10973 on September 19, 2025[12] and renewed by Presidential Proclamation 11069 on September 18, 2026.[13]

Federal courts have vacated the policies implementing the fee and enjoined collection of the $100,000 payment in *California v. Mullin*[14] and *Global Nurse Force v. Trump*.[15] In *California v. Mullin,* the court found plaintiffs likely to succeed on the grounds that the $100,000 payment is a tax unlawfully imposed by the President in derogation of Congress's exclusive taxing power;[16] that the payment requirement exceeds statutory authority; that it is arbitrary and capricious because the amount bears no demonstrable connection to DHS's cost of adjudicating the benefit; and that it violates the APA because it was imposed without notice and comment.[17] The court in *Global Nurse Force* found likelihood of success on the requirement being arbitrary and capricious for failing to consider alternatives or reliance interests and for failing to comply with notice and comment and Regulatory Flexibility Act requirements.[18] Publishing the OPT fees through notice-and-comment rulemaking cures only the last of these defects. A charge that is untethered to any cost of providing a service, and that is calibrated to suppress participation in a lawful program, does not become a lawful "fee" merely because an agency, rather than the President, imposes it. If anything, the OPT fees are more difficult to defend: OPT is not a visa, the fee is imposed on the school rather than on the party receiving the benefit, and, as discussed below, DHS concedes that the revenue will not be used to administer the program.

c. DHS Statutory Fee Authority Is Limited to Recovery of the Costs of Providing Adjudication and Naturalization Services and Information Collection

Congress expressly gave DHS limited fee-setting authority for immigration benefits. INA § 286(m), 8 U.S.C. § 1356(m), governs deposits into the Immigration Examinations Fee Account

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[10] *Id*. at 64577.

[11] 91 Fed. Reg. 64566, 64575.

[12] Proclamation No. 10973, *Restriction on Entry of Certain Nonimmigrant Workers,* 90 Fed. Reg. 46027 (Sept. 19, 2025).

[13] Proclamation No. 11069, *Restriction on Entry of Certain Nonimmigrant Workers,* 91 Fed. Reg. 60497 (Sept. 18, 2026).

[14] 833 F. Supp. 3d 50 (D. Mass. 2026), *appeal pending*, No. 26-1699 (1st Cir.) at *74, 78, 80.

[15] No. 25-cv-08454-HSG, 2026 WL 2972985 (N.D. Cal. Sept. 30, 2026), *appeal pending*, No. 26-6667 (9th Cir.). .

[16] See U.S. Const. art. I, § 8, cl. 1.

[17] 833 F. Supp. 3d 50 (D. Mass. 2026), *appeal pending*, No. 26-1699 (1st Cir.).

[18] *Global Nurse Force,* 2026 WL 2972985 at *15, 18-19.

(IEFA). That authority is not limited to recovering the cost of each individual benefit; DHS may set some fees above the cost of the specific benefit in order to recover its operational overhead, administrative costs, and the cost of services provided without charge, including humanitarian services. The statute provides, in pertinent part:

> Provided further, That fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected.[19]

Every component of this authority is defined by reference to cost: the "full costs of providing all such services," the cost of "similar services provided without charge," and the "additional costs associated with the administration of the fees collected."[20] Read together with its implementing provisions in INA § 286(n) and (o), which govern reimbursement of appropriations from the IEFA and require DHS to report annually to Congress on the account's finances, section 286(m) limits the purpose of DHS benefit fees to cost recovery.[21] The statute confers no authority on DHS to use benefit fee revenue to fund enforcement operations, nor does it permit DHS to set fees at a cost-prohibitive level as a functional barrier to a benefit, which appears to be the intent of the proposed OPT fees.

Similarly, 8 U.S.C. §1372(e)(4) grants DHS authority to collect fees from individual students and exchange visitors to fund SEVIS. Specifically, it limits fee collection for "[t]he amount of the fee shall be based on the [Secretary's] estimate of the cost per alien of conducting the information collection program described in this section." Moreover, the statute limits the use of the fees to offset receipts in the IEFA for use of administering the program and to reimburse appropriated money related to carrying out the SEVIS program. In prior SEVP fee rulemakings, DHS used Activity-Based Costing to calculate SEVP's funding needs and set fees accordingly. However, the Proposed Rule contains no cost model of any kind. Notably, the Proposed Rule does not even purport to rely on either INA §286(m) or 8 U.S.C §1372(e), the only fee setting authority that Congress gave DHS. Rather it relies on general authorities like 6 U.S.C. §112 (section 102 of the Homeland Security Act), INA §103(a), INA §214(a), INA §101(a)(15)(F), and INA §214(a) that allow the Secretary to administer immigration programs, but do not expressly or even implicitly allow DHS to set fees that are unrelated to the administration of its programs.[22] The Rule states that OPT fee revenue would be deposited into the general fund of the Treasury rather than the IEFA, that ICE "would not maintain or use" the funds, and that the fees are "not specifically earmarked for ICE, SEVP or immigration enforcement activities."[23] A fee that is not deposited in the account Congress created for immigration fees, is not used to administer the program for which it is charged, and is not calculated with reference to any cost cannot be sustained under the statutory authority Congress gave DHS to set immigration fees.

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[19] INA § 286(m), 8 U.S.C. § 1356(m).
[20] *Id.*
[21] *See* INA § 286(n)–(o), 8 U.S.C. § 1356(n)–(o).
[22] 91 Fed. Reg. at 64567.
[23] 91 Fed. Reg. 64566, 64576.

d. DHS's Own Statements Confirm That the Fees Are Designed to Deter Participation, Not To Recover Costs

Rather than quantifying SEVP's costs of administering OPT, the Proposed Rule openly embraces deterrence and a dramatic reduction in OPT participation as its goals, and it contemplates that the revenue will be spent, if at all, on other programs. The Rule states:

> A reduction in the pool of OPT applicants, along with the stabilization of participant numbers, would alleviate DHS's resource burden tied to enforcement activities related to OPT and enable the agency to conduct more focused and efficient oversight of SEVP programs. Enhanced school compliance would reduce the investigative and enforcement burden on DHS, allowing limited resources to be focused on higher-priority cases. Specifically, it would allow SEVP to strategically allocate resources to other programs that it administers and regulates.[24]

The Rule further explains that "these fees are intended to discourage [noncitizens] from using the OPT program to market themselves to employers seeking to bypass H-1B caps, fees, and prevailing wage requirements."[25] While ensuring integrity in the system is a laudable goal, and even if it was lawful to raise revenue for that purpose, DHS concedes that it will not be used to support the program for which it is collected:

> While the OPT fees would be deposited into the Treasury of the United States and not specifically earmarked for ICE, SEVP or immigration enforcement activities, the collection of these fees remain[s] essential in addressing the vulnerabilities of the OPT program for the reasons explained in this section. It is also conceivable that funds collected could later be effectively appropriated by Congress to various government agencies to further enhance the integrity of the immigration system. However, the deterrent nature of the OPT fee remains regardless of whether these funds are appropriated by Congress to government agencies for this purpose.[26]

Finally, the Rule makes clear that the fee is untethered to any particular service or employment relationship: "To be clear, this OPT fee would not be tied to a specific employer; rather the OPT fee would be applicable when a school decides to recommend an F-1 nonimmigrant student for any type of OPT."[27] This disclaimer is striking in the STEM OPT context, where a DSO may recommend the extension only after the student has secured employment with a specific employer that is enrolled in E-Verify and has executed a Form I-983 Training Plan.[28] In going out of its way to sever the fee from any specific service or recipient, DHS effectively concedes that the fee violates both the letter and the spirit of 31 U.S.C. § 9701(b)(2)(B).

These statements leave no doubt that the proposed fees have nothing to do with recovering DHS's costs. The fact that the OPT fees so closely resemble the enjoined $100,000 H-1B payment is no coincidence: both are means to achieve the same end, i.e., reducing, as far as possible, the number

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[24] 91 Fed. Reg. 64566, 64574.
[25] *Id.* at 64575.
[26] *Id.* at 64576.
[27] *Id.* at 64577.
[28] *See* 8 C.F.R. § 214.2(f)(10)(ii)(C).

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of F-1 students who enter the U.S. labor market. Because the proposed fees are designed to deter rather than to recover costs, they exceed DHS's statutory authority and must be withdrawn.

II. THE PROPOSED RULE'S JUSTIFICATION IS ARBITRARY AND CAPRICIOUS

Under the APA, a reviewing court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[29] An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[30] A rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."[31] Agency action must be "reasonable and reasonably explained."[32] The agency must make available the data on which it relies,[33] and it may not rest a rule of this magnitude on speculation.[34] Courts permit reasoned predictions where data are unavailable, but the prediction must in fact be reasoned.[35] The Proposed Rule must be withdrawn as it does not meet these standards.

a. The Fraud Justification Is Not Supported by the Record

DHS justifies the Proposed Rule largely on alleged fraud. It states that without the proposed fees it "cannot operate OPT consistent with its focus on preventing fraud and may shut down the program entirely."[36] AILA and the Council share the Department's interest in preventing fraud in practical training. The question presented here is narrower: whether the record supports the conclusion that a $70,000 or $30,000 charge on each school recommendation is a reasoned response to the fraud DHS describes. It does not.

1. DHS relies on a small number of anecdotes rather than data

The Proposed Rule's discussion of student visa fraud relies on five items that it describes as "egregious cases of fraud and abuse of OPT."[37] None support a fee of the magnitude proposed, imposed across the board on every school and every OPT recommendation:

- **A 2020 conviction of a single defendant** who founded two shell companies that supplied false offer and employment verification letters to foreign nationals seeking to remain in the United States in F-1 or H-1B status (as described in a Department of Justice press

[29] 5 U.S.C. § 706(2)(A).

[30] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[31] *Id.* at 43.

[32] *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

[33] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973)

[34] *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

[35] *See Prometheus Radio Project*, 592 U.S. at 423–27.

[36] 91 Fed. Reg. 64566, 64572.

[37] *See id*. at 64570-71 & nn.56-57.

release). This is a single prosecution of an individual bad actor, and it demonstrates that existing criminal enforcement tools work.

- **A 2021 NBC Bay Area media report** regarding potential shell companies, based on the network's own investigation. This is not an agency finding.
- **2025 site visits in Northern Virginia** that ICE reported found "evidence of nonfunctional or staged worksites" (as described in an ICE press release). The Rule does not state how many employers were visited or how many were found to be out of compliance.
- **A 2020 ICE press release announcing the arrest of 15 international students** in eight cities (in and around Boston, Massachusetts; the Washington, D.C. area; Houston, Texas; Fort Lauderdale, Florida; Newark, New Jersey; Nashville, Tennessee; and Pittsburgh and Harrisburg, Pennsylvania) who allegedly claimed to be employed by companies that did not exist. The press release provides no details regarding the nature or extent of the fraud alleged or whether those cases were adjudicated, referred, or closed.
- **A May 2026 Homeland Security Investigations (HSI) video announcement** stating that an investigation identified "more than 10,000 F-1 nonimmigrant students who were engaged in OPT and were working for highly suspect employers." The video provides no data, no methodology, and no definition of a "highly suspect" employer. Moreover, the Rule's text describes "10,000 students," while its footnote describing the same video refers to "10,000 highly suspected employers." DHS does not state how many of these matters have been adjudicated, referred, or closed, and it offers no evidence beyond the link to the video.

Anecdotes of this kind, drawn largely from press releases and a media report, do not constitute the "relevant data" that *State Farm* requires an agency to examine before imposing a charge that, in the low-participation scenario DHS itself models, would reduce participation in a major federal program by more than half.[38]

2. DHS provides no data showing a fraud trend

DHS reports that 194,554 students participated in OPT employment and 165,524 in STEM OPT in 2024 – a combined population of approximately 360,000.[39] Even if all 10,000 individuals referenced in the HSI announcement were students engaged in fraud – a conclusion the record does not support – that figure would represent approximately 2.8 percent of the combined OPT and STEM OPT population. That is not sufficient to establish a fraud trend warranting a program-wide charge.

DHS also asserts that OPT-related fraud has "expanded significantly" since 2016,[40] but the Rule provides no yearly fraud statistics. Growth in OPT participation does not, by itself, demonstrate growth in the rate of fraud. AILA and the Council request that DHS publish the fraud statistics and data on which it relies, together with the methodology used to gather them; define the term "highly

[38] *See State Farm*, 463 U.S. at 43; 91 Fed. Reg. at 64583.
[39] 91 Fed. Reg. at 64571, 64573.
[40] *Id*. at 64572.

suspect"; and clarify whether the 10,000 figure refers to students or to employers. An agency may not rest a rule on data that it withholds from the public.[41]

3. The record contains little or no evidence of fraud by schools

The Proposed Rule imposes its fee on schools, yet the record contains little, if any, evidence of OPT fraud carried out by legitimate schools and academic institutions. The cases DHS cites appear to involve smaller schools or the owners of small schools. If DHS possesses data showing that schools have committed or facilitated OPT fraud, it should publish that data. DHS has access to all school data through SEVIS and the SEVP portal, so this information should be readily available.

4. DHS offers no evidence that the fee would deter fraud

DHS asserts that the fee "would deter the participation by adverse actors" and would give schools "a direct stake in the integrity of the OPT program."[42] But the Rule offers no evidence or analysis showing how the fee would deter fraudulent participation, and elsewhere DHS concedes that it "cannot confidently predict" how the regulated community will respond.[43] Most of the burden of the Rule would fall on schools and students whom DHS does not accuse of any wrongdoing. A prediction that is not supported by evidence and that the agency itself cannot make with confidence is not a reasoned prediction.[44]

b. The Fee Is Not Rationally Connected to the Fraud DHS Describes

Even taking DHS's examples at face value, the fraud they describe is overwhelmingly employer-side: shell companies, residential addresses listed as worksites, and "phantom employees."[45] Requiring a school to pay a fee does not address the alleged fraud DHS purports to address. The school would pay the fee before the DSO enters the OPT recommendation, and DHS emphasizes that the fee "would not be tied to a specific employer."[46] Further, a student seeking post-completion OPT need not have an employer at all when the DSO makes the recommendation.[47] A fee paid by the school, at a point when there may be no employer in the picture, cannot plausibly deter employers and other U.S. companies that might profit from an OPT fraud scheme. The fee would instead harm academic institutions and the many international students who have done nothing wrong. Where, as here, an agency's chosen remedy does not address the problem it identifies, there is no "rational connection between the facts found and the choice made."[48]

c. The Rule's Rationale Is Internally Inconsistent

DHS quotes the 2020 Annual Report of the Citizenship and Immigration Services Ombudsman for the proposition that OPT is vulnerable to fraud "because agency compliance resources are not

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[41] *See Am. Radio Relay League*, 524 F.3d at 236–37; *Portland Cement*, 486 F.2d at 393.
[42] 91 Fed. Reg. 64566, 64574.
[43] *Id.* at 64582.
[44] *See Prometheus Radio Project*, 592 U.S. at 423–27; *Bus. Roundtable*, 647 F.3d at 1148–49.
[45] *See* 91 Fed. Reg. 64566, 64570-71.
[46] *Id.* at 64577.
[47] *See* 8 C.F.R. § 214.2(f)(10)(ii), (f)(11).
[48] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. U.S.,* 371 U.S. 156 (1962)).

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scaled to (or keeping pace with) the size of the program."[49] Yet the Rule provides that the fee revenue will be deposited in the Treasury as a miscellaneous receipt, that ICE "would not maintain or use" the funds, and that the funds are "not specifically earmarked for ICE SEVP or immigration enforcement activities."[50] At the same time, DHS asserts that without the fees "it cannot operate OPT consistent with its focus on preventing fraud and may shut down the program entirely."[51]

These positions cannot be reconciled. A fee whose revenue will not be used by ICE or for SEVP enforcement activities provides no resources for overseeing the OPT program, so DHS's claim that it cannot operate OPT without the fee is self-contradictory. Nor does DHS explain why the staffing, investigation, and enforcement needs of SEVP cannot be met through existing SEVIS fees together with the very substantial appropriations Congress has already provided to DHS for immigration staffing and infrastructure, including approximately $190 billion under the One Big Beautiful Bill Act of 2025 and an additional approximately $70 billion under the Secure America Act of 2026.[52] An agency's explanation that is internally inconsistent is the hallmark of arbitrary and capricious decision-making.[53] The inconsistency also confirms that combating fraud is not, in fact, a significant objective of the proposed fees; deterrence is.

d. DHS Failed to Consider the Substantial Reliance Interests of Schools, Students, and Employers

When an agency changes course, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[54] It is "arbitrary and capricious to ignore such matters," and the agency must assess "whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[55]

OPT has been an integral part of the F-1 program for decades, and the STEM OPT extension has been in place in its current form since 2016.[56] DHS has successfully defended the program as a lawful exercise of its authority.[57] Reliance on OPT is pervasive:

- **Colleges and universities** have built admissions strategies, academic programs, career services, and budgets around the expectation that international students will be able to

[49] 91 Fed. Reg. at 64571 (quoting Office of the Citizenship and Immigration Services Ombudsman, *Annual Report 2020* (June 30, 2020).
[50] *Id.* at 64576.
[51] *Id.* at 64572.
[52] *See* An Act to provide for reconciliation pursuant to title II of H. Con. Res. 14 (One Big Beautiful Bill Act), Pub. L. No. 119-21 (2025); Secure America Act of 2026, Pub. L. No. 119-98 (2026).
[53] *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (setting aside agency action that was "internally inconsistent and inadequately explained").
[54] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[55] *Regents*, 591 U.S. at 30, 33.
[56] *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13040 (Mar. 11, 2016).
[57] *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022).

complete practical training following their studies. DSOs and international student offices are staffed and trained to administer OPT and STEM OPT recommendations.[58]

- **Students currently enrolled** made the decision to study in the United States – and paid substantial tuition – in reliance on the availability of practical training following graduation. Many selected their fields of study, including STEM fields, in part because of the availability of the STEM OPT extension.[59]
- **U.S. employers** have structured recruiting, training, and workforce planning around the OPT and STEM OPT programs, including by enrolling in E-Verify and executing Form I-983 Training Plans with the reporting and site-visit obligations that the STEM OPT regulations impose.[60]

The Proposed Rule does not meaningfully identify, assess, or weigh these interests. In particular, it does not address how schools are expected to absorb fees of $70,000 or $30,000 per recommendation for students they have already admitted, or what will become of students who enrolled in reliance on the availability of OPT if their schools are unable or unwilling to pay. A rule that would upend these settled expectations without considering them is arbitrary and capricious.[61]

III. DHS FAILED TO CONSIDER REASONABLE ALTERNATIVES

An agency must consider obvious and reasonable regulatory alternatives. It must show that it examined the relevant data, weighed the realistic ways of reaching its stated objectives, and chose among them for reasons that appear in the record.[62] The D.C. Circuit has made clear that where facially reasonable alternatives exist, the agency must either consider them or give a reasoned explanation for declining to do so.[63]

DHS has not done so here. It identified a single objective – "program integrity" – and a single instrument for achieving it: a new fee of $70,000 on each initial OPT recommendation and $30,000 on each subsequent OPT recommendation, the underlying purpose of which is to deter OPT and STEM OPT employment and to encourage institutions to limit their recommendations. The Rule devotes its discussion primarily to defending the fee rather than to a good-faith comparison of the fee with other legitimate and viable alternatives.

AILA and the Council do not dispute that DHS has a legitimate interest in preventing fraud in the OPT program. Our objection is narrower and, under the APA, more fundamental: DHS identifies

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[58] *See e.g.,* Research Institute for Social Equity RISE, The Future of U.S. Higher Education: Equity Implications of Shifting Immigration Policies (2026) available at https://rise.vcu.edu/policy-solutions-/rapid-reports---posts/the-future-of-us-higher-education-equity-implications-of-shifting-immigration-policies/

[59] *See* Johanna Alonso, *What OPT Is and How It Affects the Economy in 6 Charts*, Inside Higher Ed (Oct. 23, 2026), https://www.insidehighered.com/news/global/international-students-us/2026/10/23/breaking-down-opt-and-how-it-affects-economy-6

[60] *Id.*

[61] *See Regents*, 591 U.S. at 30–33; *Encino Motorcars*, 579 U.S. at 221–22.

[62] *See Judulang v. Holder*, 565 U.S. 42, 53 (2011); *State Farm*, 463 U.S. at 43, 48–51; *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 16–17 (D.C. Cir. 2015); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013).

[63] *See* Del. *Dep't of Nat. Res. & Env't Control*, 785 F.3d at 16–17.

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fraud as the problem, yet rather than strengthening its oversight and enforcement tools, it has chosen the most burdensome option available – a fee that, by DHS's own account, functions as a deterrent and funds no enforcement – without meaningfully considering the alternatives that its own record identifies. The measure is aimed at reducing the size of the program, not at the fraud within it.

a. DHS Dismissed the Two Alternatives It Considered Without Reasoned Analysis

The Rule discusses only two alternatives to the fee, and it dismisses both quickly and without adequate consideration.

Alternative 1: Extending STEM OPT safeguards to initial OPT. The first alternative would extend the STEM OPT safeguards – the Form I-983 Training Plan, reporting obligations, and employer site visits – to the initial period of post-completion OPT. DHS rejects this alternative on the ground that such measures "do not eliminate the risk of fraud" and "may require substantial time and resources to implement, monitor, and enforce effectively."[64] But no control will completely "eliminate the risk of fraud," and neither will the proposed fee. DHS offers no estimate of how much fraud the fee would prevent, and therefore no basis for concluding that the fee is more effective than the safeguards it rejects.

Alternative 2: A fee exemption for small institutions. The second alternative would exempt small institutions from the fee. DHS rejects it because "56 percent of regulated SEVP-certified institutions are small entities," such that an exemption "could leave significant fraud vulnerabilities unaddressed."[65] This reasoning conflates the share of institutions with the share of risk. The fact that 56 percent of schools are small says nothing about how much OPT activity, or how much OPT fraud may be linked to students at those schools. DHS never asks that question, even though DHS has the data needed to answer it – SEVIS records of OPT recommendations by school.

The Rule also presents the fee as the option that "does not require DHS to deploy significant additional resources for enforcement or oversight" and can be "implemented quickly and uniformly."[66] Speed and administrative economy are legitimate considerations, but they cannot substitute for a fair comparison of alternatives. A rule that is inexpensive for the agency but ruinous for the regulated public is not a better rule; it is merely an easier one to administer. The burden that DHS seeks to avoid is shifted entirely to U.S. academic institutions, to American and international students, and to U.S. employers. Neither of DHS's explanations supports its conclusion that the alternatives are not viable.

b. DHS Ignored Obvious Alternatives Rooted in Its Own Record

Each of the following alternatives is grounded in the Rule's own description of the problem. None is properly and fully addressed in the Rule. Many would directly and immediately improve program integrity at a fraction of the cost the fee would impose on the public.

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[64] 91 Fed. Reg. 64566, 64576.
[65] *Id.*
[66] *Id.*

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1. Enhanced program oversight and employer verification

DHS describes instances of employer fraud, including shell companies, residential addresses listed as worksites, "phantom employees," and clusters of employers sharing websites and personnel.[67] The Rule acknowledges that STEM OPT employers "are not required to submit any business documents or supporting documents to DHS, such as tax records or proof of business," and that DHS "does not generally verify the employer attestations unless and until there is a site visit."[68] DHS can close this information gap immediately by imposing affirmative obligations and restrictions on U.S. employers that hire OPT participants and by adopting enhanced oversight measures, most of which are already in use in other visa categories. Such information could be collected at the point of SEVIS reporting or Form I-20 issuance, allowing DHS to flag mismatches in SEVIS before a site visit is needed. Examples include:

- **Revising Form I-20 and SEVIS reporting** to require the employer's Federal Employer Identification Number (FEIN) or Data Universal Numbering System (DUNS) number; the worksite address; clearer reporting of the relationship between the position and the student's degree (on both the Form I-20 and the Training Plan); and reporting of periods of unemployment.
- **Validating employers against government records**, for example through the USCIS Validation Instrument for Business Enterprises (VIBE).
- **Placing higher evidentiary burdens for higher-risk employment arrangements**, such as OPT and STEM OPT employment with sole proprietorships, self-employment, employment with companies founded less than one year before the OPT start date, and fully remote or telecommuting arrangements.
- **Aligning the requirements for OPT and STEM OPT**, including E-Verify enrollment and a Form I-983 Training Plan.
- **Eliminating the FICA tax exemption** for OPT and STEM OPT workers, removing any financial incentive for employers to favor OPT workers over U.S. workers.
- **Implementing fraud-specific training for DSOs** as a condition of school certification.
- **Expanding student access to SEVP systems** during OPT and STEM OPT so that students can self-report employment information and changes directly.
- **Hiring additional SEVP Field Representatives** to train DSOs, assist school officials with SEVP recertification through school visits, and conduct employer site visits, all of which promote regulatory compliance and SEVIS data integrity.

Safeguards such as these can be implemented with minimal cost and burden to the government and stakeholders alike, and they would enable ICE to collect the information it needs to oversee and enforce OPT requirements far more effectively than a blanket fee. Such initiatives for additional data-gathering, investigation and enforcement would be amply funded by the

[67] *Id.* at 64571.
[68] *Id.* at 64573.

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appropriations already authorized, including $74.9 billion to ICE under the One Big Beautiful Bill Act and another $38.5 billion to ICE under the Secure America Act.[69]

2. Expanded use of E-Verify

STEM OPT employers are already required to be enrolled in E-Verify.[70] DHS therefore already has access to a functioning verification system. DHS could have considered extending the E-Verify requirement to all OPT employers as an alternative.

3. Targeted, risk-based enforcement using DHS's own data

A fee alone does not identify or combat fraud. DHS already holds the data needed to identify the schools that present actual risks. In 2014, the Government Accountability Office (GAO) reported that ICE's own screening flagged 193 of roughly 2,650 schools with OPT students as exceeding a fraud-risk threshold; at 60 of those schools, every foreign student had been approved for OPT, and most of those schools enrolled four or fewer foreign students.[71] Risk of this kind is concentrated and identifiable from records DHS already maintains. The fraud DHS describes in the Rule was found through HSI investigations and site visits, not through the imposition of fees. A $70,000 fee on every OPT recommendation does nothing to identify or address fraud that DHS's own data shows to be concentrated at about 7 percent of schools.

In addition, both OPT and STEM OPT applications are filed with U.S. Citizenship and Immigration Services (USCIS), which conducts its own background and security checks, and applicants must submit biometrics. DHS can use this information to identify fraud indicators and to identify foreign nationals who may work with sensitive technologies. If any fee is to be imposed at all, DHS should consider a tiered approach that directs scrutiny and cost to schools with demonstrated and quantifiable risk indicators, rather than a uniform charge applied to every institution without differentiation.

4. Use of existing sanctions

SEVP may withdraw the certification of a school that fails to comply with its recordkeeping and reporting obligations,[72] and the Department of Justice prosecutes visa fraud under 18 U.S.C. § 1546. The Rule cites successful prosecutions of student visa fraud, largely through press releases and media reports, but those examples do not describe a pattern of misconduct by established institutions. DHS does not explain why its existing remedies, applied directly against the specific schools and employers that commit fraud, are inadequate. Instead, it would impose a charge on every program participant, so that the many pay for the misconduct of a few.

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[69] *See* One Big Beautiful Bill Act, Pub. L. No. 119-21 (2025); Secure America Act of 2026, Pub. L. No. 119-98 (2026).

[70] *See* 8 C.F.R. § 214.2(f)(10)(ii)(C).

[71] U.S. Gov't Accountability Off., GAO-14-356, *Student and Exchange Visitor Program: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization* 17 (2014), https://www.gao.gov/products/gao-14-356.

[72] *See* 8 C.F.R. §§ 214.3(g), 214.4.

5. Funding the oversight capacity DHS says it lacks

As discussed above, DHS asserts that its compliance resources have not kept pace with the size of the OPT program, yet it proposes a fee whose revenue will not be retained by ICE or used for SEVP oversight. If, after a rigorous data analysis, DHS determines that additional oversight resources are needed, it should consider a fee proportionate to the actual cost of that oversight, with the proceeds dedicated to that purpose through the appropriate regulatory framework to the extent the law permits. AILA and the Council offer this suggestion without conceding that DHS has statutory authority to impose any OPT-specific charge on schools, a question addressed in Section I above.

6. Completing the school-side controls already recommended

The Rule reports that DHS has fully implemented five of the seven recommendations in GAO-19-297 and has only partially implemented the remaining two,[73] and it points to a DSO fraud-training initiative that SEVP announced in November 2025.[74] DHS should explain why it should not first complete the unfinished GAO-19-297 work and evaluate the effect of the new DSO fraud-training measures before implementing a fee that, in the low-participation scenario DHS itself models, would reduce OPT participation by more than half.[75]

7. Evaluating the effect of the fixed-period-of-admission rule

DHS published its final rule ending admission for duration of status for F-1 students on July 17, 2026, less than three months before the Proposed Rule.[76] The Rule concedes that the extension-of-stay requirements in that rule "may provide DHS with additional opportunities to vet" students. Yet it does not assess what that rule will accomplish, nor what part of the perceived problem will remain once it is implemented, before adding a second and far more burdensome measure. DHS should explain why it cannot wait to assess the impact of the fixed-period-of-admission rule on the OPT program before imposing a new fee.

8. Risk-based exemptions

If DHS considers exemptions, they should be tied to criteria that indicate lower risk, such as a school's SEVP recertification history, accreditation by an agency recognized by the Department of Education, participation in Title IV federal student aid programs, and the rate of OPT recommendations relative to enrollment. An established public university with decades of clean

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[73] *See* U.S. Gov't Accountability Off., GAO-19-297, *Student and Exchange Visitor Program: DHS Can Take Additional Steps to Manage Fraud Risks Related to School Certification and Program Oversight* (2019).

[74] Study in the States, *New Initiative: Fraud Training and Resources for DSOs* (Nov. 3, 2025), https://studyinthestates.dhs.gov.

[75] *See* 91 Fed. Reg. 64566, 64583 (Oct. 8, 2026).

[76] *See* Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media, DHS Docket No. ICEB-2025-0001 (Jul. 17, 2026). After concluding that the agency acted arbitrarily and capriciously, the federal district court in *Presidents' All. on Higher Educ. & Immigr. v. U.S. DHS* postponed the effective date of this final rule while the lawsuit is pending. --- F. Supp. 3d ---, Civ. Action No. 26-13799-FDS, 2026 WL 2690098, at * 13, 24 (D. Mass. Sept. 14, 2026), *appeal pending*, No. 26-1112 (1st Cir.).

SEVP compliance does not present the same concerns as a vocational school flagged in a GAO risk analysis, yet the Proposed Rule's uniform fee treats them identically.

9. A genuinely graduated strategy with metrics and a sunset

DHS describes the fee as "a crucial first step" in a "graduated strategy" that permits "ongoing evaluation of the fee's impact."[77] A graduated strategy begins with the least burdensome effective measure and escalates only when the data require it. The Proposed Rule does the opposite: it begins with the most burdensome measure, defines no metric of success, and sets no point at which the measure will be reconsidered. If DHS wishes to proceed incrementally, it should begin with the measures described above, publish the metrics by which it will judge their effectiveness, and return to the public for notice and comment before implementing a fee of this magnitude.

c. The Regulatory Flexibility Act and Executive Order 12866 Independently Require Consideration of Alternatives

As DHS acknowledges, the Regulatory Flexibility Act requires an agency to describe significant alternatives that would accomplish its objectives while minimizing the impact on small entities, including differing compliance timetables, simplified requirements, performance standards, and exemptions.[78] Executive Order 12866, which the Rule invokes, likewise directs agencies to assess the costs and benefits of "potentially effective and reasonably feasible alternatives to the planned regulation" and to explain why the chosen approach is preferable.[79] The Rule's cursory treatment of two alternatives, and its silence on the many others described above, does not satisfy these requirements.

AILA and the Council ask DHS to withdraw the Proposed Rule. If DHS nonetheless wishes to proceed, it should publish a supplemental notice that sets out each alternative described above, estimates its cost and its expected effect on the fraud DHS has identified, explains the basis for DHS's choice, and reopens the comment period on that analysis.

IV. DHS'S ECONOMIC ANALYSIS IS DEFICIENT AND IGNORES THE RULE'S HARM TO THE U.S. ECONOMY

An agency that relies on an economic analysis as part of its rulemaking must ensure that the analysis is reasonable; a serious flaw in that analysis renders the rule arbitrary and capricious.[80] The Proposed Rule's analysis rests on assumptions that are contradicted by the available evidence and omits the most significant costs of the Rule altogether. Because DHS has not properly estimated or disclosed these costs, the Proposed Rule also fails to comply with Executive Orders 12866 and 13563 and the Regulatory Flexibility Act.

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[77] 91 Fed. Reg. 64566, 64576 (Oct. 8, 2026).

[78] 5 U.S.C. § 603(c).

[79] Exec. Order No. 12866, § 6(a)(3)(C)(iii), 58 Fed. Reg. 51735 (Oct. 4, 1993).

[80] *See State Farm*, 463 U.S. at 43; *Bus. Roundtable*, 647 F.3d at 1148–49.

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a. DHS Assumes, Without Support, That the Fees Will Not Reduce International Student Enrollment

The Regulatory Impact Analysis assumes that the proposed fees will cause no reduction in the number of STEM graduates and no reduction in overall F-1 enrollment. Both assumptions are untenable. A fee of $70,000 per initial OPT recommendation and $30,000 per subsequent OPT recommendation would fundamentally change the economics of studying in the United States, and the available evidence shows that prospective students, schools, and employers will respond accordingly.

An October 12, 2026, analysis by the Institute for Progress (IFP) draws on both IFP survey data and the research of immigration economist Michael Clemens (Ph.D.), a Fellow at the Center for Global Development.[81] Dr. Clemens estimates that if universities bear the cost of the fee, as the Proposed Rule contemplates, OPT participation would decline by 46 percent among bachelor's graduates and by 99 percent among master's graduates. If students bear the cost, participation would fall by 23 percent for bachelor's graduates and 42 percent for master's graduates; if employers bear the cost, participation would fall by 84 percent at both levels.[82] IFP's survey of 734 F-1 students, conducted from August 14 to October 5, 2026, indicates that the fees would reduce the proportion of STEM students who would try to remain in the United States after graduation by 40 to 82 percent.[83]

The effects would not be limited to graduates. Because the availability of OPT is a central factor in prospective international students' decision to study in the United States, the fees would reduce international enrollment even before students become eligible for OPT. Dr. Clemens estimates a decline of 3 to 31 percent in undergraduate enrollment of international students and a decline of 5 to 58 percent at the master's level.[84] IFP's own survey data are starker still: 70 percent of F-1 students in STEM programs reported that they would not have enrolled at a U.S. school if the proposed fees had been in place.[85] DHS's failure to account for any of these effects renders its analysis unreliable.

b. OPT Is the Front Door to the American Educated Workforce, not a Back Door

The Proposed Rule treats OPT as a means by which employers "bypass H-1B caps, fees, and prevailing wage requirements."[86] The evidence shows otherwise. As IFP explains, "OPT is not a back door into the American workforce, but the front door. DHS is treating OPT and the H-1B as substitutes, when in reality, they work in sequence. Eighty-two percent of international STEM graduates who stay to work in the United States secure OPT before getting an H-1B."[87] By suppressing participation in OPT, the Rule would shrink the pipeline of U.S.-educated talent on

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[81] Institute for Progress, *DHS's $100k Fee on STEM OPT Would Break High-Skilled Immigration* (Oct. 12, 2026); Michael A. Clemens, *Taxes on International Students: Demand and Supply Response for Post-Graduation Foreign Workers on Optional Practical Training* (working paper).

[82] *See* Institute for Progress, *DHS's $100k Fee on STEM OPT Would Break High-Skilled Immigration* (Oct. 12, 2026) (citing Clemens, *supra*).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 91 Fed. Reg. at 64575.

[87] Inst. for Progress, *DHS's $100k Fee on STEM OPT Would Break High-Skilled Immigration* (Oct. 12, 2026).

which the H-1B program and, ultimately, the employment-based immigration system, depend and which has spurred on U.S. job creation and economic growth.[88]

c. DHS Fails to Acknowledge or Quantify the Rule's Cost to Innovation and the U.S. Economy

OPT supplies a significant portion of the U.S. STEM workforce. Research published by the National Academies of Sciences, Engineering, and Medicine estimates that foreign-born workers who earned U.S. degrees make up 19 percent of the U.S. STEM workforce generally, 28 percent of STEM workers with master's degrees, and 35 percent of those with doctoral degrees.[89] IFP estimates that, after ten years, the decline in F-1 enrollment and OPT participation triggered by the Rule would reduce U.S. gross domestic product by between $110 billion and $1.18 trillion per year.[90] The Rule does not acknowledge, let alone quantify, these effects on innovation, scientific achievement, and economic growth.

d. The Rule Would Harm, Not Help, American Students and Workers

Contrary to DHS's assumptions, the available evidence indicates that the proposed fees would not increase wages or employment opportunities for American STEM workers.[91] The Rule would also harm American students. Because international students generally pay full tuition, they help subsidize the education of U.S. students; IFP estimates that the resulting decline in international enrollment would reduce the number of Americans able to enroll at U.S. colleges and universities by approximately 46,000 per year.[92] These costs are borne by American families and institutions, and the Rule does not address them.

Because DHS has failed to analyze the Rule's direct and indirect costs, the Proposed Rule does not satisfy the requirements of Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of a proposed regulation and to adopt a regulation only upon a reasoned determination that its benefits justify its costs,[93] or of the Regulatory Flexibility Act.[94] DHS should withdraw the Proposed Rule, conduct a full analysis of the direct and indirect costs, including analysis of what additional data collection, investigation and enforcement initiatives could be covered by already-authorized appropriations, and reconsider the Rule only after those costs are accurately assessed.

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[88] Partnership for a New American Economy, *The H-1B Employment Effect* (2015), https://www.americanimmigrationcouncil.org/wp-content/uploads/2015/04/H1B_12.7.pdf.

[89] *See* Inst. for Progress, *DHS's $100k Fee on STEM OPT Would Break High-Skilled Immigration* (Oct. 12, 2026) (citing research published by the National Academies of Sciences, Engineering, and Medicine).

[90] *Id.*

[91] *See id.*

[92] *Id.*

[93] Exec. Order No. 12866, § 1(b)(6), 58 Fed. Reg. 51735 (Oct. 4, 1993); Exec. Order No. 13563, § 1(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

[94] 5 U.S.C. §§ 603–604.

V. THE 30-DAY COMMENT PERIOD DOES NOT PROVIDE STAKEHOLDERS A MEANINGFUL OPPORTUNITY TO COMMENT

The 30-day comment period provided in the Proposed Rule does not afford stakeholders a meaningful opportunity to comment.[95] The APA requires that agencies "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,"[96] and that opportunity must be meaningful.[97] Executive Order 12866 provides that agencies should generally afford the public at least 60 days to comment on proposed regulations,[98] and Executive Order 13563 likewise provides that a comment period "should generally be at least 60 days."[99] A rule imposing charges of $70,000 and $30,000 on each of the many thousands of OPT and STEM OPT recommendations made each year plainly qualifies as a significant regulatory action with an annual effect on the economy of $100 million or more.[100] Despite this, DHS did not publish the rule in the Unified Agenda of Regulatory and Deregulatory Actions, giving affected stakeholders – including U.S. colleges and universities, students, and employers – no advance notice of the rulemaking. Providing only 30 days for the public to assess the significant legal, financial, and operational consequences of the Proposed Rule is insufficient to satisfy the requirements of the APA or established administrative practice.

a. Thirty Days Is Insufficient to Address the Scope, Impact, and Complexity of the Proposed Rule

The Proposed Rule spans more than 20 pages in the Federal Register and introduces a new cost that would severely affect U.S. global competitiveness in higher education and have profound ramifications for institutions and employers across virtually every sector and region of the United States. As discussed above, the Rule's discussion of costs omits critical data and provides an overly simplistic explanation for the fee amounts. Evaluating this information requires careful study of complex data tables and consultation with economic, legal, and fiscal experts to meaningfully analyze the accuracy and completeness of DHS's data. A 30-day period does not allow stakeholders to conduct this review and prepare informed, evidence-based comments.

b. The Truncated Comment Period Will Result in an Inadequate Administrative Record

An inadequate comment period weakens the administrative record by limiting the number and quality of substantive submissions, increasing the risk that any final rule will be arbitrary and capricious.[101] Because the Proposed Rule is a significant regulatory action with substantial economic impact, and is technically complex and highly controversial, there is no reason to limit the public comment period to less than the 60 days contemplated by Executive Orders 12866 and

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[95] *See* 91 Fed. Reg. at 64566.

[96] 5 U.S.C. § 553(c).

[97] *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009).

[98] Exec. Order No. 12866, § 6(a)(1), 58 Fed. Reg. 51735 (Oct. 4, 1993).

[99] Exec. Order No. 13563, § 2(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

[100] *See* Exec. Order No. 12866, § 3(f)(1).

[101] *See Prometheus Radio Project*, 592 U.S. at 423; *State Farm*, 463 U.S. at 43.

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13563. DHS has not articulated why a shorter comment period is necessary. AILA and the Council urge DHS to extend the comment period to at least 60 days.

VI. CONCLUSION

The Proposed Rule is not a fee rule in any meaningful sense. It imposes charges that bear no relationship to the cost of any service, confer no direct benefit on the schools required to pay them, and would be deposited in the U.S. Treasury rather than used to administer the program. DHS's own words confirm that the fees are intended to deter participation in OPT. The Rule therefore exceeds DHS's authority under 8 U.S.C. § 1356(m) and 31 U.S.C. § 9701, and it is contrary to the intent of Congress.

The Rule is also arbitrary and capricious. Its fraud justification rests on anecdotes rather than data; its remedy is not rationally connected to the predominantly employer-side fraud it describes; its rationale is internally inconsistent; and it ignores the substantial reliance interests of schools, students, and employers. DHS failed to consider numerous obvious, less burdensome, and more effective alternatives drawn from its own record, failed to analyze the Rule's substantial costs to U.S. institutions, U.S. students, and the U.S. economy, and provided an inadequate period for public comment.

AILA and the Council support effective measures to protect the integrity of the OPT program, and we stand ready to work with DHS toward that goal. For the reasons detailed above, however, AILA and the Council urge DHS to withdraw the Proposed Rule imposing fees of $70,000 for an initial OPT recommendation and $30,000 for every subsequent OPT recommendation. If DHS wishes to pursue changes to the OPT program, it should do so through targeted, evidence-based measures, supported by published data, and through a new proposal that affords the public a full and meaningful opportunity to comment.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL

cc: Office of Information and Regulatory Affairs, Office of Management and Budget
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