UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 17, 2023

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00050
EDGEMONT GROUP, LLC, Respondent.	)	

NOTIFICATION OF ADMINISTRATIVE REVIEW

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The undersigned assumes the parties' familiarity with the facts and procedural history of the case, which have been thoroughly recounted in four prior published decisions. *See United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470 (2022) ("*Edgemont I*"); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470a (2023) ("*Edgemont II*"); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470b (2023) ("*Edgemont III*"); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470c (2023) ("*Edgemont IV*").[1] Consequently, I will recount only the facts and procedural history necessary to inform this Notification.

The United States Department of Homeland Security, Immigration and Customs Enforcement ("DHS" or "Complainant"[2]) filed a complaint against the Respondent on February 14, 2020, charging Respondent with violating 8 U.S.C. § 1324a by failing to timely prepare and/or present employment eligibility verification forms (Forms I-9) for forty-six individuals. On

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1 and is, accordingly, omitted from the citation. OCAHO published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on OCAHO's website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions#PubDecOrders.

[2] Prior to 2003, responsibility for the enforcement of the provisions of 8 U.S.C. § 1324a fell to the Immigration and Naturalization Service ("Service"). Those functions were then transferred to DHS as of March 1, 2003, due to the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), which abolished the Service. *See United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 8 n.5 (2016). Accordingly, any remaining references to the Service in applicable regulations now refer to one of the relevant components of DHS. *See* 6 U.S.C. § 552(d); 8 C.F.R. § 1.2. Likewise, any references to the Service in prior OCAHO decisions would now be construed to refer to DHS, and current references to DHS in OCAHO decisions would be construed to refer to the Service prior to 2003.

December 22, 2022, Chief Administrative Law Judge (Chief ALJ) Jean King issued an order finding Respondent liable for forty-six violations of 8 U.S.C. § 1324a(a)(1)(B), but "bifurcat[ing] the issues of liability and penalty assessment" and inviting the parties to submit further information relevant to penalties. *See Edgemont I*, 17 OCAHO no. 1470, at 6, 7. On May 18, 2023, the Chief ALJ ordered Respondent to pay $55,024 in penalties for the violations of 8 U.S.C. § 1324a(a)(1)(B); however, following a Notification of Administrative Review, *see Edgemont II*, 17 OCAHO no. 1470a, at 1-2, the Chief ALJ's order was vacated, and the case was remanded for further proceedings, *see Edgemont III*, 17 OCAHO no. 1470b, at 12. Following remand, the Chief ALJ sought additional briefing from both the parties and any interested amicus. *See Edgemont IV*, 17 OCAHO no. 1470c, at 3. Following receipt of briefing from the parties,[3] the Chief ALJ issued an Order on Remand which ordered Respondent to pay $56,580 in penalties for the violations of 8 U.S.C. § 1324a(a)(1)(B), calculated at $1,230 per violation. Order on Remand at 22. In doing so—and following a thoughtful and extensive discussion—the Chief ALJ determined that the date of assessment for purpose of establishing the appropriate penalty range in 28 C.F.R. § 85.5 was the date Complainant served a Notice of Intent to Fine ("NIF") on Respondent, October 17, 2019. *Id*. at 2-11, 22.

II. STATEMENT OF ISSUES TO BE REVIEWED

The undersigned has identified three issues for review stemming from the Order on Remand. The undersigned need not reach all issues on review, however, should resolution of one or two of them prove dispositive. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 3 n.3 (2023).

A. Whether the Chief ALJ's determination that only DHS assesses civil money penalties for violations of 8 U.S.C. § 1324a—and, thus, that only the date of the service of the NIF constitutes the date of assessment for purposes of 28 C.F.R. § 85.5—comports with applicable law and otherwise represents a sufficiently reasoned and persuasive interpretation of an "assessment"

As discussed at length in both a prior decision of this case, *Edgemont III*, 17 OCAHO no. 1470b, at 4-11, and the Chief ALJ's most recent decision, Order on Remand at 2-11, the question of the date of the penalty assessment for purposes of 28 C.F.R. § 85.5 is a complicated one that defies easy resolution and one about which reasonable minds may differ. Nevertheless, it may have potential ramifications for the instant case, *but see infra*, Part II.B, and is, thus, subject to administrative review.

The word "assessment," or any of its variations stemming from the root word "assess," appears only once in 8 U.S.C. § 1324a and is not defined. *See* 8 U.S.C. § 1324a(e)(8). Similarly, it appears only once in a relevant regulation where it is also not defined. *See* 8 C.F.R. § 274a.9(d). It appears multiple times in 28 C.F.R. part 85, but it is, again, undefined. *See* 28 C.F.R. §§ 85.1, 85.3, 85.5. Further, neither the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note) nor the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, sec. 701 of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) (codified at 28 U.S.C. § 2461 note) defined the term "assessment" even though they applied to civil money penalties "assessed" by various

[3] No amicus briefs were received. Order on Remand at 2.

components of the federal government. Nevertheless, there is no indication in either statute—or in any other relevant statute or regulation—that the idea of an assessment contained in their language is intended to differ from or displace any agency interpretation of the concept, particularly any such longstanding interpretation.

Relying principally on 8 C.F.R. § 274a.9(d),[4] as well as on 8 C.F.R. § 274a.10(b),[5] OCAHO consistently interpreted and understood, between 1988 and 2020, an assessment of civil money penalties for violations of 8 U.S.C. § 1324a as the culmination of a process whereby a penalty was ultimately imposed. That process may have several possible endpoints, but only four result in a final order assessing civil money penalties against a respondent: the failure by a respondent to request a hearing after service of a NIF, *see* 8 C.F.R. § 274a.9(f); the abandonment of a request for hearing by a respondent after a case has been filed with OCAHO, *e.g.*, *United States v. Greif,* , 10 OCAHO no. 1177, 2-3 (2013); the dismissal of a case due to a settlement agreement, *see* 28 C.F.R. § 68.14;[6] and, a final order issued by an ALJ finding liability for violations of 8 U.S.C. § 1324a, *e.g.*, *United States v. Hudson Delivery Serv., Inc*., 7 OCAHO no. 945, 368, 402 ("assess[ing]" various civil money penalties for different violations of 8 U.S.C. § 1324a).[7] In the first three situations, the civil penalty is imposed—or assessed—by DHS, but in the fourth situation, OCAHO is the entity that imposes—or assesses—the civil money penalty. *Cf.* 8 C.F.R. § 274a.10(b)(2) (noting that a respondent can be determined to have violated the employment verification requirements by DHS in some situations and by an ALJ in other situations).[8] Accordingly, once the process referenced in 8 C.F.R. § 274a.9(d) reaches OCAHO, liability is established, and the case is not otherwise dismissed, it is OCAHO that assesses the civil money penalty. *See*, *e.g*., *United States v. Manos & Assocs., Inc*., 1 OCAHO no. 130, 877, 893 (1989[9]) (ordering the parties to submit evidence

[4] When originally drafted in 1987, the relevant language regarding a "proceeding to assess administrative penalties under [8 U.S.C. § 1324a]" appeared in 8 C.F.R. § 274a.9(c). *See* Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,225 (May 1, 1987). That language now appears in 8 C.F.R. § 274a.9(d).

[5] This regulation makes clear that civil penalties "may be imposed [*i.e.*, assessed] by [DHS] or an administrative law judge for violations under [8 U.S.C. § 1324a]." 8 C.F.R. § 274a.10(b).

[6] When OCAHO dismisses a case arising under 8 U.S.C. § 1324a pursuant to 28 C.F.R. § 68.14, DHS will subsequently issue a final order reflecting the agreed-upon penalty in the settlement agreement. *See generally Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, at 8 & n.13 (discussing DHS's practice of issuing its own final order following dismissal of a case by OCAHO due to a settlement agreement).

[7] This view that both DHS and OCAHO may issue final orders containing assessments in different circumstances is also fully consonant with sections 3(2)(B) and (C) of the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note), which reference civil monetary penalties assessed by either an agency (*e.g*., DHS) or pursuant to an administrative proceeding (*e.g*., OCAHO).

[8] To be sure, OCAHO has acknowledged that DHS makes an *initial* assessment of a civil money penalty through the service of a NIF, but for non-dismissed cases proceeding to a final order where liability for violations of 8 U.S.C. § 1324a had been established, OCAHO makes the *final* assessment. *See, e.g.*, *United States v. Camidor Props., Inc*., 1 OCAHO no. 299, 1978, 1980 (1991) (noting both that the Service assessed penalties in a NIF but that the ALJ "must assess a civil money penalty pursuant to [8 U.S.C. § 1324a(e)(4), (5)], which require the person or entity to pay a civil penalty"); *see also United States v. Frio Cnty. Partners, Inc*., 12 OCAHO no. 1276, 7 (2016) (reducing the penalty "initially assessed" by DHS); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 7 (2014) (reducing a penalty from the one "originally assessed" by DHS). In other words, from this perspective, a NIF contains only an initial assessment. It becomes the final assessment if a respondent either fails to timely request a hearing or abandons its request for a hearing resulting in the dismissal of its case. The NIF does not become a final assessment in all other cases, including the issuance of a final order by an ALJ imposing civil money penalties. In that situation, the ALJ's final order contains the final assessment, and the ALJ owes no deference to the complainant's initial assessment.

[9] The official reported decision reflects a date of February 8, 1989, and the undersigned accordingly uses the year "1989" in citing the decision. However, significant circumstantial evidence, including the dates recounted in the procedural

regarding mitigating factors to "be considered by [the ALJ] in determining *the amount of civil money penalty to assess* against Respondent in this case for all non-dismissed Counts" (emphasis added)); *United States v. Walia's, Inc*., 1 OCAHO no. 122, 814, 826 (1990) (ordering the submission of memoranda and supporting documentation regarding, *inter alia*, "all issues relevant to deciding *the amount of civil penalty to be assessed* in this case" (emphasis added)).

In short, OCAHO has clearly and consistently distinguished between civil penalties imposed—or assessed—by DHS and civil penalties imposed—or assessed—by OCAHO following proceedings presided over by an ALJ. Moreover, in the latter situation, for over 30 years, OCAHO routinely and repeatedly described its imposition of civil money penalties as assessments based on an understanding and interpretation informed by 8 C.F.R. §§ 274a.9 and 274a.10 and plain-language meanings of what an assessment is, *compare Assessment*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "assessment" as either the "[d]etermination of the rate or amount of something" or the "[i]mposition of something, such as a tax or fine, according to an established rate"), *with* 8 C.F.R. § 274a.10(b) (noting that either DHS or an OCAHO ALJ may "impose[]" civil penalties and "determin[e]" the level of those penalties for violations of 8 U.S.C. § 1324a).[10]

OCAHO's interpretation of the definition of an assessment has been further reinforced by the use of that terminology in describing OCAHO decisions by both federal courts, *see, e.g.*, *DLS Precision Fab LLC v. U.S. Immigr. & Customs Enf't*, 867 F.3d 1079, 1088 (9th Cir. 2017) ("In addition to summarily deciding DLS's liability, *the ALJ assessed civil money penalties* in the total amount of $305,050 for DLS's violations." (emphasis added)), and relevant secondary sources, *see, e.g.*, *OCAHO Assesses Penalties for I-9 Violations*, 87 *Interpreter Releases* 1715 (Aug. 30, 2010). Additionally, the parties in OCAHO proceedings have also understood that OCAHO assesses a civil

history of the decision itself and the decision's chronological location relative to other reported decisions in Volume 1, strongly suggests that "1989" was a typographical error or oversight and that the decision was actually issued in 1990.

[10] Following a closer review of OCAHO caselaw, it is clear that OCAHO's frequent, repeated use of the term "assessment" over the years to characterize its imposition of penalties as part of a final order, *see, e.g.*, *United States v. Cawoods Produce, Inc*., 12 OCAHO no. 1280, 20-21 (2016) ("As previously discussed, once liability has been established, OCAHO must assess a penalty."); *United States v. Martinez*, 2 OCAHO no. 360, 478, 481 (1991) ("Having found these violations, I [*i.e.*, the ALJ] must assess a civil money penalty pursuant to [8 U.S.C. §§ 1324a(e)(4), (5)], which require the person or entity to pay a civil penalty."), including in decisions issued after 2020, *see, e.g.*, *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 2 (2023) ("On November 7, 2022, the Court received Complainant's supplemental briefing on penalties. Respondent did not file a submission. The case is now ripe for penalty assessment."); *United States v. Cityproof Corp.,* 15 OCAHO no. 1392, 3 (2021) ("Since default is entered against Respondent, the Court finds it appropriate in this case to invite the parties to file submissions regarding the assessment of penalties."), is not simply a "semantic descriptor," *Edgemont III*, 17 OCAHO no. 1470b, at 10. Rather, it reflects a longstanding view of an assessment imposed by OCAHO as the culmination of a "proceeding to assess administrative penalties under [8 U.S.C. § 1324a] [which] commenced when [DHS] issue[d] a Notice of Intent to Fine." 8 C.F.R. § 274a.9(d). Indeed, a cursory review of OCAHO caselaw turns up numerous published decisions with subheadings and related discussions of an appropriate "penalty assessment" by an ALJ, rather than an assessment by DHS. *See, e.g.*, *Hudson Delivery Serv., Inc.*, 7 OCAHO no. 945, at 388, 399-402. Such discussions would be largely nonsensical and grossly superfluous if only DHS assessed civil money penalties for violations of 8 U.S.C. § 1324a. Accordingly, although the Chief ALJ disclaimed any legal significance to her prior use of "assess" to describe her penalty determination in the instant case, *see* Order on Remand at 8 n.9; *see also Edgemont I*, 17 OCAHO no. 1470, at 7 ("The Court will assess the penalties in a subsequent order."), or, presumably, in her prior decisions, *see, e.g.*, *United States v. El Camino, LLC*, 18 OCAHO no. 1479, 14 (2023) ("Accordingly, the Court will not assess Respondent's penalties until it issues a final order in this matter."), that disclaimer is difficult to reconcile with the consistent view of multiple ALJs over at least three decades—as reflected in OCAHO caselaw—that they, too (and not solely DHS), may assess penalties against a respondent for violations of 8 U.S.C. § 1324a for cases within their jurisdiction.

money penalty in appropriate circumstances. *See, e.g.*, *United States v. Dodge Printing Ctrs., Inc*., 1 OCAHO no. 125, 846, 850 (1990) (noting that a respondent requested that the ALJ "assess no penalty at all"); *United States v. Mid-Island Jericho Motel*, 3 OCAHO no. 468, 739, 742 (1992) (noting that "Complainant has requested that I [*i.e.*, the ALJ] assess a total civil penalty in this case of fifty thousand eight hundred forty dollars").[11] In short, prior to 2020, the interpretation that OCAHO assessed civil money penalties for proven violations of 8 U.S.C. § 1324a in cases in which a respondent timely requested a hearing and the case was not subsequently dismissed was well-established and neither particularly controversial nor ever seriously disputed.

As discussed in more detail previously, *see Edgemont III*, 17 OCAHO no. 1470b, at 6, 10, that interpretation abruptly changed in 2020 with the publication of *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338 (2020), and its conclusion that only DHS assessed a civil money penalty for violations of 8 U.S.C. § 1324a. The change in position in *Farias Enterprises*, however, occurred with little explanation, *see Edgemont III*, 17 OCAHO no. 1470b, at 6, 10 & n.15, and with no acknowledgement or awareness that it was changing OCAHO's interpretation. Indeed, the decision itself also continued to speak in terms of OCAHO assessing civil money penalties, consistent with OCAHO's longstanding interpretation, without acknowledging or explaining the incongruity in its new position. *See Farias Enters. LLC*, 13 OCAHO no. 1338, at 2 ("The Court [*i.e*., OCAHO] may assess civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5.")

As noted in *Edgemont III*, 17 OCAHO no. 1470b, at 5, "[a]lthough an agency may certainly change its position on an issue within its jurisdiction, it must both acknowledge the change and explain it." This principle is a foundational one for administrative law to ensure fairness and compliance with governing law. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (emphasis in original)); *see also Nw. Env't Def. Ctr. v. Bonneville Power Admin*., 477 F.3d 668, 687 (9th Cir. 2007) (noting that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored" (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))). Thus, the decision in *Farias Enterprises* appears to have violated that principle.[12]

---

[11] Although Complainant's position on remand was that only DHS assesses a civil money penalty, *see* Brief on Remand at 2-7, that position is somewhat at odds with its prior position as reflected in OCAHO caselaw. Moreover, that position is also somewhat in tension with DHS's public position that the date of the service of a NIF is the date of assessment only for "the civil penalty range *that HSI [Homeland Security Investigations, a subcomponent of DHS] administers*." *Form I-9 Inspection*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 7, 2023), https://www.ice.gov/factsheets/i9-inspection (emphasis added). Indeed, such a qualification would be unnecessary if the date of the service of a NIF were the binding date of assessment for civil penalties administered by both DHS and OCAHO.

[12] The undersigned does not definitively resolve this issue at the present time but may do so as part of the administrative review. *See also Edgemont III*, 17 OCAHO no. 1470b, at 10 n.15 (similarly raising but not deciding this issue). Relatedly, the conclusion flowing from *Farias Enterprises* that DHS's calculation of the applicable penalty range is binding on OCAHO also represents an apparent unexplained and unacknowledged departure from OCAHO's longstanding position that it calculates penalties *de novo* and owes no deference to DHS penalty determinations. *See id*. at 7-8 (noting the tension inherent in this issue but not resolving it). Thus, to the extent the question of whether that conclusion represents an improper departure from OCAHO's prior interpretation becomes relevant, it is also subsumed within this administrative review.

In the Order on Remand, the Chief ALJ offered more extensive support for the conclusion drawn from *Farias Enterprises*—and its apparent, concomitant departure from OCAHO's prior interpretation—that only DHS conducts an assessment of civil money penalties for violations of 8 U.S.C. § 1324a through the service of a NIF. Order on Remand at 2-11. However, whether that support is legally sufficient and persuasive—and, thus, provides a sufficiently "reasoned explanation" for the departure from prior decisions—is one of the issues subsumed within the Notification of Administrative Review.

The Chief ALJ's decision centers significantly on rebutting arguments noted in *Edgemont III*, *see* Order on Remand at 2-10, with varying degrees of initial persuasiveness, rather than on necessarily presenting an affirmative case in support of the conclusion in *Farias Enterprises* regarding the appropriate date of assessment for purposes of 28 C.F.R. § 85.5. Nevertheless, the considered analysis in the Chief ALJ's decision warrants respectful and close consideration. At heart, the Chief ALJ's decision focuses on three points—statutory and regulatory provisions, definitions and usage, and policy considerations—to conclude that only DHS assesses a civil money penalty for violations of 8 U.S.C. § 1324a. Order on Remand at 3-10. However, all three points appear to rest on unsteady legal foundations.

For instance, the parties and the Chief ALJ attach significant meaning to the distinction in 8 U.S.C. § 1324a(e)(8) between a "final order" and an "assessment." *See* Brief on Remand at 2-4; Order on Remand at 4-5. Yet, the import of that distinction does not appear to buttress the asserted conclusion that only DHS—and not an OCAHO ALJ—can assess a civil money penalty for violations of 8 U.S.C. § 1324a. To the contrary, it is undisputed that a final order issued by an ALJ and an assessment of a civil money penalty are not necessarily coterminous in all cases arising under 8 U.S.C. § 1324a. Rather, a final order is broader than an assessment because a final order (depending on the nature of the violations at issue) may include, *inter alia*, a cease and desist order, a requirement to participate in E-Verify, a requirement to comply with 8 U.S.C. § 1324a(b) for up to three years, or the return of any prohibited indemnity bonds—in addition to an assessed civil money penalty. *See* 28 C.F.R. § 68.52(c). In fact, if proceedings are dismissed for any reason—*e.g.*, a settlement, DHS's exercise of prosecutorial discretion, or a finding that a respondent is not liable for any violations of 8 U.S.C. § 1324a—a final order issued by an ALJ may not contain any assessment at all. Thus, it is unremarkable that the statute distinguishes between a broader "final order," which may encompass multiple types of remedies, and a more specific "assessment" of civil money penalties, which is but one possible remedy. That distinction, however, says nothing about why the issuance of a final order by an OCAHO ALJ containing an assessment would not itself be an assessment for purposes of 28 C.F.R. § 85.5. Indeed, nothing in 8 U.S.C. § 1324a(e)(8) precludes a final order from containing an assessment. To the contrary, its specific language —*i.e.*, "final order respecting an assessment," 8 U.S.C. § 1324a(e)(8)—strongly suggests that a final order does contain an assessment, and both DHS[13] and OCAHO issue final orders which appear to contain assessments. Thus, the language in 8 U.S.C. § 1324a(e)(8) does not appear dispositive of the issue.

Additionally, in terms of regulations, as noted, *supra*, both 8 C.F.R. § 274a.9(d) and 8 C.F.R. § 274a.10 support the conclusion that both DHS and OCAHO make penalty assessments, depending

[13] By the logic of the parties' statutory argument, the DHS NIF could not be an assessment either because it, too, may become a final order respecting an assessment if a respondent does not timely request a hearing. *See* 8 C.F.R. § 274a.9(f). Because the parties' reading of the statute would effectively eliminate both potential dates of assessment without offering a clear alternative, its persuasive value appears further limited.

on how a particular case plays out. Indeed, the language in 8 C.F.R. § 274a.9(d) that "[t]he proceeding to assess administrative penalties under [8 U.S.C. § 1324a] is commenced when [DHS] issues a [NIF]" would make little sense if the service of a NIF were itself the sole assessment. More specifically, the concept of a proceeding to assess being commenced with the service of a NIF would be meaningless or superfluous if the NIF itself were already the assessment, and adjudicators should generally read regulations to avoid rendering any portion of them meaningless or superfluous. *See, e.g.*, *United States v. Grandberry*, 730 F.3d 968, 981 (9th Cir. 2013) (noting "one of the most basic interpretive canons, that a statute or regulation should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (cleaned up)). The Chief ALJ's decision elides over the language of 8 C.F.R. § 274a.9(d) in a footnote, *see* Order on Remand at 5 n.5, and does not directly engage with 8 C.F.R. § 274a.10; further, the parties' Brief on Remand addresses neither provision. However, in light of OCAHO's historic understanding of both provisions and the interpretive issues raised by 8 C.F.R. § 274a.9, it appears they warrant closer analysis on this issue.[14]

The Chief ALJ's discussion of definitions and usage briefly acknowledges the finality aspect of the plain-language definitions of an "assessment" but quickly dismisses the import of that aspect by noting that DHS, too, determines a penalty when it serves a NIF. Order on Remand at 6. Yet, the finality aspect appears significant in separating cases in which the DHS NIF is the final penalty determination—*i.e.*, when a respondent either fails to timely request a hearing or abandons a request for hearing—and cases in which it is simply a proposed determination which is not binding on an OCAHO ALJ (who makes his or her own final determination). In any case, the finality dimension of the definition of an assessment may also call for further discussion on review.[15]

Finally, the Chief ALJ's decision posits that policy considerations would be better served by DHS being the sole entity to assess civil money penalties for violations of 8 U.S.C. § 1324a. *See* Order on Remand at 8-10. Assuming both that the statute and regulations are ambiguous and that policy considerations are a relevant factor in determining the meaning of an assessment for purposes of 28 C.F.R. § 85.5, *see, e.g.*, *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 14

[14] Similarly, the Chief ALJ's decision only briefly touches upon the language in 28 C.F.R. § 85.1 which links civil penalties assessed on a particular date and those within the jurisdiction of the Department of Justice (DOJ), and mostly summarizes the arguments of the parties dismissing that linkage as "merely jurisdictional." Order on Remand at 4. However, this jurisdictional language strongly suggests that DOJ, including OCAHO, does assess civil money penalties in certain circumstances; indeed, it would be an odd—and potentially superfluous—construction to list tables of civil penalty ranges based on an assessment in a DOJ regulation if DOJ were not the entity making the assessment. Moreover, as the Chief ALJ pointed out, Order on Remand at 5, it is true that the NIF may serve as the assessment date for a case initially within OCAHO's jurisdiction, namely one in which a respondent abandons a request for hearing. However, in such a case, it is undisputed that OCAHO issues only a final order dismissing the case and not one purporting to contain an assessment. *See, e.g.*, *Greif*, 10 OCAHO no. 1177, at 3. Consequently, because OCAHO does not impose a civil money penalty in such a situation, 28 C.F.R. § 85.1 never comes into play; thus, that example sheds little light on construing the concept of an assessment for purposes of 28 C.F.R. § 85.5. In any case, the jurisdictional language of 28 C.F.R. § 85.1 also warrants closer analysis on administrative review.

[15] The Chief ALJ's remaining discussion of the definitions and usage of the concept of an assessment in various legal settings, Order on Remand at 5-8, while both well-presented and worthy of serious reflection, may also warrant further discussion on review. For example, the Chief ALJ asserted that ALJs merely "redetermin[e] . . . DHS' assessment," Order on Remand at 8, rather than making their own assessments. However, that assertion may be a matter solely of semantics rather than law, as another way to describe the redetermination of an assessment is as a new assessment. In any case, to the extent that point becomes relevant in an analysis of the meaning of an assessment, it is subsumed within the scope of administrative review.

(2023) (discussing the limitations of policy arguments in the context of questions of statutory interpretation), the policy arguments presented in the Order on Remand may not be as strong as they initially appear. In particular, the claim that hewing to OCAHO's longstanding interpretation of an assessment "would have the undesirable side effect of deterring businesses from seeking to exercise their due process rights under the statute," Order on Remand at 10, presumably by deterring respondents from requesting a hearing before OCAHO, finds little apparent support in logic, practice, or law.

The date of assessment in 28 C.F.R. § 85.5(d) is relevant only to determine the range of applicable penalties. As such, it affects the minimum and maximum penalties possible but does not dictate the actual penalty imposed by an ALJ within that range. In recent years, DHS has frequently sought penalties near the maximum end of the penalty range. *See, e.g.*, *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 16 (2021) (noting that "[t]he proposed penalty [by DHS] is approaching the maximum level of the range [*i.e.*, 85% of the maximum] because of the formula [DHS] uses to calculate the 'base' fine"). In contrast, OCAHO has frequently reduced the proposed penalty by a significant amount. *See, e.g.*, *id*. (reducing the proposed penalty from $1,901 per violation to either $1,000 or $,1300 per violation); Order on Remand at 12, 22 (reducing the proposed penalty from $90,387.20 to a final penalty of $56,580); *see also* Bruce Buchanan, *United States: OCAHO Reduces I-9 Penalties By Average Of 34% In 2022-2023*, MONDAQ (Apr. 4, 2023), https://www.mondaq.com/unitedstates/general-immigration/1301100/ocaho-reduces-i-9-penalties-by-average-of-34-in-2022-2023.[16]

Although there is certainly no guarantee that OCAHO will reduce the penalty proposed by DHS, *see Edgemont III*, 17 OCAHO no. 1470b, at 8 n.13, as long as DHS continues to propose penalties near the maximum end of the penalty range and as long as OCAHO continues to significantly reduce those penalties, it strains credulity to think that respondents will be dissuaded from requesting a hearing before OCAHO—and, thus, simply accepting whatever penalty DHS has proposed—solely because there is a possibility that the maximum possible penalty, which is statistically unlikely to be imposed,[17] may be higher by the time an ALJ issues a final order. Indeed, when confronted with a choice between a "guaranteed," unappealable penalty imposed by DHS, *see* 8 C.F.R. § 274a.9(f), and the opportunity to seek a lower penalty before OCAHO—with a statistically significant possibility that a lower penalty would be imposed—it would be grossly irrational for a respondent to forgo its right to a hearing before OCAHO simply because the maximum potential penalty has increased since the time the NIF was served. There is no apparent basis in law or practice to expect a respondent to behave in such an irrational manner.

Similarly, for respondents with viable defenses to charges of violations of 8 U.S.C. § 1324a, it beggars belief that the penalty range would deter them from requesting a hearing before OCAHO,

[16] The figures for 2022-2023 do not appear to represent an anomaly. Since DHS restarted civil enforcement of 8 U.S.C. § 1324a in the mid-2000s, OCAHO has consistently reduced civil money penalties from what DHS proposed in a NIF. *See, e.g.*, Bruce E. Buchanan, *2015 OCAHO Decisions re I-9 Penalties*, LEXISNEXIS (May 6, 2016), https://www.lexisnexis.com/community/insights/legal/immigration/b/insidenews/posts/2015-ocaho-decisions-re-i-9-penalties---bruce-e-buchanan (discussing annual average reductions in penalties by OCAHO ranging from 32.8% to 46.5%).

[17] Although DHS frequently seeks penalties *near* the maximum end of the range, it rarely seeks the maximum amount itself. Further, the undersigned has found only one published OCAHO decision since 2003, *United States v. Symmetric Sols., Inc*., 10 OCAHO no. 1209 (2014)—and none since inflation adjustments to the penalty ranges began regularly occurring in 2017—in which DHS sought and OCAHO imposed, on the merits, the maximum allowable penalty for violations of 8 U.S.C. § 1324a.

both because they could obtain a dismissal of the case with no penalty imposed at all and because, in certain cases, they could also potentially obtain attorney's fees for their trouble, *see* 28 C.F.R. § 68.52(c)(9). In short, the assertion that respondents determine whether to request a hearing after being served with a NIF based on the maximum possible penalty is both unsupported empirically and somewhat at odds with the reality of how OCAHO proceedings have progressed in recent years.

Perhaps most importantly, however, ALJs retain broad discretion in determining penalty amounts, and there is no single method used to calculate the penalties. *See, e.g.*, *United States v. Senox Corp*., 11 OCAHO no. 1219, 3 (2014) ("OCAHO case law has long recognized there is no one single permissible method for calculating penalties."). In fact, although many ALJs have calculated an initial penalty range for violations of 8 U.S.C. § 1324a(a)(1)(B) in order to establish a baseline penalty before considering the statutory factors in 8 U.S.C. § 1324a(e)(5), there is no actual legal requirement to do so. Thus, unless an ALJ believes that a minimum or maximum penalty is appropriate for a particular case—and as long as the ALJ considers the factors in 8 U.S.C. § 1324a(e)(5)—the particular penalty range itself is not necessarily material, and an ALJ may set any penalty that the ALJ believes is reasonable and appropriate. Consequently, nothing in the law prevents a respondent from arguing for a lower penalty regardless of the maximum possible penalty or prevents an ALJ from imposing such a penalty—unless the ALJ intends to set a minimum penalty—regardless of whether the date of the service of the NIF or the date of the OCAHO final order determines the maximum penalty. Accordingly, the prospect that a higher maximum penalty may apply if the OCAHO final order is the date of assessment would appear to have little, if any, deterrent effect on a respondent's desire to pursue a case before OCAHO.[18] In short, the policy considerations presented by the Chief ALJ's decision, though vigorously articulated, do not necessarily appear dispositive of the question of the appropriate definition of the date of assessment for purposes of 28 C.F.R. § 85.5. Instead, they warrant closer analysis on administrative review.[19]

Therefore, the undersigned will review whether the Chief ALJ's determination that only DHS assesses civil money penalties for violations of 8 U.S.C. § 1324a—and, thus, that only the date of the service of the NIF constitutes the date of assessment for purposes of 28 C.F.R. § 85.5—comports with applicable law and otherwise represents a sufficiently reasoned departure from OCAHO's prior interpretation of the concept of an assessment.

---

[18] For similar reasons, nothing in the law currently appears to prevent an ALJ from considering factors such as delay in "[t]he proceeding to assess administrative penalties under [8 U.S.C. § 1324a]," 8 C.F.R. § 274a.9(d), when determining an appropriate civil money penalty. *Compare* Order on Remand at 9 (identifying the possibility of various types of potential delays as concerns if the date of an OCAHO final order is construed as the date of assessment for purposes of 28 C.F.R. § 85.5), *with Edgemont III*, 17 OCAHO no. 1470b, at 9 n.14 (acknowledging that "if OCAHO ultimately determines that the date of assessment is the date of the OCAHO final order, it may need to refine that formulation . . . to account for atypical or unique factual scenarios").

[19] For example, the Chief ALJ asserted that the "fixed and determinable" date of the service of the NIF makes it superior, from a policy standpoint, to the date of an OCAHO final order as a definition of the date of assessment for purposes of 28 C.F.R. § 85.5. Order on Remand at 10. However, DHS's initial assessment in a NIF is not necessarily fixed and may change as proceedings progress before a final assessment is made. For instance, DHS may alter its assessment through amending its proposed penalty in the complaint, *see* 28 C.F.R. § 68.9(e), or by otherwise changing its proposed penalty in the midst of proceedings, *see, e.g.*, *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 3 (2010) (noting that DHS changed its "initial assessment . . . to a new assessment" after an ALJ's partial grant of summary decision). In such circumstances, the original NIF would no longer be DHS's assessment, but the date of the new assessment is neither fixed nor easily determinable. The Order on Remand does not address such scenarios, and, thus, its emphasis on the fixed nature of the date of service of a NIF is not clearly dispositive of the issue. Further, to the extent questions regarding the "fixed" time of an assessment become relevant, they are subsumed within the scope of this administrative review.

B. Whether the Chief ALJ's overall civil money penalty imposed of $56,580 was appropriate

As discussed above and in *Edgemont III*, 17 OCAHO no. 1470b at 4, the date of assessment is relevant only to determine the range of applicable penalties. *See* 28 C.F.R. § 85.5. Consequently, the date of assessment affects the minimum and maximum penalties possible but does not dictate the actual penalty imposed by an ALJ within that range. Rather, subject to a few, well-established parameters—*e.g.*, required consideration of five statutory factors, 8 U.S.C. § 1324a(e)(5), and a prohibition on waiving a penalty or setting one below the minimum amount once a violation has been established, *United States v. Applied Comput. Tech.*, 2 OCAHO no. 367, 524, 529 (1991)—OCAHO ALJs have broad discretion in imposing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B), *see, e.g.*, *United States v. Draper-King Cole, Inc.*, 7 OCAHO no. 933, 212, 214 (1997) ("[The statute] also grants broad discretion over penalties to the administrative law judge in charge of the case*."); see also Ketchikan Drywall Servs., Inc. v. Immigr. & Customs Enf't*, 725 F.3d 1103, 1115 (9th Cir. 2013) ("Moreover, the statute itself establishes broad discretion when it comes to the determination of penalties."). Moreover, OCAHO does not impose one particular method for calculating civil money penalties, *see United States v. Golden Emp. Grp., Inc*., 12 OCAHO no. 1277, 2 (2016) ("Although the statutory factors must be considered in every case [for violations of 8 U.S.C. § 1324a(a)(1)(B)], there is otherwise no single official method mandated for calculating civil money penalties."), and OCAHO may consider nonstatutory factors "as may be appropriate in particular circumstances," *United States v. Holtsville 811 Inc*., 11 OCAHO no. 1258, 10 (2015). Overall, proportionality and reasonableness are the touchstones in imposing a civil money penalty for violations of 8 U.S.C. § 1324a. *See, e.g.*, *United States v. M&D Masonry, Inc*., 10 OCAHO no. 1211, 10 (2014) ("OCAHO case law is in accord with the view that proportionality is critical in setting penalties."); *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 3 (2023) ("The primary focus [in] assessing penalties is the reasonableness of the result achieved." (cleaned up)).

In short,

> OCAHO caselaw has long recognized that there is no single preferred method of calculating penalties. The principal focus must be on the reasonableness of the result achieved, not the particular methodology employed to reach that result. The goal is to set a penalty that is sufficiently meaningful to enhance the probability of future compliance without being unduly punitive in light of the respondent's resources. Another appropriate guideline in determining whether a fine is excessive is the relationship between the fine and the nature of the offense.

United States v. Fowler Equip. Co., 10 OCAHO no. 1169, 6 (2013) (citations omitted). Thus, if the overall penalty imposed by an ALJ is reasonable and not disproportionate—or, alternatively, if the undersigned would impose the same penalty upon *de novo* review—then the penalty may be affirmed on review even if there was an error in calculating the appropriate range based on an error in determining the date of assessment.[20] Accordingly, as the penalty imposed by the Chief ALJ in

[20] A variation on this type of "harmless error" analysis has already been adopted in several recent OCAHO decisions following *Edgemont III*. In other words, an ALJ may impose a civil money penalty that would be appropriate regardless of the range dictated by the date of assessment, rendering any such error in determining that date harmless. *See, e.g.*, *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436b, 9 n.17 (2023) ("While the Court is mindful that

the instant case would fall within either range regardless of the date of assessment, the undersigned will also review whether that penalty was appropriate regardless of any potential error in determining the date of assessment.

C. Whether the parties have reached a settlement of the case

Respondent admitted liability for the violations charged in the complaint. *See Edgemont I*, 17 OCAHO no. 1470, at 2 ("Through its Prehearing Statement, Respondent admitted liability for failure to timely prepare Forms I-9 for the forty-six identified individuals."). Furthermore, prior to the remand, Respondent had effectively stopped participating in the case after it conceded liability.[21] *See Edgemont III*, 17 OCAHO no. 1470b, at 4. Further, neither party sought review of the Chief ALJ's original decision containing a penalty determination of $55,024; moreover, on administrative review, Respondent did not file a brief, and Complainant filed only an untimely and cursory two-paragraph brief. *See id*. at 3-4. Additionally, following the vacatur of that decision and remand, the parties attempted to stipulate to a penalty range based on the date of service of the NIF as the date of assessment pursuant to 28 C.F.R. § 85.5. *See* Brief on Remand at 6. Although the parties' attempted stipulation of a legal issue is not binding,[22] their overall behavior—*i.e*., Respondent's admission of liability, both parties' lack of challenge to the Chief ALJ's initial penalty determination, and both parties' agreement on a penalty range—nevertheless indicates they may have reached an accord on the resolution of this case. In other words, the parties' actions strongly suggest—in substance, if not necessarily in form—they may have already tacitly agreed to settle this case for a specific civil money penalty amount.

OCAHO policy favors settlement over litigation, though specific regulatory requirements in 28 C.F.R. § 68.14 must be followed in order to effectuate a settlement. *See generally United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416e, 11-12 (2023). The parties clearly have not complied with the requirements for settlement and dismissal under 28 C.F.R. § 68.14(a)(1), but whether the case should be dismissed due to a settlement under 28 C.F.R. § 68.14(a)(2), which requires only notification that the parties have agreed to a settlement and dismissal, is a closer question based on the parties' handling of the case to this point. Accordingly, the undersigned will review whether the parties' actions have manifested an agreement to settle the case and, thus, whether it should be dismissed. Further, to that end, the parties should clarify their intentions regarding a settlement no later than the deadline for submitting briefs listed below.

---

another, unrelated, case raises the issue of the appropriate date selection for the 'date of assessment,' (which bears on the correct penalty range), discussion of this issue is unnecessary here as the appropriate penalty falls within either possible penalty range, and would be appropriate within either range."). Indeed, unless an ALJ intends to impose either a minimum or a maximum penalty—a situation that has rarely occurred in recent years—the date of assessment will have little bearing on whether the overall penalty imposed is appropriate.

[21] Respondent did resume participating in the case following the remand, and the ALJ declined to find Respondent's request for hearing abandoned. *See* Order on Remand at 10. That determination is not included within the scope of this Notification of Administrative Review.

[22] As in federal court, *see, e.g.*, *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986) ("We are not bound by the stipulation as to the substance of the law."); *accord Sanford's Est. v. Comm'r*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law."), stipulations of law in OCAHO proceedings are not binding on adjudicators, *see, e.g.*, *Rainwater v. Dr.'s Hospice of Ga., Inc*., 12 OCAHO no. 1300, 20 n.21 (2017); *accord United States v. Noorealam*, 5 OCAHO no. 797, 611, 614 (1995) (noting that stipulations of law by parties are not binding in OCAHO proceedings); *cf.* 28 C.F.R. § 68.47 (authorizing parties to stipulate only to "pertinent facts").

III. CONCLUSION

This administrative review will be conducted in accordance with the provisions of 28 C.F.R. § 68.54(b)-(d). Accordingly, within twenty-one days of the date of entry of the Chief ALJ's order, the parties may submit briefs or other written statements addressing the issues presented above. *See* 28 C.F.R. § 68.54(b)(1). The deadline for submitting such briefs or other written statements is **December 4, 2023**.[23] Parties must file and serve their briefs by expedited delivery, in accordance with the provisions of 28 C.F.R. § 68.54(c) and § 68.6(c). The parties are further reminded that the undersigned "ordinarily expects both parties to fully develop their positions and arguments during an administrative review." *See United States v. El Paso Paper Box, Inc*., 17 OCAHO no. 1451b, 5 (2023).

James McHenry
Chief Administrative Hearing Officer

[23] Because no amicus responded to the Chief ALJ's invitation for briefing in July 2023, *see* Order on Remand at 2, the undersigned sees little point in calling for amicus briefing again, approximately four months later. Nevertheless, as in any OCAHO case, nothing prohibits a potential amicus from seeking leave to submit a brief in this case. Any such requests for leave by an amicus, accompanied by a brief, should be received by OCAHO no later than December 4, 2023, to ensure full consideration. Copies of any amicus briefs received by that date will be provided to the parties who may, in turn, seek leave to respond to the briefs, if appropriate. Both parties and potential amici should be mindful, however, of the statutory deadline for completing an administrative review. *See* 8 U.S.C. § 1324a(e)(7).