October 14, 2016

Alberto Ruisanchez, Deputy Special Counsel
Office of Special Counsel for Unfair
Immigration-Related Employment Practices
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

RE: Comments on Proposed Rule of Office of Special Counsel DOJ-CRT-2016-0020; RIN 1190-AA71

Dear Mr. Ruisanchez:

The undersigned organizations appreciate the opportunity to submit comments on the above-captioned notice of proposed rulemaking ("NPRM") published by the Department of Justice (the "Department").

INTRODUCTION

The commenters are organizations that represent HR professionals and employers in a wide range of industries. Our members, both individuals and member companies, fully support the intent of Congress to prohibit and remedy immigration-related employment discrimination and recognize the important role that the Office of Special Counsel for Unfair Immigration-Related Employment Practices ("OSC") plays in that process. Our members devote substantial resources to understanding their obligations under Section 274B (hereinafter "§ 274B") of the Immigration and Nationality Act ("INA"), developing procedures to ensure that their personnel comply with the often-complicated obligations of employers, and monitoring to ensure that those procedures are effective. We are employers who take seriously our obligations under the INA and all other anti-discrimination laws.

Nevertheless, we believe that the NPRM goes far beyond the boundaries of § 274B in a way that ignores the statutory context, runs contrary to Congress's intent, and is not necessary to the effective administration of the immigration-related unfair employment practices provisions of the INA. The NPRM is described as a proposal merely to "conform the regulations to statutory text," to "clarify … procedures," and to "reflect developments in nondiscrimination jurisprudence." The proposed changes, however, are not nearly so modest. Instead, they would expand the scope of OSC's regulations in a manner that exceeds the plain language of the statute, disregards the careful policy choices made by Congress, and contradicts numerous fundamental principles set forth in a well-developed body of federal and administrative caselaw.

Congress intended § 274B to be a carefully designed framework to prohibit discrimination in the operation of the employer sanctions regime under § 274A, and to account for the particular complexities in the immigration field that differ from the broader and more absolute prohibitions against employment discrimination in the Title VII context. Section 274B was intended to keep employers from drawing distinctions among non-citizens beyond what are required in § 274A—to ensure that steps taken by employers in connection with employment verification requirements would not become *discrimination*. Immigration-related discrimination is an issue about which Congress is rightfully concerned, but the statutory history and design of § 274B indicate that such discrimination stands, by Congressional choice, on a different footing from other types of employment discrimination.

A central principle resulting from this statutory history and design is that the anti-discrimination provisions of § 274B exist only in tandem with the employment verification provisions of § 274A. The scope of § 274B must therefore be interpreted by reference to the scope and purpose of § 274A. It is certainly correct, as OSC suggests, that Title VII authority can help inform the interpretation of § 274B in certain circumstances. This is not the case, however, where there are specific and different limitations in § 274B or § 274A that control.

In a number of very important ways, the changes proposed by the Department in the NPRM would violate this central principle, and would seek to import features of Title VII law that Congress determined very specifically are not appropriate in the immigration context. These proposed changes would upset the careful balance that Congress created in § 274A and § 274B, would provide excessive and unauthorized powers to OSC, would interrupt sound human resource policies, and would be bad anti-discrimination policy.

For example, the proposed regulations would eliminate the statutory requirement that OSC show that the employer intended to discriminate based on citizenship status. Congress inserted this requirement for the dual purpose of: (i) ensuring that § 274B would not inadvertently discourage precisely the employment verification duties imposed on employers under § 274A, while (ii) still prohibiting excessive employer reactions to the employer sanctions regime that would amount to discrimination. Elimination of the intent requirement would effect a vast expansion of OSC's powers, would punish conduct that Congress determined should not be punished, and has no support either in § 274B, in the statutory structure and history of that provision, or even in the separate body of Title VII case law that has set forth the parameters of disparate treatment discrimination over the years.

Further, OSC proposes to expand vastly the time periods within which it may investigate claims of immigration-related employment discrimination. Depending on how the process is started, investigations are typically concluded within just over a year under the current system. Under the new regulations, employers would be subject to ongoing investigations that could take up to *half a decade* to complete. The NPRM thus disregards Congress's determination that claims should be advanced within 180 days—subject to certain statutory exceptions—in order to ensure that relevant evidence is preserved, key witnesses are available, and a reliable determination may be reached within a finite time period. Such a result is in the interests of employers and employees alike. The proposed regulatory change here is a key example of how this NPRM would exceed the authority that Congress has provided.

The employers whose interests are represented by the commenters recognize the important role that OSC plays in investigating, preventing, and penalizing immigration-related employment discrimination. But they also recognize the important role that Congressional intent and statutory language plays in defining regulated conduct and in providing careful limits to government investigative agencies. Because the proposed regulations violate Congress's will, exceed statutory and constitutional limits, and ultimately represent flawed policy choices, they should be withdrawn.

SUMMARY OF COMMENTS

The proposed regulation is contrary to the precise statutory language and to the overall statutory structure of § 274B.[1] Furthermore, the regulatory changes proposed are not supported by the caselaw from the Office of the Chief Administrative Hearing Officer ("OCAHO") or by decisions construing Title VII that the NPRM purports to "reflect." The most significant problems with the proposed regulations are:

1. The proposed regulations ignore the fact that Congress has, from creation of § 274B in 1986 through its substantive amendments in 1990 and 1996, stated its clear intention that: (i) the statute is principally a remedy for unfair employment practices connected in some fashion to § 274A, the employer sanctions provision; (ii) intentional or purposeful discriminatory actions are the only employment practices within the statute's scope, and mere "disparate treatment" without discriminatory intent is not an immigration-related unfair employment practice; and (iii) the procedural requirements for bringing actions, as well as the investigative powers of the Office of Special Counsel, are strict and narrow.

2. The proposed regulations would make mere "disparate treatment" without any discriminatory purpose or intent an actionable ground of discrimination, even though: (i) § 274B contains express language to the contrary; and (ii) no OCAHO or Title VII caselaw—including that cited in the NPRM accompanying the proposed regulations—supports such an interpretation and application of the INA.

[1] *See* 8 U.S.C. § 1324b.

3. Section 274B places strict and precise time limits on when a complaint may be brought by either a private individual or by OSC acting on its own, and none of the caselaw or other authority cited in the proposed regulations supports the notion that OSC has discretionary authority to change or circumvent those limits.

4. The Department's proposed definition of the term "hiring" expands the term beyond its common-sense and dictionary definitions, is inconsistent with the statutory structure of § 274B, and specifically exceeds the OCAHO caselaw incorrectly cited in support.

5. The proposed expansion of OSC's investigative powers greatly exceeds its statutory authority, is not supported by the caselaw or federal civil procedure rules cited, and intrudes on well-established Fourth Amendment principles.

Given that the flaws identified above apply to the central aspects of the proposed regulations, this proposed rulemaking should be withdrawn. We set forth our analysis in support of this conclusion in greater detail below.

INTERESTED PARTIES

The Chamber of Commerce of the United States of America is the world's largest business organization representing the interests of more than three million businesses of all sizes, sectors, and regions, with substantial membership in all 50 states. While virtually all of the largest U.S. employers are active Chamber members, more than 96 percent of its membership consists of small businesses with 100 or fewer employees, and 70 percent have 10 or fewer employees.

The Council for Global Immigration, founded in 1972 as the American Council on International Personnel, is a nonprofit trade association comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals, and of sound U.S. immigration policies in general. It bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, and it contributes more than $2 trillion to the U.S. economy annually. It is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Society for Human Resources Management is the world's largest Human Resources ("HR") professional society, representing 285,000 members in more than 165 countries. It has more than 575 affiliated chapters within the United States. It is the leading provider of resources

serving the needs of HR professionals and advancing the practice of human resource management.

The College and University Professional Association for Human Resources ("CUPA-HR") provides leadership on higher education workplace issues in the U.S. and abroad by monitoring trends, exploring emerging workforce issues, conducting research, and promoting strategic discussions among colleges and universities. It serves as the voice of more than 22,000 member representatives at almost 2,000 colleges and universities across the United States. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

Associated Builders and Contractors ("ABC") is a national construction industry trade association established in 1950 that represents nearly 21,000 members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

COMMENTS

I. Congress Has Repeatedly Demonstrated Its Intent that § 274B Be Construed Narrowly and with Reference to § 274A.

Many of the excesses of the proposed regulations are rooted in the Department's failure to follow Congress's intent that § 274B be read to address a specific issue—discrimination against individuals because of their citizenship status, or because of their immigration status in those precise circumstances described by the statute. A brief history of the statute confirms this point, but the NPRM ignores that clear Congressional intention.

Section 274B was added to the INA through the enactment of the Immigration Reform and Control Act of 1986 ("IRCA").[2] Section 274B is a corollary to the centerpiece of IRCA, in which the United States for the first time made it unlawful for an employer to knowingly hire an alien not authorized to work—through enactment of the "employer sanctions" provision and the addition of § 274A to the INA. The reason for including these anti-discrimination provisions was to address concerns on the part of some members of Congress that employer sanctions would cause employers to deny job opportunities to some applicants because of perceived or actual citizenship status.[3]

[2] Pub. L. 99-603, 100 Sta. 3359 (Nov. 6, 1986).

[3] *See* Joint Hearing Before the House Subcomm. on Immigration, Refugees, and International Law and the Senate Subcomm. on Immigration and Refugee Policy, 99th Cong., 1st Sess. 111 (1985). *See also* Michael C. Lemay, *Assessing the Impact of IRCA's Employer Sanctions Provisions*. Center for Migration Studies of New York (1989) Vol. 12 at 150-51; Anodorra Bruno, *Electronic Employment Eligibility Verification*. Congressional Research Service (Mar. 19, 2013) at 14.

Employer sanctions were included as new § 274A in the first versions of IRCA in the 97th Congress, without inclusion of § 274B or any other anti-discrimination provisions.[4] In the 98th Congress, the House-passed version of IRCA added § 274B, but the Senate-passed version did not.[5] In the 99th Congress, the House-passed version of IRCA again added § 274B, but the Senate-passed version of IRCA did not. And in conference committee, the House version of § 274B was subject to a number of revisions that narrowed the scope and authority of the OSC statute, with the House Report specifically stating that § 274B is a "complement to the [§ 274A] sanctions provisions, and must be considered in this context."[6]

As enacted, § 274B(a)(1) prohibits discrimination based on citizenship status in the precise activities covered by § 274A(a)—hiring and recruitment or referral for a fee. Section 274B(a)(1) also added "discharge" as a covered activity because the employment verification process in § 274A occurs in a post-hire setting. Other bases for discrimination covered by Title VII—for example, discrimination based on the terms and conditions of employment—were intentionally excluded from § 274B. An important distinction arises from this statutory structure: § 274B principally refers to, and is substantially dependent on, the employer sanctions regime created in § 274A. Other anti-discrimination statutes, such as Title VII, might be informative if there is an ambiguity in § 274B. However, if and when § 274A speaks to a question relating to the scope of § 274B, § 274A prevails over other anti-discrimination statutes that were drafted for a different purpose.

In light of the aforementioned concern over discrimination, Congress provided in § 274A, as enacted in 1986, for the termination of employer sanctions if: (i) the GAO determined that a widespread pattern of discrimination had resulted against authorized workers as a result of employer sanctions within three years of its enactment; and (ii) Congress enacted within 30 days a joint resolution stating that it approved of the GAO's findings.[7] Making it very clear that Congress did not intend to pass a free-standing immigration-related antidiscrimination provision independent of the employer sanctions regime, § 274B (the OSC statute) was to be terminated *automatically* if § 274A was terminated by this process.[8] OSC's performance as of the 1989 trigger point was irrelevant; if employer sanctions were terminated by Congress, then the OSC regime would be terminated—automatically—as well. Congress thus clearly tied the existence of § 274B entirely to the existence of § 274A.

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[4] Immigration Reform and Control Act of 1982, S. 2222, 97th Cong. (1982).
[5] Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong. (as passed by House of Representatives, Jun. 20, 1984); *compare* Immigration Reform and Control Act of 1983, S. 529, 98th Cong. (as passed by Senate May 18, 1983).
[6] H.R. Rep. No. 99-1000, 99th Cong. 2d Sess. 87, reprinted in 1986 U.S. Code Cong. & Admin. News 5840 (Oct. 17, 1986).
[7] INA § 274A(*l*) (1986). This provision was ultimately repealed when Congress failed to so act within the time period permitted. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 412(c), Pub. L. 104-208, 110 Stat. 3009-546, 3009-668 (Sept. 30, 1996).
[8] INA § 274B(k) (1986). This provision was similarly terminated in 1996. *See* IIRIRA § 412(c), 110 Stat. at 3009-668.

Some early OCAHO caselaw might lead to a different conclusion, if viewed in isolation from this context. But, that caselaw only addresses the facts of the particular case, has not been tested in federal court, and is largely dicta.[9] But importantly, no respondent in any of the early cases was challenging the breadth of a promulgated rule, or OSC's interpretation of such a rule, and thus the question raised by the proposed regulations here—namely whether the applicable statutory text support OSC's proposed broad expansion of the jurisdictional scope of § 274B—has not been addressed by either administrative or federal-court caselaw. As explained preliminarily here, and later throughout these comments, the answer to this question is "no."

After the three-year evaluation period of employer sanctions ended in 1989, further legislative activity reaffirmed the relationship between § 274A and § 274B, and established additional limitations relevant to this NPRM. In 1989, the GAO reported that a "widespread pattern of discrimination" had occurred as a result of employer sanctions,[10] thus allowing for an expedited vote in Congress to repeal both § 274A and § 274B. The report, however, was viewed by many in Congress as empirically flawed, so no such repeal vote occurred.[11] Instead, a task force headed by the Civil Rights Division of the U.S. Department of Justice recommended that certain revisions be made to the OSC statute, and Congress enacted a number of these recommendations in the Immigration Act of 1990 ("IMMACT").[12] These revisions included: (i) expansion of the covered grounds of discrimination to include intimidation or retaliation against a person exercising rights under the OSC statute;[13] (ii) expansion of the covered grounds of discrimination by prohibiting employers from requesting more or different documents than are required by the I-9 Form (*i.e.* "document abuse");[14] and (iii) clarification of the statute of limitations to set a 120-day period for OSC to determine whether it will file a complaint based on an individual charge, and requiring an individual to file a complaint before an Administrative Law Judge within 90 days of notice from OSC that OSC is unable to make a determination whether to file a complaint. The statute also gave OSC an additional 90-day period after sending the "right to sue" letter to file a complaint.[15]

New § 274B(a)(6) under IMMACT covered employer actions "for purposes of satisfying the requirements of section 274A(b) of this title"—relating once again to the employment verification provisions of employer sanctions. The subrogation of § 274B to § 274A—and in

[9] *See, e.g., United States v. Mesa Airlines*, 1 OCAHO no. 74, 461, 466-68 (1989) (no separate requirement for complainant to show employer's sanctions motivate); *United States v. Southwest Marine*, 3 OCAHO no. 429, 336, 359 (1993) (citing *Mesa Airlines* without discussion); *United States v. General Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1147 (1993) (declining to apply INS's regulations under §274A to definition of "employer" in dispute over alleged discrimination by respondent employer's contractor).

[10] *Immigration Reform: Employer Sanctions and Questions of Discrimination*. U.S. General Accounting Office (Mar. 1990).

[11] Paul Houston, *Bill Targets Immigration Law's Employer Sanctions*, L.A. Times (Sept. 21, 1991).

[12] P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990)

[13] *See* IMMACT § 534, codified as new INA § 274B(a)(5).

[14] *See* IMMACT § 535, codified as new INA § 274B(a)(6).

[15] *See* IMMACT § 537, codified as new INA § 274B(d)(2).

particular its employment verification requirements—is explicitly demonstrated by this statutory text.

In the years that followed, OSC was treating "document abuse" under § 274B(a)(6) as a strict liability offense, and in 1996, employers complained to Congress that this was inconsistent with the requirement that discriminatory intent be shown to sustain any charge of discrimination under § 274B.[16] In addition to constituting a misreading of the statute, OSC's pre-1996 approach to "document abuse" reflected a poor policy decision, as many employers were requesting more or different documents based on good faith reasons to suspect the validity of the documents tendered by certain employees pursuant to § 274A's employment verification requirements. In response, Congress amended § 274B(a)(6) to clarify that requests for more or different documents "shall be treated as an unfair immigration-related employment practice <u>if made for the purpose or with the intent of discrimination against an individual in violation of paragraph (1)</u>."[17] This amendment was codified through enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[18]

Thus, from OSC's creation in 1986—through as recently as 1996—Congress has repeatedly and consistently made it clear that INA § 274B is not a "stand-alone" anti-discrimination statute, and that OSC cannot interpret the statute as if it were. Rather, § 274B is irrevocably tethered to the scope of the employer sanctions regime, and OSC's regulatory jurisdiction does not extend beyond those anti-discrimination concerns that are reasonably related to employer sanctions or the employment verification requirements of § 274A.

We discuss throughout these comments how the proposed regulations disregard and exceed the scope of § 274B and the statutory provision—§ 274A—on which § 274B depends.

II. The Statutory Limitations in § 274B Reflect Important Congressional Choices about the Immigration-Related Unfair Employment Practices Framework.

A. Intent to Discriminate is Required by § 274B to Avoid Frustrating the Objectives of Employer Sanctions.

The NPRM proposes wide-reaching changes to the regulation by analogy to Title VII. This analogy does not support the proposals in the way described in the NPRM. It is important to distinguish between the objectives of § 274B and of Title VII. Title VII (together with its related statutes) prohibits discrimination on certain bases—including race and color, national origin, religion, sex, age and disability. There is general societal agreement—reflected in the enactment of Title VII and its related statutes—that employment discrimination based on any of these protected categories should either not be allowed at all or allowed only in certain limited situations. Federal courts have made the same judgment as a constitutional matter, applying stricter standards of judicial review when assessing the constitutionality of statutes that make

[16] *See* 142 Cong. Rec. S4401–01, S4410–S4412 (daily ed. Apr. 30, 1996) (statement of Sen. Simpson).
[17] IIRIRA § 421, 110 Stat. at 3009-670 (underlining indicates newly added text).
[18] Pub. L. 104-208, div. C; 110 Stat. 3009, 3009-46 at 724 (Sept. 30, 1996).

distinctions based on the grounds of discrimination covered in Title VII.[19]

The federal courts have also recognized that, because of the special considerations involved in federal regulation based on immigration status, narrower standards of judicial review apply, and Congress may appropriately make, mandate, or allow distinctions based on immigration status differently than it might with respect to other characteristics such as those protected under Title VII.[20] That is precisely what Congress has done in § 274B. For example, Congress specified in § 274B that it is not an unfair immigration-related employment practice, and no discrimination claim against an employer is valid: (1) if the employer is required by law, regulation or executive order to insist on U.S. citizenship as a hiring prerequisite,[21] or (2) if the employer preferred to hire an "equally qualified" U.S. citizen over a foreign national who was otherwise protected under the terms of this section.[22]

Likewise, § 274A and its implementing regulations require employers to distinguish among employees in certain scenarios based on citizenship or immigration status. For example, employees with temporary work authorization may only work for the duration of such temporary authorization (and, in many cases, only for a sponsoring employer) and must then reverify with the employer their employment authorization. Foreign nationals without work authorization must be treated even more differently -- they may not be employed at all.[23] Even lawful permanent residents are subject to reverification in certain discrete circumstances (*e.g.*, those having an I-551 visa stamp in their passport but not presenting a permanent resident card), notwithstanding having indefinite work authorization.[24]

These structural features of § 274B articulate the congressional policy of creating a limited anti-discrimination statute that: (i) requires employers to distinguish for adverse treatment among certain foreign nationals (*i.e.*, those lacking work authorization and those possessing authorization for employment with only one sponsoring employer) and (ii) allows employers to distinguish between U.S. citizens and non-citizens in certain circumstances, but (iii) prohibits discrimination against protected individuals that exceed the statutory bounds of both § 274A and § 274B. This was a reasonable policy choice to accomplish the dual goals of preventing the knowing employment of unauthorized aliens while preventing over-cautious employers from implementing broad "citizens-only" or similar hiring policies. The bases of

[19] For instance, statutes—including federal statutes—that make gender-based distinctions must pass intermediate scrutiny under the Equal Protection Clause. *See, e.g.*, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (reviewing the Family and Medical Leave Act). *See also Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996).

[20] *See Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (upholding a five-year residency requirement for permanent residents to qualify for the Medical supplemental insurance program under 42 U.S.C. § 13950).

[21] INA § 274B(a)(2)(B).

[22] INA § 274B(a)(4).

[23] *See* INA §§ 274A(a)(1), (2).

[24] 8 C.F.R. § 274a.2(b)(1)(vi-vii); U.S. Citizenship and Immigration Services, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)*, M-274 (Rev. 04/30/13) N, at 12-13, *available at* https://www.uscis.gov/sites/default/files/files/form/m-274.pdf.

discrimination covered by § 274B, however, are not fully congruent with the bases of discrimination covered by Title VII and its related statutes.

The NPRM disregards these clear Congressional policy choices by redefining intentional discrimination to include any instance of disparate treatment "regardless of the explanation for the differential treatment." 81 Fed. Reg. at 53976. The NPRM flatly ignores Congress's decision that immigration status can be a relevant factor in determinations under both § 274A and § 274B. Ironically, not only do the proposed changes not deter actual, intentional discrimination against individuals protected by § 274B, they actually penalize employers who, for example, seek in good faith to "help the individual complete the Form I-9 . . . even if the employer was completely unaware of [§ 274B]." 81 Fed Reg. at 53967. These changes could also result in frustrating the ban in § 274A(a) on the knowing employment of unauthorized aliens, by exposing employers to discrimination liability for good faith efforts to verify the employment eligibility of new hires or those whose work authorization is about to expire. Neither result is good policy, nor were they intended by the statutes the NPRM purports to interpret.

B. Congress Chose to Make § 274B Dependent Upon § 274A.

The congressional policy decision described in the prior section illuminates another critical aspect of § 274B: it is more dependent upon § 274A than upon other civil rights statutes when construing its scope or implementing it by regulation. Reading the two sections together, it is impossible to miss their dual purposes: (i) to prevent the knowing employment of unauthorized aliens, while (ii) deterring intentional discrimination based on citizenship status as a result of § 274A's employment verification requirements. Congress therefore determined that § 274B is subrogated to § 274A, because to view § 274B otherwise would undermine the principal aim of the Immigration Reform and Control Act—which as revealed by its very title and by President Reagan's signing statement was to *control* the unauthorized employment of undocumented aliens.[25]

The NPRM, however, gives at best passing reference to § 274A and treats the statutory terms of § 274B as fully congruent with Title VII and its related civil rights statutes. This would result in inappropriate policy outcomes. If "intent" is read out of the discriminatory activities prohibited by § 274B, then there would be no theoretical bar on the use of statistical disparities in hiring outcomes based on immigration status to create theories of employer liability akin to Title VII's disparate impact doctrine. Such a result would directly contradict § 274A, which *requires* employers to make certain distinctions based on immigration status and which will inevitably result in disparate statistical outcomes based on immigration status. The NPRM would turn

[25] *See*, *e.g*, President Reagan's Statement on Signing the Immigration Reform and Control Act of 1986 (Nov. 6 1986) ("the Special Counsel should exercise the discretion provided under subsection [INA § 274B](d)(1) so as to limit the investigations conducted on his own initiative to cases involving discrimination apparently caused by an employer's fear of liability under the employer sanctions program"). That statement is available at https://www.reaganlibrary.archives.gov/ archives/speeches/ 1986/110686b.htm.

IRCA on its head and subrogate § 274A to § 274B—a policy result that Congress explicitly rejected.

III. The Proposed Rule Improperly Removes the "Intent" Element in its Definition of "Discriminate."

The proposed regulations further violate Congress's intentions with respect to § 274B by removing intent considerations from its definition of "discriminate." In particular, the proposed regulations violate the clear statutory language of § 274B(a)(6) and § 274B(d)(2), are unsupported by the OCAHO caselaw they purport to codify, and are inconsistent with the Title VII caselaw that is incorrectly cited in their support.

The INA's antidiscrimination provisions prohibit, *inter alia*, discrimination "against any individual . . . with respect to the hiring, or recruitment or referral for a fee . . . or the discharging of the individual from employment . . . (A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status."[26] IRCA also prohibits "document abuse," which is the practice of demanding more or different documents than required by law from employees when completing the Form I-9 for the purpose of employment eligibility verification or reverification.[27]

A. The INA Does Not Support the Proposed Rule.

The INA requires that a complainant establish by a preponderance of the evidence that the employer engaged in "knowing and intentional discriminatory activity."[28] As OCAHO has stated, "[l]iability under [§ 274B] is proven by a showing of deliberate discriminatory intent on the part of an employer."[29] Similarly, an employer is only liable for document abuse if the unnecessary request for more or different documents is "made for the purpose or with the intent of discriminating against an individual in violation of [INA § 274B(a)(1)]."[30] The regulations implementing these statutory provisions are consistent with these statutory provisions.[31]

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[26] INA § 274B(a)(1). A "protected individual" is defined as a U.S. citizen, most law permanent residents, refugees, asylees and certain persons who derived temporary resident status through special programs under IRCA. INA § 274B(a)(3).

[27] INA § 274B(a)(6).

[28] INA § 274B(d)(2).

[29] *See United States v. Marcel Watch Corp.*, 1 OCAHO no. 143, 988, 1001 (OCAHO 1990).

[30] INA § 274B(a)(6). The authority is split regarding whether standing as a "protected individual" is necessary to file a charge based on document abuse. *Compare United States. v. Mar-Jac Poultry, Inc*., 10 OCAHO no. 1148, 10 (OCAHO 2012) ("[T]he weight of authority in OCAHO caselaw is that all work authorized individuals are included within the scope of § 1324b(a)(6).") *with Ondina-Mendez v. Sugar Creek Packing Co*., 9 OCAHO no. 1085, 16 (OCAHO 2002) ("[T]he cross reference to [INA § 274B(a)(1)] defines the type of discrimination prohibited: citizenship status discrimination against protected individuals[.]"). In any event, intent is today unequivocally a necessary element for document abuse.

[31] *See, e.g.*, 28 CFR § 44.200(a).

The proposed regulations add two new definitional sections that would violate the explicit statutory language of § 274B(a)(1), § 274B(a)(6), and § 274B(d)(2). Although the Department characterizes these changes as mere language that "clarifies" existing law or policy, 81 Fed. Reg. at 53967, that is a mischaracterization; in fact, these proposals would *in effect* eliminate the well-settled concept of "discriminatory intent" and could make "immigration-related unfair employment practices" a strict liability offense.

The first such change is in proposed § 44.101(e), which states:

> *(e) Discriminate as that term is used in 8 U.S.C. [§]1324b means the act of intentionally treating an individual differently from other individuals,* ***regardless of the explanation for the differential treatment,*** *and regardless of whether such treatment is because of animus or hostility.*

81 Fed. Reg. at 53976 (emphasis added).

In addition, a new § 44.101(g) would make intent similarly irrelevant in the context of "document abuse." The proposed language reads:

> *(g) An act done ''for the purpose or with the intent of discriminating against an individual in violation of paragraph (1) [citizenship status discrimination],'' as that phrase is used in 8 U.S.C. [§]1324b (a)(6), means an act of intentionally treating an individual differently based on national origin or citizenship status in violation of 8 U.S.C. [§]1324b(a)(1),* ***regardless of the explanation for the differential treatment,*** *and regardless of whether such treatment is because of animus or hostility.*

Id (emphasis added).

The effort to disregard the statutory "intent" requirement is reiterated in the preamble to the proposed rule. There, the Department not only says that discrimination means "the act of intentionally treating an individual differently based on national original or citizenship status … regardless of the explanation for the discrimination, and regardless of whether it is because of animus or hostility," but goes even further by saying that "the employer may be liable for discrimination even where the employer does not take or threaten adverse employment action, and where the employer's intent actually is to help the employees" (*e.g.*, to avoid gaps in work authorization). 81 Fed. Reg. at 53967 (emphases added).

The proposed rule ignores these express statutory requirements altogether.

B. OCAHO Caselaw Does not Support the Proposed Rule.

The Department relies heavily on *United States v. Life Generations Healthcare, LLC*[32] for the proposition that discrimination can be established "regardless of whether it is based on animus or hostility." 81 Fed. Reg. at 53967. The Department appears to rely on some isolated language from *Life Generations Healthcare*, to support its interpretation of "discrimination," such as "[i]t is not required that malice or ill will be shown,"[33] and "the absence of a malevolent motive does not alter the character of a discriminatory policy."[34]

The Department's reliance on *Life Generations Healthcare* is misplaced and is based on extracted quotations that do not reflect a reasonable reading of the overall case. Nowhere does that opinion say that *any* disparate treatment of an individual based on citizenship status is discrimination *per se*, regardless of the explanation. Furthermore, the Department overlooks—or implies that *Life Generations Healthcare* supersedes—*United States v. Diversified Technology & Services of Virginia, Inc.*,[35] a seminal case on the issue of "intent" in § 274B proceedings. An examination of both opinions shows substantial consistency between them.

In *Diversified Technology*, the same administrative law judge (ALJ) who decided *Life Generations Heathcare* explained that some discrimination cases can be established through "direct evidence," meaning "evidence which proves the fact at issue without the need to draw any inferences."[36] The ALJ further opined that "[w]hile OSC says that intentional discrimination does not necessarily require a showing of some special animus toward a protected group, direct evidence, in contrast, usually does require such evidence of animus. That is what the term direct evidence means in the context of an employment discrimination case."[37] *Diversified Technology* further holds that, absent direct evidence of intentional discrimination, a complainant may proceed by raising an inference of discrimination. The employer then must proffer a nondiscriminatory reason to rebut this inference. If the employer is able to do so, the complainant must show "that the employer's reasons are unworthy of credence or are otherwise a pretext for discrimination."[38] But in any of these scenarios, a finding of discriminatory intent is a threshold requirement.

Consistent with *Diversified Technology*, *Life Generations Healthcare* illustrates how OCAHO may draw such an inference of discrimination in the absence of direct evidence from data and statistics. In *Life Generations Healthcare*, OSC alleged that the employer had a discriminatory policy of limiting the type of documents that non-U.S. citizens may present when verifying their employment eligibility while not subjecting U.S. citizens to the same restrictions. The ALJ opined that "[d]iscriminatory intent may be established by direct or circumstantial

[32] 11 OCAHO no. 1227 (OCAHO 2014)
[33] *Life Generations Healthcare*, 11 OCAHO no. 1227, 22-23.
[34] *Id.* at 29 (citing *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).
[35] 9 OCAHO no. 1095 (OCAHO 2003).
[36] *Diversified Technology*, 9 OCAHO no. 1095, 13.
[37] *Id.* at 21.
[38] *Id.* at 20.

evidence, or it may be inferred from statistical evidence . . . , and gross statistical disparities may themselves provide *prima facie* proof of a pattern or practice of discrimination."[39] The ALJ also opined that "[a] discriminatory pattern is itself probative with respect to motive, and can create an inference of intent" and that "[s]tatistics too may also be helpful in showing that an employer's reason is pretextual."[40] *Life Generations Healthcare* thus addressed inferences of discriminatory intent that required further proof. That decision did *not* equate the evidence of disparate treatment with an actual finding of covered discrimination. Furthermore, in no way did the *Life Generations Healthcare* opinion state or imply that *Diversified Technology* was superseded or overruled.

While the ALJ in *Life Generations Healthcare* did say that "the absence of a malevolent motive does not alter the character of a discriminatory policy,"[41] the opinion provides no support for making disparate treatment alone—regardless of the reason for such disparity—a strict liability offense. Rather, the ALJ specifically held that "[i]ntentional discrimination is shown when an employer treats some people less favorably than others because of a prohibited factor."[42] The ALJ concluded that a "*prima facie* pattern or practice discrimination case is established by evidence that an employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure, not just an unusual practice."[43]

In *Life Generations Healthcare*, the ALJ found that the employer "over documented" 100% of its non-U.S. citizen employees in the employment verification process, while the violation rate when verifying U.S. citizens was between 8.33% and 10%.[44] The ALJ then drew an "inference" of discrimination based on the statistical showing that the disparate treatment was unfavorable to the covered class, that such treatment was a standard operating procedure, and that the employer failed to rebut the inference with a nondiscriminatory explanation.[45] Thus, the *Life Generations Heathcare* ALJ imposed three requirements for establishing prohibited discrimination that the proposed regulation omits: (i) a showing by complainant that the disparate treatment was unfavorable to a particular group because of that group's protected characteristic; (ii) evidence from complainant that statistical evidence of such treatment amounted to "standard operating procedure" for the company; and (iii) no evidence from the employer to rebut the inference that the disparate treatment was in fact on account of a discriminatory purpose or intent. *Life Generations Healthcare* does not in any way stand for the proposition that § 274B allows OSC to dispense with the need to demonstrate discriminatory intent in some fashion. Therefore, the case does not support OSC's proposed definitions, which omit each of these critical elements.

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[39] *Life Generations Healthcare*, 11 OCAHO no. 1227, 23.
[40] *Id.* (internal citations omitted).
[41] *Id.*
[42] *Id.* at 29 (emphasis added) (citing *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977)).
[43] *Id.* at 30.
[44] *Id.* at 26.
[45] *Id.* at 21.

The outcome in *Life Generations Healthcare* depended entirely on an analysis of the specific evidence presented before the ALJ. Had the proposed rule been in effect, liability would have been established at the point where any disparate treatment was demonstrated, there would have been no need for the ALJ to have delved into the detailed empirical evidence to identify a pattern or draw any inference, and the employer certainly would not have been afforded an opportunity to present rebuttal evidence after the inference was drawn. Ironically, while the proposed regulation purports to rely heavily on the reasoning set forth in *Life Generations Healthcare*, it would in effect overrule the case.

C. Title VII Caselaw does not Support the Proposed Rule.

The proposed rule also implies that its definitional changes are justified by caselaw under Title VII—relying on a single case for the proposition that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." 81 Fed. Reg. at 53967 (quoting *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)). However, the proposed rule relies on a misreading of Title VII caselaw; in fact, the case that the NPRM cites actually *rejects* the Department's position.

The Supreme Court has reiterated on numerous occasions that intent to discriminate is required in Title VII disparate treatment cases, both in cases of individual discrimination and in pattern or practice cases.[46] The Department's proposed changes, however, eliminate employer intentions from the § 274B analysis, which stands in direct conflict with the analogous Title VII framework. Under the famed three-part *McDonnell Douglas* burden shifting framework, for instance, the employee must first establish the disparate treatment from which discrimination might be inferred, then the employer has a chance to "articulate some legitimate, nondiscriminatory reason for the employee's rejection," and then the employee must show that the employer's reason is pretextual.[47] The proposed rule would essentially presume discrimination at the first stage regardless of the employer's motives, which are central to establishing *intentional* discrimination.

The Supreme Court has recognized the common-sense proposition that "in some situations [an intention to discriminate] can be inferred from the mere fact of differences in treatment" in order to make a prima facie showing of discrimination.[48] In the *Johnson Controls* case that the NPRM cites, for instance, the employer had a policy banning fertile women from positions involving lead exposure despite scientific evidence showing that exposure to lead could

[46] *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) ("Liability in a disparate-treatment case depends on whether the protected trait…actually motivated the employer's decision.") (quotations omitted, alterations in original); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."); *Int'l Broth. of Teamsters v. United States*, 531 U.S. 324, 335 n.15 (1977) (holding that in disparate treatment cases "[p]roof of discriminatory motive is critical").
[47] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
[48] *See, e.g.*, *Int'l Bhd. of Teamsters*, 531 U.S. at 335 n.15.

cause fetal harm regardless of the sex of the parent. Such a facially discriminatory policy established prima facie discrimination.[49]

But critically, as OCAHO has acknowledged this type of inference can only be drawn in *some cases*, namely in those instances where the employer has a broad, facially discriminatory policy.[50] The proposed rule, however, would presume discriminatory intent even for isolated actions of differential treatment of employees who are not subject to a broad, facially discriminatory policy. This is a clear misreading of Title VII caselaw because it ignores employer intent—entirely in derogation of the *McDonnell Douglas* and *Teamsters* framework. *Johnson Controls* is applicable Title VII caselaw for factual settings where an employer has a facially discriminatory policy; the language quoted by the Department is limited to its particular factual circumstance and does not support a generalized rule that would apply to any and all instances of disparate treatment—particularly those where an employer lacks any facially discriminatory policy whatsoever. Quite simply, the Department has cited no viable Title VII authority in support of its proposed definitional changes.

The Department's reading of § 274B would effectively impose strict liability on employers and assert jurisdiction in a way that resembles disparate impact cases that are outside of OSC's jurisdiction. Disparate impact cases do not require proof of discriminatory motive.[51] But OSC by statute cannot pursue disparate impact cases that the EEOC is permitted to pursue under Title VII, as the Department recently acknowledged.[52] The Department cannot expand OSC's jurisdiction to include disparate impact cases by eliminating the clear element of employer intent required under § 274B.

IV. The NPRM Violates § 274B's Specific Time Limitations.

The NPRM would make various changes to greatly expand the time period during which either OSC or an affected individual could pursue claims of alleged discrimination against an employer. These changes run afoul of clear Congressional intent, as evinced by the plain language of § 274B and the Department's own rulemaking record. The proposed changes regarding the statute of limitations clearly exceed the Department's regulatory authority and must be abandoned.

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[49] *See Johnson Controls*, 499 U.S. at 197-99.

[50] *See, e.g., Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568 (Oct. 19, 1993) (citing Supreme Court caselaw for the principle that "a broad-based policy of employment discrimination may establish a prima facie case of individual discrimination").

[51] *See Int'l Brotherhood of Teamsters*, 531 U.S. at 335 n.15 ("Proof of discriminatory motive, we have held, is not required under a disparate impact theory.").

[52] Letter from Alberto Ruisanchez to Bruce A. Morrison (Dec. 22, 2015) ("In contrast to several anti-discrimination laws that prohibit neutral policies that impose a disparate impact on a protected class, the INA's anti-discrimination provision only prohibits intentional discrimination."), *available at* https://www.justice.gov/crt/file/801721/download.

A. The Statutory and Regulatory Scheme in Place Since 1991.

In broad terms, § 274B provides two "tracks" according to which an OSC investigation against an employer may commence. On "Track One," an affected individual can lodge a "charge" against the employer alleging discriminatory action. OSC subsequently investigates that charge and decides whether to (i) file a complaint against the employer directly or (ii) in the alternative, give the affected individual a right to file a complaint before an administrative law judge.[53] On "Track Two," OSC can begin its own investigation into alleged discriminatory activity and decide on the basis of that investigation whether to file a complaint against the employer.[54]

In either case, the statute and current regulations provide well-defined timelines under which either the individual or OSC must file a complaint with an ALJ. On "Track One," the individual must file a charge with OSC no later than 180 days after any alleged discrimination.[55] If the individual's charge is defective, current regulations allow OSC to grant the employee an additional 45 days to correct that error.[56] OSC has 120 days from when the charge is filed to conduct its investigation and either file a complaint or notify the individual that he or she may file a complaint.[57] If OSC decides at that time not to file a complaint, there is a further 90-day period in which either the individual or OSC can file a complaint.[58] Under the much simpler "Track Two" scheme for independent investigations, OSC must investigate alleged discrimination and bring a complaint within 180 days of the discriminatory act.[59] **Exhibit A** contains charts diagramming the time periods under the current regulations.

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[53] *See* INA § 274B(d)(1-2).

[54] *See generally* INA § 274B(d)(3).

[55] INA § 274B(d)(3) ("No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel."); 28 C.F.R. § 44.301(d)(1) ("If the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice.").

[56] 28 C.F.R. § 44.301(d)(2) ("Inadequate submissions that are later deemed charges…are timely filed as long as – (i) The original submission is filed within 180 days of the alleged occurrence of an unfair immigration-related employment practice; and (ii) Any additional information requested by the Special Counsel…is provided in writing…within the 180-day period or within 45 days of the date on which the charging party received the Special Counsel's notification…,whichever is later.").

[57] INA § 274B(d)(1) ("The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge."); *id.* at (d)(2) ("If the Special Counsel, after receiving such a charge…, has not filed a complaint…within such 120-day period, the Special Counsel shall notify the person making the charge…and the person making the charge may…file a complaint directly…."). *See also* 28 C.F.R. § 44.303.

[58] INA § 274B(d)(2) ("[T]he person making the charge…file a complaint directly before such a judge within 90 days after the date of receipt of the notice. The Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period."). *See also* 28 C.F.R. § 44.303(b-d).

[59] INA § 274B(d)(3); 28 C.F.R. § 44.304(b) ("The Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment practice has occurred within 180 days from the date of the filing of the complaint.").

Under either Track One or Track Two, the time between the employer's alleged discriminatory acts and the filing of the complaint is carefully circumscribed. Under Track One, the matter is resolved—either by the filing of a complaint or by OSC and the affected party declining to do so—within 390 days. This period includes the 180-day period for filing a charge, the 120-day period for OSC's investigation, and the additional 90-day period in which the affected individual or OSC can file a complaint. Under Track Two, OSC conducts an investigation and files a complaint within 180 days of the alleged discrimination. Thus, under the current scheme, an employer has a relatively clear period during which it faces uncertainty regarding alleged discrimination—just over a year (Track One) or six months (Track Two) from the allegedly discriminatory acts.

B. The Proposed Regulatory Expansion.

The Department's proposed changes would make several substantive alterations to the existing regulatory scheme that would greatly expand the current time frames in which a complaint could be brought by OSC as a result of an independent investigation (six months) or by an affected individual as a result of a charge (just over one year). Instead, the time frames in either case would be extended to *five years* under either Track One or Track Two. Indeed OSC would in practice eliminate the affected individual charge process altogether, since OSC could freely open its own five-year investigation even when a charge is deficient. Aside from being ill-advised from a policy perspective, these proposed changes run afoul of Congress's intent and the plain wording of the INA.

The proposed regulations would make four key expansions to the time periods involved under § 274B. First, on Track One, the proposed regulations would nominally preserve the 45-day period in which an affected party must correct defects in a charge but in practice all but eliminate that period. The provision giving the affected party 45 days to correct defects remains, *see* 81 Fed. Reg. at 53977 (§ 44.301(d)(2)), but the Special Counsel can now in his or her "discretion" deem an admittedly incomplete charge to be complete and "obtain the additional information…in the course of investigating the charge." *Id.* (§ 44.301(e)). In practice, this change permits a situation in which (i) an affected individual files a defective charge 180 days after alleged discrimination; (ii) OSC grants the affected party 45 days to correct the defects; (iii) the affected party fails to provide the requested information; but (iv) OSC proceeds with an investigation into that defective charge despite the lack of correction.

Second, on Track One, the proposed regulations would vitiate the 180-day period under which an employee must bring a charge. In place of the 180-day period contained in the current regulations,[60] the proposed regulations would allow an extension of the 180-day period if "the Special Counsel determines that the principles of waiver, estoppel, or equitable tolling apply." The NPRM asserts in the preamble that these extensions will be "sparingly applied," primarily in cases where "failure to meet a deadline arose from circumstances beyond the charging party's control," but no such limitation appears in the regulation itself. 81 Fed. Reg. at 53969.

[60] *See* 28 C.F.R. § 44.301(d).

Third, on Track One, the proposed regulation would eliminate the 90-day limit after the charging party is advised of the private right of action (on Day 120) for OSC to file a complaint. 81 Fed. Reg. at 53978. In practice, this would grant OSC up to five years after the date of the alleged discrimination to file a complaint based on an employee charge. The Department asserts that this change is to "clarify that the Special Counsel is not bound by the statutory time limit on filing a complaint that is applicable to individuals filing private actions." 81 Fed Reg. at 53969. OSC relies on § 274B(d)(2)—which says "the person making the charge may . . . file a complaint directly with [OCAHO] within 90 days of [receiving the right to sue letter]"—as well as the Department's assertion that "[n]othing in the statute explicitly states that the Special Counsel is subject to that 90-day limit." 81 Fed. Reg. at 53969. The Department acknowledges that the final sentence in § 274B(d)(2) does say that OSC's "failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period." However, OSC asserts further that because the sentence does not "prohibit[] the Special Counsel's office from continuing to investigate a charge or from filing its own complaint . . . even after the 90-day period," Congress therefore must not have placed *any* time limit on how long OSC may prolong its investigation. *See* 81 Fed. Reg. at 53969.

Fourth and finally, on Track Two, the proposed regulations would drastically alter the 180-day period concerning OSC's independent investigations. Currently, OSC must *file a complaint* within 180 days of the alleged discrimination if it conducts an independent investigation.[61] Under the proposed regulations, however, OSC now need only *open an investigation* within 180 days of the alleged discrimination. *See* 81 Fed. Reg. at 53978 (§ 44.304(b)).[62] Under the proposed regulations, OSC's ability to bring a complaint as a result of its own investigation is confined only by "equitable limits" and the general five-year statutory limit in 28 U.S.C. § 2462 for levying civil penalties. *See* 81 Fed. Reg. at 53970. The NPRM asserts that this reading comports with the statute, OCAHO caselaw, and analogous Title VII caselaw. These changes result in a dramatic expansion in the time frames during which employers must defend themselves from allegations of discrimination, as summarized visually in **Exhibit B** (changes indicated in bold italics).

The end result is a vast expansion of both the applicable time periods and the uncertainty involved for employers. Under the proposed rule's interpretation of Track One, the initial 180-day period would be expanded by OSC's unilateral—and potentially unreviewable—determination that equitable considerations allow an expansion of that time period. Similarly, OSC could unilaterally proceed on the basis of a defective charge even after giving the affected party 45 days to correct the defects. Moreover, though a private party is limited by statute to file a complaint between Day 120 and Day 210 after filing a charge with OSC to file a complaint with an ALJ, OSC, in effect, would have up to five years—limited only by 28 U.S.C. § 2462—

[61] *See* 28 C.F.R. § 44.304(b).

[62] That provision states: "The Special Counsel may file a complaint with OCAHO when there is a reasonable cause to believe that an unfair immigration-related employment practice has occurred no more than 180 days prior to the date on which Special Counsel opened an investigation of that practice."

from the time of the alleged violation to continue its investigation of the employer and file a complaint.

And finally, under Track Two, OSC now expands the time for its investigation into alleged discrimination from 180 days to *five years*. This ten-fold increase in the time that an employer would face the possibility of an OSC investigation is a staggering overreach. And, under this new regime, OSC could seemingly also convert all Track One cases brought within 180 days into Track Two cases (by opening its own "independent" investigation concerning the same matter in the employee's charge), granting itself a vastly expanded schedule within which to conduct an investigation.

C. The NPRM's Proposed Alteration to the Time Frames Violates the INA.

The proposed enlargement of the time under which the Special Counsel can bring a complaint based on his own investigation violates the limitations set forth in § 274B(d).[63] Despite what seems clear in the words of the statute, the NPRM asserts that the proposed changes would make the time frame for an independent investigation "consistent with the statutory text," which it asserts "can be reasonably read to provide no time limit for the Special Counsel to file a complaint." 81 Fed. Reg. at 53970. Because, the NPRM asserts, § 274B(d)(3) makes reference to the "filing of a charge" and no "charge" is filed as part of an independent investigation, the only real limits on charges from an OSC independent investigation are (1)

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[63] That provision reads:

(d) **Investigation of charges.**—

(1) ***By special counsel.***— The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge. The Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation and subject to paragraph (3), file a complaint before such a judge.

(2) ***Private actions.***— If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge within 90 days after the date of receipt of the notice. The Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period.

(3) ***Time limitations on complaints.***— No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1).

equitable considerations and (2) "the five-year statutory time limit in 28 U.S.C. § 2462 for bringing actions to impose civil penalties." 81 Fed. Reg. at 53970.

Under the rule as proposed, OSC would need to open an investigation within 180 days of the alleged discrimination but would apparently be free to conduct that investigation over the course of the ensuing four and a half years. The NPRM asserts that the 180-day period for beginning an investigation rests on 28 U.S.C. § 1324b(d)(3) because "the opening of the Special Counsel's investigation is the nearest equivalent to the filing of a charge" on Track Two. 81 Fed. Reg. at 53970.

The Department's proposed interpretation of the statute is unfounded. When the Department promulgated regulations implementing INA § 274B in 1987, the Department concluded that Congress intended to impose a 180-day period in which OSC should *conclude* its investigation. In the preface to the final implementing rule, the Department explicitly cast the 180-day limitation as an implementation of Congressional intent:

> **Section 44.304** ***Special Counsel acting on own initiative.***
>
> Section 44.304(b) has been amended in the final rule to limit the period of time in which the Special Counsel on his or her own initiative may investigate and file a complaint of an unfair immigration-related employment practice. We believe that requiring a complaint to be filed within 180 days of the occurrence of an unfair immigration-related employment practice *is a reasonable implementation of the desire of Congress reflected in 8 U.S.C. 1324b(d)(1), (3), to place a time limit on the actions of the Special Counsel*.

52 FR 37402-01 at 37409, 1987 WL 139721 (Oct. 6, 1987) (emphasis added).

After nearly 30 years, the Department apparently now concludes that its longstanding interpretation of Congress's intent—dating from shortly after passage of the statute—was mistaken. But, as the Supreme Court has exhorted time and again, "[s]tatutes must be interpreted, if possible, to give each word some operative effect."[64] The Department's proposed new interpretation, however, reads the phrase "subject to paragraph (3)" out of § 274B(d)(1).

Section 274B(d)(1) requires OSC to investigate "charges" brought by affected parties and permits it to conduct its own independent investigation "subject to paragraph (3)" *i.e.* § 274B(d)(3). Section 274B(d)(3) states: "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel." The Department suggests that because no "charge" is filed when OSC opens an investigation, that § 274B(d)(3) can be read to impose a limitation on the "nearest equivalent"—the opening of OSC's investigation. 81 Fed. Reg. at 53970.

[64] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 209 (1997).

The new interpretation is a clear misreading of the statute. While the Department correctly notes that no "charge" is filed when OSC conducts its own investigation, § 274B(d)(1) invokes § 274B(d)(3) in the context of filing a *complaint*, not initiating an investigation: "The Special Counsel may…conduct investigations…and, based on such an investigation and subject to [§ 274B(d)(3)], file a complaint before such a judge."[65] Section 274B(d)(3) also explicitly relates to the filing of *complaints*, not the initiation of investigations. Its header reads "*Time limitations on complaints*" and it begins with the language "[n]o complaint may be filed."[66] The proposed rule's analogizing to the filing of a "charge" is not permitted because the statute places a 180-day time limit on the filing of a complaint. Analogies are unnecessary—and in this case inaccurate—when a direct statutory statement to the contrary is present.

The Department's new reading of the statute is also inconsistent with the statutory scheme as a whole. If an affected individual files a charge, OSC must conduct its investigation within only 120 days, though the regulations also give OSC the ability to change its mind in the 90-day period provided for the affected individual to sue. But, despite language in the statute clearly designed to limit OSC's investigation temporally in some way, OSC could now under the NPRM take up to *four and a half years* to conduct an investigation. The Department lifts that limitation on OSC's investigatory period from a completely different, general statute relating to civil penalties and ignores the temporal limitations in § 274B.

The OCAHO authority cited by the Department provides little support for the new interpretation of the statute. The NPRM identifies two OCAHO decisions that purportedly stand for the proposition that the statute contains no time limits for an independent investigation. Those cases do not support the Department's position.

First, the NPRM cites *United States v. Agripac, Inc.*[67] as stating that INA § 274B ''does not set out in terms any particular time within which the Special Counsel must file a complaint before an administrative law judge." 81 Fed. Reg. at 53969-70. That case, however, concerned a "procedural misstep" by OSC in a Track One case initiated by an affected individual—not a Track Two independent investigation.[68] Moreover, the ALJ concluded in that case that "Congress expressly and unambiguously created only one limitations bar in § [274B]; it is found at § [274B(d)(3)]."[69] The *Agripac* decision further concluded that the § 274B(d)(3) bar "is applicable both to suits based on a charge and to suits based on the Special Counsel's own-initiative investigations."[70] The Department cannot use *Agripac* to circumvent the INA § 274B(d)(3) bar, because that case stands for the opposite proposition.

[65] INA § 274B(d)(1).
[66] INA § 274B(d)(3)
[67] 8 OCAHO no. 1028, 399, 404 (OCAHO 1999).
[68] *Id.* at 410.
[69] *Id.* at 415.
[70] *Id.*

Second, the NPRM cites *United States v. Gen. Dynamics Corp.*[71] as support for the notion that no statute of limitations governs its independent investigations. In that case, however, OSC had in fact filed a complaint within 180 days of the employer's discriminatory actions, and thus OSC complied with its regulations—rendering the ALJ's discussion of the proper limitations period in that case dicta. In that case, the ALJ quoted and followed the current regulations imposing a 180-day limit on the period during which OSC may file a complaint in an independent investigation. The ALJ offered no reason for why his dicta on the statute of limitations departed from the current Justice Department regulation on which his decision relied. As such, this case does not provide any meaningful legal theory to support the expansive reading that the Department proposes to give to a narrow statute of limitations.

Nor can the Department properly rely on the Title VII case that it cites on this point. *See* 81 Fed. Reg. at 53970 (citing *Occidental Life Ins. Co. v. Calif. V. EEOC*, 432 U.S. 355, 361 (1977)). In the *Occidental Life* case, the Supreme Court explicitly noted that the Title VII statutory scheme did not provide an outer limit by which the EEOC had to file a complaint:

> *The 1972 Act expressly imposes only one temporal restriction on the EEOC's authority to embark upon the final stage of enforcement the bringing of a civil suit in a federal district court: Under § 706(f)(1), the EEOC may not invoke the judicial power to compel compliance with Title VII until at least 30 days after a charge has been filed. But neither § 706(f) nor any other section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time.*[72]

While § 274B may have "similar charge-filing procedures and virtually identical timetables" as the NPRM suggests, *see* 81 Fed. Reg. at 53970, § 274B(d)(3) *does* provide an outer limit for OSC. The statute relied upon in the cited Title VII authority simply does not contain the explicit time limitation that exists in the applicable portion of § 274B.

Equally unfounded is the Department's assertion that it is has no time limit (except that contained in 28 U.S.C. § 2462) to continue its investigation of an individual charge even long after the statute of limitations has expired for the private charging party to file a complaint. To read § 274B(d)(2) as limiting only private parties but not the OSC to file a complaint within 90 days of the 120-day investigation period would require ignoring altogether the final sentence of that paragraph, which grants OSC a 90-day period to continue its investigation.

Words in a statute must be read to have meaning, and that meaning must generally be what an ordinary or reasonable person would understand them to mean.[73] Here, the plain text of § 274B(d)(2) says that OSC's failure to file a complaint within the initial 120-day period does

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[71] 3 OCAHO no. 517, 1121, 1156 (OCAHO 1993).
[72] *Occidental Life Ins.*, 432 U.S. at 360.
[73] *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning.").

not affect its right "to investigate the charge or to bring a complaint." The proposed § 44.303(d) does more than "clarify"—it would *repeal* the last sentence of paragraph INA § 274B(d)(2). This result is clearly invalid.

D. The Department's New Reading of § 274B Would Be Due No Deference.

The Department's new reading of § 274B's statute of limitations would be unlikely to receive deference from the federal courts. As an initial matter, deference is not due to the Department because it is unclear that Congress granted the Department any interpretive authority concerning the statute of limitations whatsoever.[74] A statute of limitations contained in the INA is not generally a matter that is placed within the Department's "particular expertise" but instead is a legal matter that courts "are better equipped to handle."[75]

The statutory structure of § 274B supports this interpretation. The substantive bases for discrimination set forth in § 274B(a) are most likely to be found within OSC's "particular expertise." On matters where such expertise is less certain, such as the scope of the investigative powers of OSC and the ALJs, the statutory language delegates regulatory authority to the Attorney General only in specific instances.[76] No such statutory delegation of rulemaking authority is granted to the Department by § 274B(d), where the time limitations are set forth. Furthermore, when changes to the time limitations for private actions were deemed necessary by the Justice Department itself in 1990, these changes were accomplished by statutory amendment—not by revised regulations.[77] Given the lack of congressional delegation on limitations issues, federal courts are unlikely to provide deference to the revised regulations in the NPRM.

Moreover, even if *Chevron* deference were due to the Department's reading, for the reasons outlined above it would receive none because Congress has indicated a clear intent to limit OSC independent investigations to 180 days. *Chevron* recognizes that agencies can "fill in the gaps" in areas of statutory ambiguity, and federal courts will grant deference to those agency pronouncements (such as APA rulemaking) that meet procedural safeguards. Here, however, the statute clearly states that OSC's authority to bring a complaint in an independent investigation is "subject to paragraph (3)" of § 274B(d)—which contains a 180-day time limitation directed at the filing of a complaint. The proposed reading here is thus not reasonable, there is no statutory "gap" to fill, and federal court deference would be unavailable.

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[74] *See U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that *Chevron* deference is due only "when it appears that Congress delegated authority to the Department generally to make rules carrying the force of law").
[75] *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) (refusing to defer to the former INS regarding the statute of limitations in INA § 246(a)).
[76] *See, e.g.*, INA § 274B(f)(2).
[77] *See, e.g.*, Pub. L. 101-649, § 537.

E. The Proposal is Poor Public Policy.

There is a clear public interest in ensuring that claims are brought in a timely manner so that: (i) necessary witnesses remain available, (ii) relevant documentary evidence has been preserved without undue burden on employers, and (iii) available witnesses are asked questions of relatively recent events so that their memories are more reliable. The NPRM violates all of these well accepted principles.

In today's mobile job market, it is a simple fact that employees who have critical knowledge of a case may no longer work for a respondent employer four and one-half years after a disputed event. The unavailability of such witnesses would dramatically reduce the integrity of a case outcome—and this adverse effect could apply equally to the complaining and responding parties. Further, a witness who was available at a much later date may be asked questions relating to conversations or events that occurred four or more years before. Limited witness recall of critical events would also reduce the integrity of a case outcome, and again could have adverse effects on both complainant and respondent.

Finally, the long but uncertain period of time during which OSC could bring a case under the NPRM would place a large but uncertain document retention burden on employers. Should records be retained for five years no matter the circumstances of employment for every employee? Particularly for companies in labor intensive industries, or where employee turnover is significant, the document retention burdens under the NPRM would be time-consuming, cumbersome and expensive. The NPRM disregards these important public policy considerations, failing even to acknowledge or discuss them.

V. The New Definition of "Hiring" Is Overly Broad and Without Legal Support.

The proposed rule provides a regulatory definition of "hiring" that exceeds its statutory and case-law boundaries to include "all conduct and acts during the entire recruitment, selection and onboarding process." 81 Fed. Reg. at 53976 (proposed § 44.101(h)).

A. Statutory Setting

Section 274A makes it unlawful to "hire, or recruit or refer for a fee, for employment in the United States": (i) an unauthorized alien knowing of such individual's status, or (ii) an individual without complying with the employment verification process set forth in § 274A(b). Section 274B(a)(1) prohibits discrimination against individuals arising as a result of the prohibition and its employment verification requirement, and thus applies "with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment." Section 274B(a)(6) prevents requests for more or different documents "for purposes of satisfying the requirements of section 274A(b) . . . if made for the purpose or with the intent of discriminating against an individual in violation of paragraph [(a)](1)."

B. Authority in Proposed Rule

The Department relies on OCAHO authority such as *United States v. Mar-Jac Poultry, Inc.*[78] for its proposal that "all conduct and acts during the entire recruitment, selection and onboarding process" are within its statutory "hiring" jurisdiction. 81 Fed. Reg. at 53967. But this case is not nearly so broad. Rather, *Mar-Jac Poultry* states: "our cases have long held that it is the entire ***selection*** process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment."[79] Notably absent from the *Mar-Jac Poultry* holding is a reference to "recruitment" or "onboarding."

C. Recruitment

The proposed regulations add "recruitment" to the definition of hiring, even though *Mar-Jac Poultry* explicitly omits it. The result in *Mar-Jac Poultry* is consistent with the OSC statute, which limits OSC jurisdiction to "recruitment or referral ***for a fee***."[80]

"Recruitment" as described by INA § 274B is not a subset or an aspect of "hiring," but rather covers a separate industry or activity consisting of companies that "recruit or refer individuals for a fee" to different companies that are the ultimate employers. This interpretation is clear from the plain language and punctuation of INA § 274B(a)(1), which only covers discrimination by companies in the business of recruiting individuals for a fee to other companies for employment. But "recruitment" in general is also clearly not within the scope of INA § 274B. The analogous prohibition in INA § 274A(a) refers to the knowing employment, or recruitment or referral for a fee, of individuals who are not authorized to work in the United States. Again, employer sanctions liability only applies at the time of new hire (or reverification), and not to a prospective employer's pre-hire activity such as recruitment. There is no permissible reading of INA § 274B(a)(1) that would include the ultimate employer's own recruitment process—as distinct from the company's "selection" process—in INA § 274B's definition of "hiring."

The proposed rule also cites *Mid-Atlantic Reg'l Org. Coal. v. Heritage Landscape Servs.*[81] to support its expanded definition of "hiring." This case's holding is unclear, however, and its language on recruitment has not been followed in subsequent cases. *Mid-Atlantic* states: "The governing statute specifically applies to recruitment for employment as well as to hiring, and OCAHO cases have long held that it is the entire selection process, and not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment."[82]

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[78] 10 OCAHO no. 1148, 11 (OCAHO 2012).
[79] *Id.* (emphasis added).
[80] INA § 274B(a)(1) (emphasis added).
[81] 10 OCAHO no. 1134, 8 (OCAHO 2010).
[82] *Id.*

The first phrase, "[t]he governing statute specifically applies to recruitment for employment" omits "for a fee" and thus is an incorrect reading of § 274B(a)(1). The second phrase is limited only to selection. Critically, subsequent OCAHO cases do not repeat the error in this case's first phrase, but rather focus on the "selection" process instead.[83] There is thus no statutory or caselaw authority to extend the definition of "hiring" to include the "recruitment" practices of the ultimate employer.

D. Onboarding

The process or practice of "onboarding" is similarly absent from the OCAHO authority cited by the Department in support of its regulatory expansion. The proposed rule does not elaborate on what employment practices would be covered by the "onboarding" term nor what "onboarding" conduct it might have encountered in the past that it believes is "unfair." *Dictionary.com* defines the verb "onboard" to mean: "to assist and support (a new employee) in developing the skills, knowledge, attitudes, etc., needed to be successful in the job."[84] The I-9 employment-verification process is arguably a part of the "onboarding" process, but there is no question that OSC already has jurisdiction over this activity. Thus, the Department's addition of "onboarding" is unnecessary to the extent it seeks to cover the I-9 process.

Any other activity in the "onboarding" process—for example training or new employee orientation—are clearly post-hiring practices that would only be actionable under § 274B if those practices resulted in a "discharge." It would be impracticable to list by regulation all of the possible employment actions that could lead to a "discharge." Thus, OSC's proposed addition of "onboarding" is already covered to the extent it leads to a "discharge" but cannot be added to the definition of "hiring."

The proposed rule fails to identify a problem it seeks to solve, and fails to cite statutory or caselaw authority for two of the three activities it proposes to cover. "Hiring" includes the entire "selection" process, but there is no authority to support the proposal that hiring also includes "recruitment" by the ultimate employer or "onboarding."

VI. The Proposed Expansion of OSC Investigative Powers Lacks Legal Authority.

The proposed regulations also contain a substantial broadening of OSC's investigatory powers that once again runs afoul of INA § 274B and administrative caselaw. The current regulations concerning OSC's investigatory powers reads as follows:

§ 44.302 Investigation.

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[83] *See, e.g.*, *Mar-Jac Poultry*, 10 OCAHO 1148, 11; *Olisaemeka Eze v. West County Transp. Ag'cy*, 10 OCAHO No. 1140, 6 (2011) ("nondiscrimination statutes are offended by discrimination at any point in the selection process").

[84] "Onboard," Dictionary.com, *available at* http://www.dictionary.com/browse/onboard?s=t (last accessed Oct. 12, 2016).

(a) The Special Counsel may propound interrogatories, requests for production of documents, and requests for admissions.

(b) The Special Counsel shall have reasonable access to examine the evidence of any person or entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such of its books, records, accounts, and other sources of information, as the Special Counsel may deem pertinent to ascertain compliance with this part.

28 C.F.R. § 44.302.

The proposed replacement rule would give OSC substantially broader powers, and reads as follows:

§ 44.302 Investigation.

(a) The Special Counsel may seek information, request documents and answers to written interrogatories, inspect premises, and solicit testimony as the Special Counsel believes is necessary to ascertain compliance with this part.

(b) The Special Counsel may require any person or other entity to present Employment Eligibility Verification Forms (‘‘Forms I–9’’) for inspection.

(c) The Special Counsel shall have reasonable access to examine the evidence of any person or other entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such books, records, accounts, papers, electronic and digital documents, databases, systems of records, witnesses, premises, and other sources of information the Special Counsel may deem pertinent to ascertain compliance with this part.

(d) A respondent, upon receiving notice by the Special Counsel that it is under investigation, shall preserve all evidence, information, and documents potentially relevant to any alleged unfair immigration-related employment practices, and shall suspend routine or automatic deletion of all such evidence, information, and documents.

81 Fed. Reg. at 53977-78.

A. The Department Provides No Basis for the Changes.

As an initial matter, the NPRM describes the changes to the rule by reciting them, *see* 81 Fed. Reg. at 53969, but makes no effort to explain why the proposed changes are necessary for OSC’s conduct of its investigations. The Department provides, for example, no instances in which OSC investigations have been impaired by its current powers, which already include a wide-ranging ability to access an employer’s business records.

Moreover, the NPRM fails to provide *any* legal basis whatsoever for the Department's decision to grant itself such broad investigatory powers. The NPRM cites no OCAHO caselaw on the issue, and it provides no statutory basis for its sweeping change. The NPRM thus fails to provide even the basic notice to the public required by the Administrative Procedure Act ("APA").[85] An agency must at a minimum "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," lest it run afoul of the APA's bar on arbitrary and capricious decision-making.[86] The NPRM fails to address the need for an expansion in OSC's investigatory power or to provide a legal justification for that expansion.

B. The Department Fails to Mention Caselaw Contrary to Its Proposed Regulations.

The proposed regulations ignore OCAHO authority finding that OSC's investigatory powers are curtailed by the statutory language in INA § 274B. In the case of *In re Investigation of Charge of Estela Reyes-Martinon v. Swift and Company*,[87] OSC sought an investigatory subpoena from an ALJ requiring an employer's answers to OSC interrogatories as part of OSC's investigation. The ALJ determined that "OSC's investigatory power, and OCAHO's subpoena authority, is not as broad as that enjoyed by EEOC" and denied OSC's request.[88] The ALJ rooted his decision first in the language of INA § 274B, which the ALJ found "does not authorize OCAHO judges to issue subpoenas requiring answers to interrogatories or the creation of evidence not yet in existence."[89]

In contravention of the *Swift* holding, which found that even the existing regulation on this point is unauthorized by statute, the proposed regulations would continue to require investigated parties to create evidence. While the ALJ in *Swift* found that OSC's regulatory authority to "propound interrogatories" in 28 C.F.R. § 44.302 was problematic, the proposed regulations would continue requiring parties to provide "answers to written interrogatories." 81 Fed. Reg. at 53977 (proposed § 44.302(a)). The NPRM makes no mention of the *Swift* case or why the Department believes that OSC can, under the statute, seek written interrogatory answers as the new rule provides.

The proposed changes also do nothing to solve the separate regulatory hurdle identified by the ALJ in *Swift*. The ALJ in *Swift* noted that separate OCAHO regulations found at 28 C.F.R. § 68.25—which the proposed regulations leave unchanged—failed to grant OCAHO the

[85] *See* 5 U.S.C. § 553(b) (notice of proposed rulemaking must provide "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved").
[86] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations omitted).
[87] 9 OCAHO 1058, 1 (OCAHO 2000).
[88] *Id.* at 3.
[89] *Id.* at 4.

authority to compel a party to answer interrogatories.[90] Thus, the regulatory changes made in 28 C.F.R. § 44.302 lack justification by the Department on either practical or statutory grounds and appear to change nothing, as neither the statute nor the separate OCAHO regulations allow OSC to compel an investigated entity to answer written interrogatories or otherwise create evidence.

C. The Department Fails to Address Significant Constitutional Problems.

The proposed regulations would grant OSC greatly expanded powers to conduct investigations. The current regulations suggest that OSC can request the production of documents, interrogatories, and requests for admission and that it can seek "access" to certain records during regular business hours to "ascertain compliance" with the statute.[91] The current practice with respect to OSC investigations generally involves OSC indicating the topic of its investigation, requesting from employers documents targeted to that investigation, and soliciting the employer's assistance in obtaining witness testimony from those with primary knowledge regarding the topic of the investigation at a mutually convenient time. The NPRM nowhere explains why this investigative authority is insufficient.

Nevertheless, the new regulations would greatly expand OSC's powers. First, the regulation would now permit OSC to "inspect premises" and "solicit testimony." 81 Fed. Reg. at 53977 (proposed § 44.302(a)). Second, employers would be forced to allow Special Counsel "access" to "electronic and digital documents, databases, systems of records, witnesses, [and] premises." *Id.* (proposed § 44.302(c)). In other words, OSC would be empowered to visit employer businesses at will, interview whatever employee personnel that it wished (without prior notice or preparation by counsel), and require employers to give OSC unfettered access to company databases and electronic systems. The justification for such sweeping investigative powers under § 274B is weak, especially since OCAHO held in *Swift* that § 274B does not even permit subpoenas compelling interrogatory answers.

The constitutional issues with OSC's proposed regulations are serious and are not even addressed in the NPRM. As the Supreme Court has held, warrantless searches of businesses like those implemented by the proposed regulations are "generally unreasonable" and violate the Fourth Amendment.[92] Even in administrative schemes involving investigations, warrants serve a valuable purpose:

> A warrant…would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and

[90] *See id.* at 10 ("I conclude that 28 C.F.R. § 68.25(a) does not authorize a Judge to issue a subpoena compelling an investigated entity to answer interrogatories or create documents not yet in existence.").
[91] 28 C.F.R. § 44.302.
[92] *See, e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that OSHA inspections without a warrant or its equivalent violated the Fourth Amendment).

there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.[93]

These concerns have motivated other agencies conducting similar inspections to have warrant-like processes in place to safeguard these important constitutional concerns.[94]

The powers granted to OSC under the proposed regulations, however, are both broad and unencumbered by a warrant requirement or other limitations. On their face, the proposed regulations permit OSC to appear at a business premises, demand access to those premises, question any and all employees, and gain access not only to paper documents but also to employer electronic systems such as e-mail. OSC will also be allowed to question any employee on employer premises and ask those employees questions that they may not understand or be prepared to answer. OSC will also perform all of these tasks simply on the basis of its own opening of an investigation—which need not be approved by any "neutral officer" and could take place at any time over the four-and-one-half year period after the investigation is opened.

The proposed regulations would thus be substantially broader than the discovery process under the Federal Rules of Civil Procedure—a process that current OSC practice closely mirrors. Under the Federal Rules, one party makes a request for relevant documents, after which the opposing party reviews documents, produces relevant documents, and withholds privileged information. The proposed rule would, by contrast, give OSC access to *all* company documents, including privileged and irrelevant information. And even if OSC included a warrant requirement in its scheme, it is unclear that such untargeted requests would pass muster under the Fourth Amendment's requirement that a warrant describe documents to be seized with particularity.[95]

Courts have already found that such intrusive warrantless schemes fail to pass constitutional muster in the immigration context. When the former INS attempted a similar effort in the 1980s that involved warrantless entries into businesses to search for undocumented workers, a District Court in California certified a class action against the INS for those actions and issued an injunction against the INS.[96] OCAHO has, on that same basis, excluded evidence from warrantless searches in investigations under § 274A.[97] The Department has provided no basis for the sweeping, warrantless search powers that it seeks to impose on employers, and it has made no attempt to justify those powers from a constitutional perspective.

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[93] *Id.* at 323.
[94] *See, e.g.*, 21 U.S.C. § 880 (concerning administrative inspections and warrants for site inspections by the Drug Enforcement Agency).
[95] *See, e.g.*, *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 ("[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.").
[96] *See Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432 (N.D. Cal. 1989) (certifying class action based on INS searches of workplaces without valid warrants).
[97] *See U.S. v. Widow Brown's Inn of Plumsteadville, Inc.*, 1992 WL 535540 (OCAHO 1992) (citing *Pearl Meadows Mushroom Farm*).

D. The Department's Litigation Hold Regulation is Overly Broad.

Finally, the document retention provisions in the proposed § 44.302(d) are overly vague, confusing, and unnecessary. As an initial matter, the Department again fails to explain why it feels it necessary to "codify" the existing practice whereby "since at least 2006, all entities subject to an investigation by the Special Counsel have been instructed in writing, at the outset of the investigation, to preserve relevant documents." 81 Fed. Reg. at 53969. The NPRM does not explain why the Department is choosing to supplement or supplant this long-standing process by formal regulation.

The Department describes the regulatory change as "consistent with the 'litigation hold' requirements under the Federal Rules of Civil Procedure," 81 Fed. Reg. at 53969, but the Department's intentions remain uncertain. The confines of any such litigation hold requirements are unclear from the largely inapposite rules cited by the NPRM. The first cited rule states that a ***federal court's*** scheduling order "may" provide for discovery or preservation of information.[98] The other two cited provisions are even further afield, as they require parties to preserve information that has already been produced by another party and that is later subject to a claim of privilege.[99] The Department's reference to these federal rules thus obscures, rather than clarifies, the confines of its new litigation hold regulations.

The waters are further muddied by the proposed regulatory provision's failure to moor the preservation obligations to any requests from OSC. In federal litigation, counsel to the parties generally draft litigation hold memoranda on the basis of other documents in the case that outline the universe of relevant information, such as the complaint, a court order, or document requests from opposing parties. The proposed rule notes that Special Counsel notifies parties via letter of their obligation to preserve specific documents at the outset of an investigation, but the regulation as written relates to "potentially relevant" documents without reference to any such letter from OSC.

Instead, the proposed regulations state that upon receiving OSC's notice concerning the opening of an investigation, employers are expected to preserve "all evidence, information, and documents *potentially relevant* to any alleged unfair immigration-related employment practices." 81 Fed. Reg. at 53977 (proposed § 44.302(d)). The proposal gives little guidance to employers concerning how they are to determine what evidence is "potentially relevant" to an allegation or how to apply that "potentially relevant" formulation. The Department should specify whether the universe of "potentially relevant" documents under the rule might ever be broader than the universe of documents identified in OSC's letter to the employer concerning the investigation or if, instead, the "potentially relevant" documents will be tied to the OSC letter.

The proposed regulation as written leaves a host of open questions. If the Department intends for its regulation to require preservation of documents that are not identified in a letter

[98] Fed. R. Civ. Pro. 16(b)(3)(B)(iii).
[99] *See* Fed. R. Civ. Pro. 26(b)(5)(B), 45(e)(2)(B).

from the Department, it should outline further how an employer is to determine the universe of such documents. For instance, if OSC is investigating alleged pattern or practice of discrimination, would all documents concerning an employer's hiring process be "potentially relevant" without respect to date or position? The regulation on its face suggests that an employer would face this substantial preservation obligation but provides no policy basis or negative investigative experiences to justify such a burdensome imposition.

The Department should reconsider inclusion of the new preservation obligation in the rule entirely, as they are unjustified by the NPRM. If the Department wishes to continue to include those obligations, the regulation should abandon the vague and overbroad "potentially relevant" formulation in the existing regulation and specify that parties must preserve relevant documents as specified in the OSC letter notifying employers of initiation of an investigation. The Department should further specify whether and how it intends to penalize employers who fail to preserve documents.

CONCLUSION

For the reasons set forth above, the proposed rulemaking is based on a fundamental misinterpretation of the statute it seeks to implement, is unsupported by the caselaw authority it cites, and lacks a firm basis in public policy objectives. It should therefore be withdrawn.

Respectfully submitted,

Chamber of Commerce of the United States of America

Council for Global Immigration

National Association of Manufacturers

Society for Human Resource Management

College and University Professional Association for Human Resources (CUPA-HR)

Associated Builders and Contractors, Inc.