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

December 12, 2023

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

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER

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 presumes the parties' familiarity with the facts and procedural history of the case, which have been thoroughly recounted in five 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*"); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470d (2023) ("*Edgemont V*").[1] Consequently, I will recount only the facts and procedural history necessary to inform this decision.

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. During the ensuing proceedings, based on Respondent's stipulations of fact and admissions, Chief

[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] References to DHS also include references to the former Immigration and Naturalization Service ("Service") prior to 2003, as appropriate. *See Edgemont V*, 17 OCAHO no. 1470d, 1 n.2. Similarly, references to the Service in both applicable regulations and relevant OCAHO case law now refer to DHS. *See id*.

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). *Edgemont I*, 17 OCAHO no. 1470, at 6. The Chief ALJ further "bifurcat[ed] the issues of liability and penalty assessment" and invited the parties to submit further information relevant to penalties. *See id.* at 6, 7. Subsequently, the Chief ALJ ordered Respondent to pay $55,024 in penalties; however, following a Notification of Administrative Review, *see Edgemont II*, 17 OCAHO no. 1470a, at 1-2, that order was vacated, and the case was remanded for further proceedings, *see Edgemont III*, 17 OCAHO no. 1470b, at 12. Following the remand and additional briefing, the Chief ALJ issued an Order on Remand on November 13, 2023, which ordered Respondent to pay $56,580 in penalties for the violations of 8 U.S.C. § 1324a(a)(1)(B). Order on Remand at 22.

In issuing the Order on Remand, the Chief ALJ determined that the date of assessment for purpose of establishing the appropriate penalty range in 28 C.F.R. § 85.5(d) was the date DHS served a Notice of Intent to Fine ("NIF") on Respondent, October 17, 2019. *See id*. at 2-11. Although not spelled out in great detail, that determination also necessarily involved two corollary determinations regarding the meaning of an assessment, namely that only DHS (and not OCAHO) can assess a penalty for violations of 8 U.S.C. § 1324a and that DHS's calculation of the penalty range for purposes of the NIF is binding on OCAHO. *Cf. id*. at 8.

On November 17, 2023, the undersigned issued a Notification of Administrative Review, identifying three issues in the Order on Remand to be reviewed. *Edgemont V*, 17 OCAHO no. 1470d, at 2-11. The Notification of Administrative Review also set a deadline of December 4, 2023, for the parties to file briefs or other written statements related to the administrative review. *Id*. at 12. Both parties timely submitted briefs,[3] and the undersigned has accepted and fully considered those briefs. For the reasons stated below, the Order on Remand will be MODIFIED.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer ("CAHO") has discretionary authority to review an ALJ's final order in cases under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(a). Under OCAHO's rules, the CAHO may review an ALJ's final order on his or her own initiative by issuing a notification of administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(2). A party may also file a written request for administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). If administrative review is timely noticed or requested, the CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings within thirty days of the date of entry of the ALJ's order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act ("APA"), which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final orders issued by an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990). In conducting an administrative review, "the CAHO exercises independent

[3] The certificate of service attached to Complainant's Brief indicates that it was served "October 6, 2010." Complainant's Brief at 5. That date is obviously a typographical error, and there is no indication that Complainant's Brief was not otherwise properly served. Accordingly, it has been accepted and fully considered.

judgment and discretion free from ideological or institutional pressure." *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 3 (2023). The CAHO reviews both questions of law and fact *de novo*, but "should accord some degree of consideration" to an ALJ's findings of fact, "depending on the particular circumstances of the case under review." *United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021). In conducting administrative review, "the CAHO must ensure that the ALJ's overall decision is well-reasoned, based on the whole record[,] . . . free from errors of law, and supported by or in accordance with reliable, probative, and substantial evidence contained in the record." *Id.* at 5.

III. BRIEFING

Both parties submitted briefs in response to the Notification of Administrative Review. Complainant's Brief on Administrative Review ("Complainant's Brief") first reiterates Complainant's position that "the date a penalty is 'assessed' is the date Complainant serves the [NIF] on the Respondent." Complainant's Brief at 2. The Complainant therefore urges that the civil penalty range be determined "consistent with the date Complainant served the NIF in this matter[.]" *Id.* Complainant does not elaborate further on this question.

Regarding the second issue under review—whether the Chief ALJ's overall civil money penalty of $56,580 was appropriate—the Complainant asserts that if the CAHO finds that the date of the final order is the date of assessment, then the CAHO should apply the same methodology as the Chief ALJ and impose a penalty in the middle of the applicable penalty range. *Id.* at 3-4. Specifically, Complainant argues that, if the higher penalty range is chosen, the CAHO should assess a penalty of $1,486.50 per violation, for a total penalty of $68,379, which reflects the midpoint of the current penalty range for the violations at issue. *Id.*; *see also* Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. 5,776, 5,780 (Jan. 30, 2023) (to be codified at 28 C.F.R. pt. 85) (reflecting a penalty range of $272 to $2,701 for penalties under 8 U.S.C. § 1324a(e)(5) that are assessed after January 30, 2023).

Finally, addressing the third issue under review—whether the parties have reached a settlement in the case—Complainant states plainly that "the parties have not reached a settlement agreement." Complainant's Brief at 4.

Respondent's Brief on Administrative Review ("Respondent's Brief") begins by addressing the question of settlement, and similarly asserts that the parties have not reached a settlement in this matter. Respondent's Brief at 1-2. Respondent notes that, although the parties agreed on the "discrete legal issue" of the date of assessment of the penalty, they "have been unable to reach a settlement on the issue of the ultimate penalty in the case." *Id.*

On the question of whether the overall penalty amount set by the ALJ was appropriate, Respondent argues that the $56,580 penalty "remains appropriate irrespective of [the] date of the 'assessment' under 28 C.F.R. § 85.5 as the penalty is within the regulatory range applicable at the time of the NIF and the regulatory range in effect today." *Id.* at 2.

Finally, on the primary question at issue in this administrative review, Respondent argues that the Chief ALJ's determination regarding the date of assessment for purposes of 28 C.F.R. § 85.5 was correct. *See id.* at 3-6. Respondent relies primarily on the language of 8 U.S.C. § 1324a(e)(8),

asserting that the separation of the terms "order" and "assessment" in § 1324a(e)(8) shows that "[i]t is clear . . . that Congress did not intend the order to be considered the assessment." *Id.* at 5. Furthermore, Respondent asserts that even if the statutory language "were more ambiguous, [canons] of statutory interpretation dictate that when two words are used within the same phrase and in opposition to one another they should be given different meanings." *Id.* (citing *United States v. Dominguez*, 7 OCAHO no. 972, 789, 812 n.21 (1997)). In this instance, Respondent argues that this canon of interpretation favors giving the terms "assessment" and "final order" different meanings. *Id.*

Respondent further argues that "any policy considerations are irrelevant in the face of the clear statutory text" and thus that OCAHO "should not engage in any speculation about how parties may or may not act in the face of a regulatory scheme that increases fines over time." *Id.* Respondent concludes its brief by asserting that "[t]he only reasonable interpretation of 28 C.F.R. § 85.5 is that the date of the fine assessment refers to the date that DHS serves the Notice of Intent to Fine and not the date that this Court enters a final order." *Id.* at 6.

IV. DISCUSSION

A. Date of Assessment[4]

The undersigned presumes the parties' familiarity with the background legal principles and prior OCAHO decisions regarding this issue, *see, e.g., Edgemont III*, 17 OCAHO no. 1470b, at 4-11; *Edgemont V*, 17 OCAHO no. 1470d, at 2-9; accordingly, I will turn directly to an analysis of it. As the multiple prior decisions in this case have illustrated, the legal question of the meaning of the word "assessed" in 28 C.F.R. § 85.5(d) presents a choice between two competing definitions or interpretations. On one hand, OCAHO's longstanding interpretation of an assessment for over thirty years is that it is a final order, *see* 5 U.S.C. § 551(6), determining or imposing a civil money penalty and that an assessment is issued by either DHS or OCAHO, depending on the procedural posture of the case. *See generally Edgemont V*, 17 OCAHO no. 1470d, at 3-4; *see also* 8 C.F.R. § 274a.10(b) ("Civil penalties may be imposed by [DHS] or an administrative law judge for violations under [8 U.S.C. § 1324a]."). In other words, in accordance with the ordinary and plain meaning of the term "assessment," an assessment is the determination or imposition of a civil money penalty for violations of 8 U.S.C. § 1324a, and that penalty—*i.e.*, an assessment—only takes effect upon the issuance of an administratively final order.[5] According to this interpretation, the agency which issues the final order is the one that makes the assessment. If DHS issues the final order, then DHS makes the assessment; if OCAHO issues the final order, then OCAHO makes the assessment. Further, under this interpretation, the penalty contained in DHS's NIF—and, subsequently, in a complaint if the case is filed with OCAHO—is simply a proposed penalty. Because a proposed penalty is neither imposed nor determined with finality, it is not an assessment. In fact, a NIF (Form I-763) itself *never* imposes

[4] Throughout this decision, the undersigned uses different variations of the root word "assess"—*e.g.*, "assessed" and "assessment"—because the relevant legal sources each use slightly different forms of that root word. Nevertheless, all of them refer to the same basic concept, and there is no suggestion in the law, the parties' arguments, or the Order on Remand that each variation has its own separate, independent meaning.

[5] The undersigned recognizes that the finality connoted by the term "assessment" for purposes of 28 C.F.R. § 85.5(d) is only at the administrative level, for there may be subsequent federal civil litigation challenging an agency assessment. *See, e.g.*, 8 U.S.C. § 1324a(e)(8). Thus, unless otherwise noted or unless the context indicates otherwise, considerations of finality for purposes of interpreting the term "assessment" in the instant decision refer only to administrative finality.

or finally determines a penalty, for even if a respondent fails to request a hearing, DHS must issue a separate final order (Form I-764) which is the instrument that actually imposes a civil money penalty for violations of 8 U.S.C. § 1324a. *See* 8 C.F.R. § 274a.9(f) ("If the respondent does not file a request for a hearing in writing within [a specified time period after service of the NIF], [DHS] shall issue a final order . . . ."); *compare* Complaint, Ex. A (Form I-763, the NIF), *with HSI Inspection Chart—Choice Driven Option*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/hsi-inspection-chart-choice-driven-option (last visited Dec. 11, 2023) (noting that DHS "will issue a Final Order to Cease Violations and Pay Fine (ICE Form I-764)" if a request for hearing is not timely made after receiving a NIF).

Rather, the assessment occurs only when either DHS issues a final order imposing a penalty—*i.e.*, if either the respondent fails to timely request a hearing, the respondent and DHS settle the case before DHS files a complaint with OCAHO,[6] the respondent subsequently abandons the request for hearing resulting in the dismissal of the case by OCAHO, or the parties reach a settlement pursuant to 28 C.F.R. § 68.14(a)(2) resulting in the dismissal of the case by OCAHO[7]—or OCAHO does, *see* 28 C.F.R. § 68.2 (definition of "final order"). Thus, in this interpretation, either DHS or OCAHO may assess civil money penalties. Moreover, because OCAHO may assess a civil money penalty based on its own reading of the law and the available evidence, DHS's proposed penalty calculations, which necessarily include the penalty range, are not binding on OCAHO adjudicators. Collectively, and for ease of reference, this decision will label this interpretation as "Interpretation One."

In 2020, OCAHO abruptly began using an alternate definition and interpretation of assessment, which posited that an assessment occurs only when DHS serves a NIF.[8] *See United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 & n.3 (2020); *see also Edgemont III*, 17 OCAHO no. 1470b, at 6-7, 10; *Edgemont V*, 17 OCAHO no. 1470d, at 5. Under this interpretation, an assessment is a *proposed* civil money penalty, rather than a final order, and the assessment of a civil money penalty is distinct from the final determination of such a penalty. Consequently, under this interpretation, only DHS may assess civil money penalties for violations of 8 U.S.C. § 1324a because only DHS issues a NIF. Moreover, under this interpretation of an assessment, DHS's calculation of the penalty range reflected in the NIF is binding on OCAHO. Collectively, and also for ease of

[6] In previously discussing endpoints of the proceeding commenced pursuant to 8 C.F.R. § 274a.9(d) which may result in a final order containing an assessment of civil money penalties, the undersigned inadvertently omitted the scenario in which DHS and a respondent settle prior to DHS filing a complaint with OCAHO. *Compare Edgemont V*, 17 OCAHO no. 1470d, at 3, *with Form I-9 Inspection*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 7, 2023), https://www.ice.gov/factsheets/i9-inspection ("If a written request for a hearing is timely received, the employer may request to engage in settlement negotiations with [DHS] regarding the charges or fine(s) imposed prior to a hearing before OCAHO. If the employer and [DHS] reach an agreement, [DHS] will not file a complaint with OCAHO."). In that situation DHS will issue a final order, Form I-764, containing a penalty assessment.

[7] In contrast to dismissal pursuant to 28 C.F.R. § 68.14(a)(1), dismissal pursuant to 28 C.F.R. § 68.14(a)(2) does not require consent findings and a proposed decision and order, nor does it necessarily have the same "force and effect" as an order issued by an ALJ after a "full hearing." *Compare* 28 C.F.R. § 68.14(a)(1), (b), *with* 28 C.F.R. § 68.14(a)(2). *See also United States v. Cal. Mantel, Inc*., 10 OCAHO no. 1168, 7 (2013) (discussing the differences between the two forms of dismissal). Thus, dismissal pursuant to 28 C.F.R. § 68.14(a)(2) is typically followed by a final order issued by DHS—rather than an ALJ order based on consent findings—directing payment of a civil money penalty in the amount the parties agreed to as part of the settlement.

[8] Apart from whether this new interpretation was substantively correct, the decision adopting it neither acknowledged nor explained the change from the prior interpretation. As discussed in more detail in Part IV.A.3, *infra*, that unexplained deviation raises its own separate concerns as a matter of administrative law.

reference, this decision will label this interpretation as "Interpretation Two."

In the instant case, the Chief ALJ adopted Interpretation Two and attempted to amplify the support for it beyond the brief discussion in *Farias Enterprises*. Order on Remand at 2-11. However, a review of the relevant statutory language, regulatory provisions, prior OCAHO interpretations, dictionary definitions, usage by federal courts, usage by parties before OCAHO, policy considerations, and other relevant factors all indicate that Interpretation Two is legally erroneous and that Interpretation One remains the best reading of the legal concept of an assessment. Accordingly, for the reasons set forth below, the Order on Remand must be modified.

1. Statutory Provisions

a. Statutory Interpretation

Neither of the most relevant statutes—*i.e.*, 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) [hereinafter "FCPIAA"], and 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) [hereinafter "BBA"]—define the word "assessment," or any of its variations stemming from the root word "assess." As such, the starting point in interpreting those statutes is with the ordinary meaning of "assess" or "assessment." *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of such a [statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning."). The ordinary, relevant meaning of "to assess" is "[t]o calculate the amount or rate of (a tax, fine, etc.) . . . [t]o impose (a tax, fine, etc.) . . . [or] [t]o determine the value of (something), esp. for tax purposes." *Assess*, BLACK'S LAW DICTIONARY (11th ed. 2019). Similarly, the ordinary relevant meaning of an "assessment" is the "[d]etermination of the rate or amount of something, such as a tax or damages . . . [or] [i]mposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed." *Assessment*, BLACK'S LAW DICTIONARY (11th ed. 2019). Both of these definitions unquestionably describe OCAHO's actions in issuing a final order determining and then imposing civil money penalties for violations of 8 U.S.C. § 1324a. *See* 8 C.F.R. § 274a.10(b) (noting that either an OCAHO ALJ or DHS "*determine*[*es*] the level of the penalties that will be *imposed*" (emphasis added)); *cf.* 8 U.S.C. § 1324a(e)(5) (requiring the consideration of five factors before "*determining* the amount of the penalty" for violations of 8 U.S.C. § 1324a(a)(1)(B) (emphasis added)). In contrast, a NIF never imposes or finally determines anything—only a final order issued by either DHS or OCAHO does. Accordingly, the ordinary meaning of an assessment as used in these statutes strongly supports Interpretation One.

To be sure, statutory interpretation is a "holistic endeavor," for "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted). However, those considerations all point toward Interpretation One as well.

For example, section 2(a)(4) of the FCPIAA expressly notes Congress's concern with the

"accounting of the efforts of Federal agencies to *assess and collect* civil monetary penalties" (emphasis added). The linkage of the words "assess" and "collect" indicates that an assessment of a civil money penalty must be final; otherwise, there is no penalty to collect. Moreover, there is no indication of concern in the FCPIAA for proposed, suggested, or preliminary penalties, nor is there any logical reason why there should be. In enacting the FCPIAA, Congress was concerned with, *inter alia*, "improv[ing] the collection by the Federal Government of civil monetary penalties." FCPIAA § 2(b)(3). Again, by definition, the collection of civil money penalties necessarily requires an extant final determination of those penalties—*i.e.*, an assessment. In other words, interpreting "assess" in the FCPIAA to mean solely the non-final proposal of a civil money penalty—*e.g.*, a NIF issued by DHS, rather than a final order issued by either DHS or OCAHO—would be nonsensical in context because it would suggest Congress was attempting to improve the collection of proposed penalties, rather than final ones. Moreover, such an interpretation would remove any concept of a final assessment from the statute altogether, effectively omitting a crucial and necessary step in addressing the collection of civil money penalties. In short, interpreting "assessed" in the FCPIAA consistent with Interpretation Two to mean solely a non-final, proposed penalty is both strained and unnatural in the overall context of the statute and would lead to an absurd reading fundamentally at odds with the language of the statute itself and the intent behind it; thus, the plain language of the FCPIAA does not support that Interpretation. *See United States v. Turkette*, 452 U.S. 576, 580 (1981) (noting that when interpreting statutes, "absurd results are to be avoided").

Further, sections 3(2)(B) and (C) of the FCPIAA makes clear that an assessment may occur either by an agency or through an administrative proceeding, which is fully consonant with Interpretation One and OCAHO's longstanding view that either DHS or OCAHO may assess civil money penalties for violations of 8 U.S.C. § 1324a, *see generally Edgemont V*, 17 OCAHO no. 1470d, at 3-4. Indeed, the plain language of the statute clearly contemplates that an assessment may occur "*pursuant* to an administrative proceeding"—*e.g.*, proceedings conducted by OCAHO. FCPIAA § 3(2)(C) (emphasis added). Conversely, interpreting assessment to mean only a proposed penalty—*i.e.*, adopting Interpretation Two—would render the provision providing for an "assess[ment] . . . pursuant to an administrative proceeding," FCPIAA § 3(2)(C), largely meaningless or superfluous because administrative tribunals themselves do not typically propose penalties. Indeed, it is undisputed that OCAHO assesses civil money penalties for violations of 8 U.S.C. § 1324b, *see* 28 C.F.R. § 85.5(d); *Ogunrinu v. Law Res.*, 13 OCAHO no. 1332j, 24 (2021), but OCAHO does not propose those penalties.[9]

Moreover, Interpretation Two would necessarily mean that only DHS could assess penalties

[9] Neither party nor the Order on Remand asserted that section 3(2)(C) of the FCPIAA would apply to OCAHO in the context of a civil money penalty imposed pursuant to 8 U.S.C. § 1324b. Although that reading would restore applicability of the FCPIAA to OCAHO, at least in the context of 8 U.S.C. § 1324b, it would still render the portions of 28 C.F.R. § 85.5(d) ostensibly related to OCAHO adjudications under 8 U.S.C. § 1324a superfluous. Relatedly, and perhaps even more problematically, it would create two operating definitions of the word "assessed" in the same statutory section—*i.e.*, "assessed" in section 3(2)(B) of the FCPIAA would mean a proposed penalty and in section 3(2)(C) would mean a final penalty in some situations but a proposed penalty in others. Not only does the statutory construction not support such a variable or situational-dependent definition of "assessed," but such an argument would also run counter to a well-established canon of statutory construction that the same words in the same part of a statute are intended to have the same meaning, *see Comm'r v. Keystone Consol. Indus., Inc*., 508 U.S. 152, 159 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (cleaned up)).

for violations of 8 U.S.C. § 1324a which would, accordingly, render *both* of the relevant sections of the FCPIAA inapplicable to OCAHO, notwithstanding the plain statutory language in section 3(2)(B) regarding an "assess[ment] . . . pursuant to an administrative proceeding."[10] In turn, because those sections form part of the definition of a "civil monetary penalty" under the FCPIAA, *see* FCPIAA § 3(2), this interpretation would render that definition—and the overall concept of a "civil monetary penalty" in the FCPIAA—inapplicable to OCAHO altogether. Thus, that interpretation would also render the provisions of 28 C.F.R. § 85.5(d) that putatively apply to OCAHO a legal nullity; at best, they would be superfluous because they would apply neither to OCAHO nor to any agency within the Department of Justice, and at worst, they would be *ultra vires* because they were promulgated pursuant to the ostensible authority in the FCPIAA, as amended by the BBA, *see* Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. at 5,776; 28 C.F.R. pt. 85, Authority. In short, reading the FCPIAA to be inapplicable to OCAHO because of an interpretation that only DHS can assess civil money penalties for violations of 8 U.S.C. § 1324a would not only strain the straightforward language of that statute well beyond its breaking point, but would also lead to inarguably absurd results, including the vitiation of all regulatory provisions intended to apply to OCAHO in 28 C.F.R. part 85, as well as OCAHO's own regulations cross-referencing those provisions, *see*, *e.g.*, 28 C.F.R. § 68.52(c)(8).[11] Such an outcome strongly militates against the correctness of Interpretation Two. *See Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018) ("[I]t is also a basic tenet of statutory construction that courts should interpret a law to avoid absurd or bizarre results. An absurd interpretation is one that defies rationality or renders the statute nonsensical and superfluous." (cleaned up)).

Although the FCPIAA, as amended by the BBA, is the most relevant statutory text for interpreting the meaning of "assessed" for purposes of 28 C.F.R. § 85.5(d), the undersigned is cognizant that 8 U.S.C. § 1324a also contains a single use of the word assessment. *See* 8 U.S.C. § 1324a(e)(8). Although Respondent—and to some extent the Order on Remand—attaches great weight to that single reference, its use is more inscrutable and does not clearly support Interpretation

[10] To be clear, sections 3(2)(B) and (C) of the FCPIAA refer to penalties "assessed or enforced." However, there is no suggestion by either party or in the Order on Remand that OCAHO enforces any penalties under any statute. To the contrary, civil penalties for violations of 8 U.S.C. § 1324a are enforced administratively by DHS after a final order is issued, *see generally* 6 C.F.R. pt. 11 (outlining procedures for collection of debts owed to DHS) or through a civil action filed in district court, *see* 8 U.S.C. § 1324a(e)(9) (specifically authorizing a civil action in district court to enforce compliance with a final order finding violations of 8 U.S.C. § 1324a); *see also* 31 U.S.C. § 3711(g)(4)(C) (generally authorizing referral of a debt to the Department of Justice for litigation). Thus, because OCAHO does not enforce civil money penalties, if it does not assess them either, then subsections 3(2)(B) and (C) of the FCPIAA simply would not apply to it, rendering the entire FCPIAA effectively inapplicable to OCAHO.

[11] On this point, the undersigned also notes that the Department of Justice appears to have already tacitly adopted Interpretation One through its annual adjustment of the penalty ranges in 28 C.F.R. § 85.5(d). Subsequent to the passage of the BBA, the Office of Management and Budget (OMB) annually directs federal agencies to identify civil monetary penalties covered by the FCPIAA and to update the ranges of those penalties accordingly. *See*, *e.g.*, Off. of Mgmt. & Budget, OMB M-23-05, IMPLEMENTATION OF PENALTY INFLATION ADJUSTMENTS FOR 2023, PURSUANT TO THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015 (Dec. 15, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf. If OCAHO did not assess a penalty for violations of 8 U.S.C. § 1324a, then the definition of a civil monetary penalty in the FCPIAA would not apply to it, and there would be no reason for the Department of Justice to update the portions of 28 C.F.R. § 85.5(d) relating to penalties for violations of 8 U.S.C. § 1324a in accordance with the OMB guidance. Thus, by continuing to annually update the pertinent sections of 28 C.F.R. § 85.5(d), the Department of Justice appears to have concluded, albeit indirectly, that the FCPIAA applies to OCAHO. Accordingly, if the FCPIAA applies to OCAHO, then OCAHO must assess a civil money penalty, and only Interpretation One is consistent with that conclusion.

Two.

The only use of the word "assessment" in 8 U.S.C. § 1324a occurs in the context of describing the deadline and process for filing a petition for review by "[a] person or entity adversely affected by a *final order respecting an assessment*." 8 U.S.C. § 1324a(e)(8) (emphasis added). It is undisputed that both DHS and OCAHO may issue final orders regarding violations of 8 U.S.C. § 1324a depending on particular circumstances and that final orders issued by both agencies are subject to judicial review consistent with the provisions of 8 U.S.C. § 1324a(e)(8). It is also undisputed that the final orders issued by those agencies often—though not always, *see Edgemont V*, 17 OCAHO no.1470d, at 6—contain orders to pay civil money penalties. Thus, the most natural reading of the language in 8 U.S.C. § 1324a(e)(8) is that a final order containing or regarding an assessment of civil money penalties—*i.e.*, "respecting an assessment"—is subject to judicial review. Further, the assessment addressed in a final order is necessarily a final one, rather than a proposed one, as a final order containing an order to pay a proposed penalty in this context would be a *non sequitur*. As such, the most natural reading of 8 U.S.C. § 1324a(e)(8) is also congruent with Interpretation One.

Conversely, there is no indication Congress intended the strained reading of 8 U.S.C. § 1324a(e)(8)—consistent with Interpretation Two and meaning a "final order respecting [a proposed penalty]"—asserted by Respondent and adopted in the Order on Remand. Indeed, it is unclear as a matter of law or logic why Congress would explicitly provide for review of a final order regarding a proposed penalty, rather than review of a final order containing a final penalty. Moreover, if an assessment is merely a proposed penalty, then the function of the phrase "respecting an assessment" in 8 U.S.C. § 1324a(e)(8) is unclear as every final order would necessarily have had to address the proposed penalty in one way or another. Further, as discussed, *supra*, such a reading would be at odds with the interpretation of "assessed" in the FCPIAA, which was enacted approximately four years after 8 U.S.C. § 1324a(e)(8); thus, in light of the *in pari materia* canon of statutory construction, *see Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006) (noting that it is "[t]rue, under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law" (cleaned up)); *accord United States v. Freeman*, 44 U.S. 556, 564 (1845) ("The correct rule of interpretation is, that if divers[e] statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law."), there is no colorable argument that Congress intended two statutes related to the assessment of civil money penalties—*i.e.*, the FCPIAA and 8 U.S.C. § 1324a—to have two fundamentally opposite meanings of an assessment. Consequently, although it may be theoretically possible to read 8 U.S.C. § 1324a(e)(8) to be consistent with Interpretation Two, such a reading raises more questions than it answers and decidedly does not "produce[] a substantive effect that is compatible with the rest of the law." [12] *United Sav. Ass'n of Tex.*, 484 U.S. at 371.

[12] It is perhaps also notable that federal courts, which necessarily have a strong stake in correctly interpreting 8 U.S.C. § 1324a(e)(8), have frequently described the actions of OCAHO during their reviews as penalty "assessments," consistent with Interpretation One. *See*, *e.g.*, *Visiontron Corp. v. United States*, No. 20-1273, 2022 WL 9583754, at *1, *2 (2d Cir. Oct. 17, 2022) (repeatedly describing the actions of an OCAHO ALJ as "assessing [a] fine"); *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)). Although this point is hardly dispositive and federal courts have not interpreted the term "assessment" per se—at least as contemplated in the FCPIAA or in 8 U.S.C. § 1324a(e)(8), *see infra* note 13—this usage does support Interpretation One over Interpretation Two.

In sum, although the relevant statutes lack definitions of "assessed" or an "assessment" and there are no federal judicial interpretations of those terms to provide guidance,[13] applying relevant methods of statutory interpretation leads to only one conclusion: the term "assessed" in the FCPIAA, as amended by the BBA, and the term "assessment" in 8 U.S.C. § 1324a are unambiguous and include a final order issued by OCAHO imposing civil money penalties. Thus, based on the plain language of the relevant statutes, the term "assessed" in 28 C.F.R. § 85.5(d) necessarily includes such orders as well, meaning that the relevant date of assessment under that regulatory provision when OCAHO imposes a civil money penalty is the date of the OCAHO final order.

b. The Parties' Arguments

Complainant's Brief does not reference the FCPIAA, the BBA, 8 U.S.C. § 1324a or any other relevant statute. Respondent does not address the language in either the FCPIAA or the BBA, but it does make multiple arguments regarding 8 U.S.C. § 1324a(e)(8). However, none are persuasive.

As an initial point, Respondent's failure to address the statutory language in the FCPIAA, which is the basis for 28 C.F.R. § 85.5(d), and the interplay with that language and 8 U.S.C. § 1324a fatally undermines many of its arguments. As discussed, *supra*, Respondent's arguments, as applied to the FCPIAA, would render sections of that statute meaningless or nonsensical in the context of OCAHO and vitiate the relevant portions of 28 C.F.R. § 85.5(d).

Further, although Respondent is correct that 8 U.S.C. § 1324a never says explicitly that an ALJ issues an assessment, it also never says explicitly that DHS issues an assessment either. *Compare* Respondent's Brief at 4, *with* 8 U.S.C. § 1324a(e)(8). The lack of a specific textual commitment in 8 U.S.C. § 1324a(e)(8) to one agency does not support Respondent's argument that only DHS may issue an assessment. To the contrary, it suggests, consistent with Interpretation One, that either agency may issue an assessment, an interpretation that is buttressed by sections 3(2)(B) and (C) of the FCPIAA which expressly contemplate assessments issued by an agency or pursuant to an administrative proceeding (*e.g.*, one presided over by an ALJ).

Respondent also asserts that if Congress intended a final order to encompass an assessment, it would not have used the phrase "respecting an assessment." Respondent's Brief at 4. Yet, this argument misapprehends the meaning of the word "respecting." "As a matter of ordinary usage, 'respecting' means 'in view of: considering; with regard or relation to: regarding; concerning.'" *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (collecting dictionary definitions of "respecting") (cleaned up). In other words, the ordinary meaning of the relevant phrase in 8 U.S.C. § 1324a(e)(8) is a "final order relating to or regarding an assessment," which clearly indicates that an assessment may be contained in that order and that the phrase "respecting an assessment" merely serves to identify which final orders are subject to judicial review.[14]

[13] Despite diligent efforts, the undersigned has found no reported federal court decision defining the term "assessed," or any of its variants, in the context of the FCPIAA, the BBA, or 8 U.S.C. § 1324a(e)(8).

[14] The use of "respecting" in the statute is an admittedly somewhat awkward and uncommon construction, so an analogy to perhaps the most well-known "respecting" construction in law may help illustrate this point. Most people are familiar with the admonition that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. No one asserts that the object of the word "respecting," "an establishment of religion," is synonymous with the word

Additionally, Respondent posits that a final order and an assessment are in "opposition" to one another in the statute, Respondent's Brief at 5, but the language suggests only they are distinct concepts and not that they are so mutually exclusive that one cannot be a part of another. Similarly, Respondent attaches great significance to the fact that the word "order" appears in 8 U.S.C. § 1324a "approximately thirty-four times, whereas the word 'assessment' appears only once." Respondent's Brief at 4. Based on that disparity, Respondent asserts the words "order" and "assessment" must have different meanings. *Id*. at 4-5. The undersigned does not disagree with that assertion, but it appears to miss the overall point. Interpretation One does not posit that "order" and "assessment" have identical definitions; rather, it posits that an assessment is part of a final order and the use of "respecting an assessment" in 8 U.S.C. § 1324a(e)(8) merely cabins what types of final orders are subject to judicial review. *See generally Edgemont V*, 17 OCAHO no. 1470d, at 6 (discussing the questionable import of the parties' arguments distinguishing an order from an assessment); *cf.* 28 C.F.R. § 68.38(d) (noting that a "final order entered as a summary decision . . . shall include," *inter alia*, the "terms and conditions of the final order"); 28 C.F.R. § 68.52(c) (delineating multiple possible contents of a final order for violations of 8 U.S.C. § 1324a, including a civil money penalty). Nothing in the statutory language of 8 U.S.C. § 1324a(e)(8), particularly when considered in tandem with the FCPIAA, prohibits a civil money penalty—*i.e.*, an assessment—from being included in a final order, including a final order issued by OCAHO.

Taken to their logical endpoint, Respondent's arguments would not support *any* agency issuing an assessment, including DHS. *See Edgemont V*, 17 OCAHO no. 1470d, at 6 n.13. Indeed, Respondent's arguments cannot account for the complete omission of the word "assessment" in both 8 U.S.C. § 1324b and 8 U.S.C. § 1324c[15] even though it is undisputed that assessments occur under both statutes, and such assessments are addressed in 28 C.F.R. § 85.5(d). In short, Respondent's attempt to hang significant meaning on a sole reference to an assessment in 8 U.S.C. § 1324a—particularly without also considering the language of the FCPIAA and the relevant regulations—is unavailing.

c. The Order on Remand

The Order on Remand largely omits an analysis of the FCPIAA and the BBA, other than to note the latter statute clearly made the date of a violation of 8 U.S.C. § 1324a less relevant in determining the civil money penalty to be imposed for that violation. Order on Remand at 3. Although the point about the BBA is undoubtedly correct, it does little to aid an interpretation of the term "assessment."

"law"; rather, the phrase "an establishment of religion" refers to the content of the "law," namely a law encompassing an establishment of religion. Similarly, the undersigned does not assert that the object of the word "respecting" in 8 U.S.C. § 1324a(e)(8), "an assessment," is synonymous with the phrase "final order"; rather, the word "assessment" refers to the content of the "final order," namely a final order encompassing, *inter alia*, an assessment.

[15] The procedures for imposing a civil money penalty under 8 U.S.C. § 1324c are identical to those for imposing a penalty under 8 U.S.C. § 1324a in all material respects, and Respondent's arguments regarding the purported talismanic nature of the use of the word "assessment" in 8 U.S.C. § 1324a(e)(8) cannot account for this discrepancy. Rather, the only interpretation that can reconcile both statutes—*i.e.*, by reading "assessment" in 8 U.S.C. § 1324a(e)(8) to delineate the types of final orders subject to judicial review, namely those containing an assessment—is Interpretation One.

The Order on Remand does summarize the parties' arguments regarding 8 U.S.C. § 1324a and concludes that "[a]rguably, the parties' strongest argument is that 8 U.S.C. § 1324a(e)(8) clearly delineated between a final order issued by an ALJ and an assessment, and it is the only place where Congress used the words together." *Id.* at 4. It further concludes that "[t]his argument has some force, as there would have been no reason for Congress to include both terms unless it was referring to a prior assessment, which can only be the notice of intent to fine." *Id*. However, that conclusion does not flow from the argument.

As discussed in the Notification of Administrative Review,

> 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 . . . 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 and OCAHO issue final orders which appear to contain assessments.

Edgemont V, 17 OCAHO no. 1470d, at 6 (footnote omitted). In other words, it does not follow that because a final order and an assessment are separate concepts they must be issued at different times, with an assessment preceding a final order. To the contrary, both the language of 8 U.S.C. § 1324a(e)(8), *see id*.; *see also supra* Part IV.A.1.a, and the regulatory structure of 28 C.F.R. § 68.52(c)(8), *see infra* Part IV.A.2.a, strongly suggest that an assessment *is* part of a final order. Accordingly, the Order on Remand's analysis of this statutory question to the contrary is, on balance, unconvincing.

Overall, the Order on Remand notes that statutory "references to 'assessment' . . . are scant, and parsing the references are arguably far from conclusive." Order on Remand at 5. Although the statutory references do not contain formal definitions, customary tools of statutory interpretation reveal that the references are ultimately unambiguous and conclusive. Accordingly, although the

Order on Remand's measured analysis of the relevant statutes merits respectful consideration, it is also ultimately unpersuasive. In short, the statutes support Interpretation One.

2. Regulatory Provisions

a. Regulatory Interpretation

As with the relevant statutes, the relevant regulatory provisions also do not define the word "assessment" or any derivative forms of the word "assess." Nevertheless, each of five relevant provisions, 28 C.F.R. § 85.1(b), 28 C.F.R. § 85.5(d), 28 C.F.R. § 68.52(c)(8), 8 C.F.R. § 274a.9(d), and 8 C.F.R. § 274a.10(b), points to the clear conclusion that an assessment includes a civil money penalty issued by OCAHO as part of a final order.

For example, 28 C.F.R. § 85.1(b) applies to "civil monetary penalties provided by law within the jurisdiction of the Department of Justice" and that are "assessed" after August 1, 2016. This regulation specifically links penalties assessed after a certain date and penalties within the jurisdiction of the Department of Justice, and the most natural reading of that provision is that the Department of Justice makes the assessment of penalties at issue. Although the clauses about assessment and the jurisdiction of the Department of Justice are separated by another clause regarding the date of the violations for which penalties are being assessed, that separation appears to have been done solely to avoid an unclear or remote antecedent,[16] rather than to put forth an odd construction whereby a Department of Justice regulation refers to a penalty within the jurisdiction of the Department of Justice but not a penalty assessed by the Department of Justice. In short, the least strained and most straightforward, ordinary reading of the plain language of 28 C.F.R. § 85.1(b) is that it applies to penalties assessed by the Department of Justice, which includes OCAHO. *See also* supra note 11 (discussing the Department of Justice's tacit endorsement of the position that OCAHO does assess civil money penalties for purposes of the FCPIAA and 28 C.F.R. § part 85).

Similarly, 28 C.F.R. § 85.5(d), the provision which contains the relevant table for establishing the penalty range for violations of 8 U.S.C. § 1324a, specifically labels the ranges for the "DOJ [*i.e.*, Department of Justice] penalty *assessed*" (emphasis added). OCAHO is a component of the Department of Justice, and no other component of the Department of Justice possesses jurisdiction over violations of 8 U.S.C. § 1324a. Thus, if OCAHO did not assess penalties for violations of 8 U.S.C.§ 1324a, then both the table labels in 28 C.F.R. § 85.5(d) and the table provisions for "Immigration-Related Penalties" for violations of 8 U.S.C. § 1324a would be null, meaningless, or superfluous. Such a reading, which would be mandated by Interpretation Two, is wholly at odds with the normal rules of regulatory interpretation. *see 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)). Thus, not only would Interpretation Two vitiate the parts of 28 C.F.R. §§ 85.1 and 85.5 ostensibly applicable to OCAHO as either *ultra vires* or superfluous based on the statutory construction of the FCPIAA, *see supra* Part IV.A.1, but it would also vitiate those

[16] If 28 C.F.R. § 85.1(b) were written to avoid separating these clauses, it would have read "For civil penalties assessed after August 1, 2016, provided by law within the jurisdiction of the Department of Justice, whose associated violations occurred after November 2, 2015…" leaving the antecedent of the pronoun "whose" unclear and remote from the subordinate clause about violations.

regulatory parts based on principles of regulatory interpretation as well.[17] Such results counsel strongly in favor of Interpretation One.

Relatedly, OCAHO's own regulation regarding the "[c]ontents of final order with respect to unlawful employment of unauthorized aliens," 28 C.F.R. § 68.52(c) (italics omitted), which spells out the potential contents of an OCAHO final order for violations of 8 U.S.C. § 1324a, explicitly references "[c]ivil penalties assessed after August 1, 2016 ," 28 C.F.R. § 68.52(c)(8) (italics omitted) and cross-references 28 C.F.R. § 85.5. Again, the ordinary construction of this language, consistent with Interpretation One. Is that OCAHO may assess civil money penalties for violations of 8 U.S.C. § 1324a and may include such assessments in a final order. Conversely, under Interpretation Two, not only would a reference to "penalties assessed" in an OCAHO regulation be facially odd if OCAHO did not actually assess such penalties, but that entire subsection would largely be a nullity. *See supra* note 17. Consequently, the plain language of 28 C.F.R. § 68.52(c)(8) also favors Interpretation One.

Additionally, as discussed in *Edgemont V*, 17 OCAHO no. 1470d, at 6-7, 8 C.F.R. § 274a.9(d) also uses the word "assess," and although it does not define the term, its language would be largely incoherent under Interpretation Two:

> 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.

Edgemont V, 17 OCAHO no. 1470d, at 7. Again, the only way to give full effect to the language in 8 C.F.R. § 274a.9(d) is to read it consistent with Interpretation One.

Furthermore, 8 C.F.R. § 274a.10(b) makes clear that "[c]ivil penalties may be imposed [*i.e.*, assessed] by [DHS] or an [ALJ] for violations under [8 U.S.C. § 1324a]." The imposition of a civil penalty is an assessment. *See supra* Part IV.A.1. Thus, the reference to an ALJ in this provision—including additional references to an ALJ in subsections (b)(1) and (2)—would be superfluous under Interpretation Two, which is yet another reason to reject that Interpretation. Moreover, the reference to an ALJ in 8 C.F.R. § 274a.10(b)(2) occurs in conjunction with the listing of the minimum and maximum potential penalties for violations of 8 U.S.C. § 1324a(a)(1)(B) occurring after November 2, 2015, which is identical to the penalty range in 28 C.F.R. § 85.5(d) for penalties "assessed" after January 30, 2023.[18] *Compare* Civil Monetary Penalty Adjustments for Inflation, 88 Fed. Reg. 2,175,

[17] For similar reasons, Interpretation Two would also render null or superfluous parts of OCAHO regulations in 28 C.F.R. part 68 that specifically cross-reference 28 C.F.R. § 85.5. *See* 28 C.F.R. § 68.52(c)(8), (d)(2), (e)(3). Again, such an outcome significantly supports Interpretation One.

[18] Both DHS and the Department of Justice make annual inflation-based adjustments to the civil money penalty ranges for violations of 8 U.S.C. § 1324a in their respective regulations, albeit in "idiosyncratic" ways. *See generally United States v. Corrales-Hernandez*, 17 OCAHO no. 1454c, 2 n.2 (2023). Whereas the Department of Justice's regulation includes a chart broken down by various assessment dates, when DHS updates its regulation, it includes only the most recent adjustment, "rather than [an] historic progression based on different assessment [dates]." *Id*.

2,183 (Jan. 13, 2023) (to be codified at 8 C.F.R. pt. 274a), *with* Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. at 5,780 (to be codified at 28 C.F.R. pt. 85). Thus, 8 C.F.R. § 274a.10(b) appears to tacitly imply not only that OCAHO ALJs assess civil money penalties for violations of 8 U.S.C. § 1324a, but that when they do, the date of assessment is the date of the final order because it necessarily occurs after the most recent inflation-based penalty adjustment.

In sum, the language of 8 C.F.R. § 274a.10(b), as well as the language of the other relevant regulations, strongly supports Interpretation One. Interpretation Two runs contrary to the plain language of the regulatory text and would also render many regulatory provisions nugatory. Accordingly, the undersigned concludes that the relevant regulations firmly support the conclusion that OCAHO issues assessments in the form of civil money penalties for violations of 8 U.S.C. § 1324a, that those assessments are issued through final orders, and that the date of assessment for purposes of 28 C.F.R. § 85.5(d) is the date of a particular final order.

b. The Parties' Arguments

Complainant's Brief does not substantively address any relevant regulations—not even its own regulation in 8 C.F.R. § 274a.9(d) which uses the term "assess"—or otherwise engage with the regulatory provisions noted in the Notification of Administrative Review. *Compare* Complainant's Brief at 1-4, *with Edgemont V*, 17 OCAHO no. 1470d, at 3-4, 6-7. Respondent does not address any relevant regulation directly; rather, it simply notes that the Department of Justice "cannot promulgate regulations that conflict with clear congressional intent." Respondent's Brief at 5. Respondent's observation is correct, but there is no conflict between the regulations and the statutes because both support Interpretation One. Additionally, Respondent concedes, in the context of discussing 28 C.F.R. § 85.5, that "it is logical to call the issuance of a civil monetary penalty an assessment," Respondent's Brief at 3, but then Respondent further asserts that "assessment" should not be given its ordinary meaning in 28 C.F.R. § 85.5 because it has become a "term[] of art," *id*. However, as analyzed, *supra*, both the statute and the relevant regulations, including 28 C.F.R. § 85.5, are fully consistent with the ordinary meaning of the term "assessment," and there is no indication that either Congress, in enacting the relevant statutes, or the Department of Justice, in promulgating 28 C.F.R. § 85.5, intended assessment to have a non-standard meaning rendering it a term of art. In sum, these limited arguments by the parties are insufficient to refute the conclusion discussed above that the relevant regulations support Interpretation One.

c. The Order on Remand

The Order on Remand addresses the jurisdictional language in 28 C.F.R. § 85.1 by parsing its grammatical structure, yet the deconstruction of that language offers little support for Interpretation Two. As discussed in Part IV.A.2.a, *supra*, the separation of the terms "assessed" and "jurisdiction" appears to occur to avoid a remote antecedent for the possessive pronoun "whose," rather than to signal a non-ordinary meaning of the word "assessed" or to suggest that the Department of Justice does not assess the penalties at issue. Further, the observation that because "assessed" is used in the past tense in 28 C.F.R. § 85.1, whereas "civil monetary penalties . . . are adjusted" is used in the "passive present tense," there must be a "temporal separation" between the assessment and the penalty appears to misread the point of the regulation by conflating an "assessment" with an "adjustment." Order on Remand at 4. The focus of the regulation, as directed by the FCIAA and the

BBA, is to adjust all civil penalties for inflation, and that process is an annual, ongoing one. Thus, it is unsurprising that the language regarding the adjustment of penalties is phrased in the present tense. However, for any penalty to apply—regardless of any adjustments for inflation—there must have already been an assessment, by definition. *See* FCPIAA § 3(2)(B), (C) (defining a civil penalty as one that, *inter alia*, "is assessed"). Thus, it is equally unsurprising that the language regarding an assessment in 28 C.F.R. § 85.1 is phrased in the past tense. In short, the fact that the regulation distinguishes between a penalty assessment and a penalty adjustment offers little support for Interpretation Two.

Overall, the Order on Remand concludes that the language in 28 C.F.R. § 85.1 "does not exclude the possibility that the event that triggers the date that determines the penalty range could be one not within the jurisdiction of the Department of Justice." Order on Remand at 4. That conclusion might be accurate if 28 C.F.R. § 85.1 were read in isolation, though it would remain an unusual construction to place language regarding both an assessment of penalties and the jurisdiction of the Department of Justice in a Department of Justice regulation if the Department of Justice did not actually assess the penalties at issue. However, that regulation cannot be read by itself, and a review of all relevant statutes and regulations, *see supra* Parts IV.A.1.a and IV.A.2.a, indicates that such a possibility can be excluded. In other words, notwithstanding the Order on Remand's trenchant analysis, the best way—if not also the only way—to read 28 C.F.R. § 85.1 is through the lens of Interpretation One.

The Order on Remand additionally notes that the parties have a "strained" point in interpreting the language of 28 C.F.R. § 68.52(c)(8) as evidence that an assessment and a final order are different things. Order on Remand at 5. As discussed in Part IV.A.1, *supra,* the undersigned does not dispute that a final order and an assessment are separate concepts, but that differentiation does not also mean that an assessment cannot be part of a final order. To the contrary, the use of the term "assessed" in a regulatory subsection listing the possible contents of an OCAHO final order finding violations of 8 U.S.C. § 1324a strongly suggests that such an assessment *is* part of a final order. The undersigned finds the point noted in the Order on Remand even weaker than "strained," and in any event, the Order on Remand's cursory treatment of it does not persuasively overcome a plain-language reading of that subsection under Interpretation One.

Otherwise, the Order on Remand largely elides a discussion of relevant regulations—including the table labels in 28 C.F.R. § 85.5(d) which expressly refer to a "[Department of Justice] penalty assessed"—other than to note that "references to 'assessment' . . . are scant, and parsing the references are arguably far from conclusive." Order on Remand at 5. The Order on Remand does briefly acknowledge the language in 8 C.F.R. § 274a.9(d) regarding a "proceeding to assess administrative penalties," but dismisses it with the curious observation that "there is no further formal process before DHS." Order on Remand at 5 n.5. The import of that observation is unclear for at least two reasons. First, nothing about the language in 8 C.F.R. § 274a.9(d) suggests that the proceeding it references is intended to be confined solely to DHS. To the contrary, both the following subsection, 8 C.F.R. § 274a.9(e), and a subsection in the following regulation, 8 C.F.R. § 274a.10(b), reference an ALJ, indicating that the proceeding mentioned in 8 C.F.R. § 274a.9(d) may include an ALJ. Second, DHS does, in fact, have a further formal process after a NIF is served if, for instance, it issues a final order (Form I-764) because a respondent failed to timely request a hearing, *see* 8 C.F.R. § 274a.9(f); *see also supra* Part IV.A, or because of a settlement with a respondent before a complaint

is filed with OCAHO, *see supra* note 6. Indeed, DHS may even choose to withdraw a NIF altogether and issue a warning letter instead of filing a complaint with OCAHO. *See*, *e.g.*, Defendants' Motion to Dismiss & Memorandum in Support of Motion at Ex. 1, *ProCraft Masonry, LLC v. U.S. Dep't of Just.*, No. 4:23-cv-00393-TCK-JFJ (Dec. 11, 2023) (seeking dismissal of a civil action because DHS has withdrawn a NIF, issued a warning letter, and committed to not filing a complaint with OCAHO). Nevertheless, even if the observation in the Order on Remand were clearer, it is insufficiently persuasive when compared to both the plain language of the regulation itself and the superfluousness issue that would result from reading it consistent with Interpretation Two. In short, notwithstanding the considered arguments presented in the Order on Remand, the applicable regulations all support interpreting the concept of an assessment consistent with Interpretation One.

3. OCAHO Interpretations of an Assessment

As recounted previously, for over thirty years, OCAHO described its imposition of a civil money penalty in a final order as an "assessment." *See Edgemont V*, 17 OCAHO no. 1470d, at 3-4. That usage follows from 8 U.S.C. § 1324a(e)(8), the language of 8 C.F.R. § 274a.9(d), and the ordinary meaning of the word "assessment." Moreover, although OCAHO has had no occasion to interpret the FCPIAA itself until recently, that statute—and its reliance on the concept of an assessment—was enacted in 1990, approximately four years after the statute leading to the creation of OCAHO, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), was enacted and approximately two years after OCAHO began issuing decisions imposing penalties that it labeled as assessments, *see*, *e.g.*, *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 96 (1988) ("Having found violations of the prohibition against continuing to employ aliens knowing they were unauthorized as to those employments, 8 U.S.C. 1324(a)(2), with respect to counts 1, 2, 3, 5, 6 and 7, *assessment* of civil money penalties and a cease and desist order are required as a matter of law." (emphasis added)), *aff'd sub nom*. *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989). There is no indication—and neither the parties nor the Order on Remand identifies any authority to the contrary—that Congress intended to displace OCAHO's interpretation of "assessment" when it passed the FCPIAA, particularly when that enactment was roughly contemporaneous with OCAHO's emergent use of the term "assessment." Moreover, when Congress amended the FCPIAA in 2015 through the BBA, it also made no apparent effort to displace any agency's interpretation of "assessed," including OCAHO's, which had been in place for over twenty-five years at that point. That inaction is strong evidence that OCAHO's interpretation of "assessed" (*i.e.*, Interpretation One) was fully consistent with the FCPIAA and the correct one under that statute and 8 U.S.C. § 1324a(e)(8). *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation omitted)).

To be sure, OCAHO's use of the term "assessment" prior to 2020 was not done in the context of interpreting the FCPIAA or 28 C.F.R. § 85.5 specifically because there was no reason to until after the BBA was enacted. Nevertheless, it would be strange—though, admittedly, perhaps not impossible—for OCAHO to have consistently interpreted "assessment" incorrectly and contrary to a statute for over thirty years only to discover its error in 2020, when that statute became more salient. However, as discussed in detail, *supra*, OCAHO's original interpretation, Interpretation One, remains

the best reading of the relevant statutes and regulations even after considering the new interpretation, Interpretation Two, advanced in *Farias Enterprises*.

Furthermore, neither the Order on Remand nor the parties persuasively refute OCAHO caselaw consistent with Interpretation One. The Order on Remand largely avoids a discussion of prior OCAHO usage of the term "assessment," but suggests that usage was merely semantic without any legal significance. Order on Remand at 8 n.9. However, as noted previously, OCAHO's use of "assessment" prior to 2020 was not merely semantic and would have led to nonsensical or superfluous legal conclusions, particularly in light of the language in 8 C.F.R. § 274a.9(d).[19] *See Edgemont V*, 17 OCAHO no. 1470d, at 4 n.10.

Turning to the positions of the parties, Complainant does not address OCAHO's caselaw at all, other than to cursorily cite to two recent cases, including *Farias Enterprises*, adopting Interpretation Two. Complainant's Brief at 2. Respondent dismisses OCAHO's pre-2020 caselaw as not "particularly instructive" because it was not interpreting 28 C.F.R. § 85.5 or any of the relevant statutes. Respondent's Brief at 3. Respondent's point is well-observed, but as discussed, *supra*, it is ultimately unpersuasive because of the plain language of both the relevant statutes and regulations.

Respondent also attaches no significance to OCAHO's abrupt change in its interpretation of an assessment in 2020, Respondent's Brief at 3, but that argument overlooks an important point. Agencies may certainly change their interpretations of terms, but they "must both acknowledge the change and explain it." *Edgemont III*, 17 OCAHO no. 1470b, at 5; *accord 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))). An agency that neither explains nor acknowledges its change in interpretation violates the APA. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency [between agency interpretations] is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]."). Thus, even if the interpretation of assessment in *Farias Enterprises* were the correct result substantively, its failure both to sufficiently explain its departure from prior interpretations and to acknowledge that departure was an arbitrary and capricious change that likely would have violated the APA if challenged. *See Edgemont V*, 17 OCAHO no. 1470d, at 5 & n.12

[19] The undersigned accepts the Chief ALJ's disclaimer that her prior usage of the term "assessment" was semantic. Order on Remand at 8 n.9. Nevertheless, it is difficult to reconcile that disclaimer with the text of the Order on Remand itself which repeatedly uses "assessment" in reference to the issuance of an order by an OCAHO ALJ. *See*, *e.g.*, Order on Remand at 14 ("V. PENALTY ASSESSMENT"), 21 n. 17 ("OCAHO ALJs have recognized proportionality as a consideration in penalty assessment."), 22 ("Each of the forty-six violations is assessed at $1,230."), 24 ("For the forty-six violations with an applicable penalty range of $224–2,236, the Court assesses a penalty of $1,230 per violation, for a total of $56,580."). If anything, the use of "assessment" as even a semantic descriptor in this context only confirms the ordinary meaning of "assessment" is fully consistent with what an ALJ does in imposing a civil money penalty through a final order.

(raising but not resolving this issue). Accordingly, the nature and abruptness of the change in interpretation in *Farias Enterprises* cautions against adopting Interpretation Two without a further explanation.[20]

The Order on Remand attempted to offer a more "reasoned explanation," *see Edgemont V*, 17 OCAHO no. 1470d, at 6, for that change in interpretations, Order on Remand at 2-10, but for all of the reasons given in this decision, it is ultimately neither legally sufficient nor persuasive. Thus, it, too, would likely be found arbitrary and capricious if challenged. Accordingly, far from being insignificant, the adverse administrative law ramifications of adopting Interpretation Two provide further reason not to do so.[21] In sum, OCAHO's consistent interpretation of an assessment prior to 2020, the abrupt and largely unexplained changed in that interpretation in 2020, and a full analysis of the relevant statutes and regulations all further support the ultimate conclusion that OCAHO assesses civil money penalties for violations of 8 U.S.C. § 1324a for purposes of 28 C.F.R. § 85.5(d).

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[20] For similar reasons, another aspect of Interpretation Two flowing from *Farias Enterprises* would likely be found arbitrary and capricious in violation of the APA if challenged. From its inception, OCAHO has taken the consistent position that DHS penalty calculations are not binding on OCAHO adjudicators and that adjudicators review proposed penalties *de novo*. *See*, *e.g.*, *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011) (noting that "[DHS's penalty] guidelines have no binding effect in this forum, and OCAHO may exercise its authority to review the penalty question de novo" (citations omitted)); *accord Ketchikan Drywall Servs., Inc. v. Immigr. & Customs Enf't*, 725 F.3d 1103, 1115 (9th Cir. 2013) (acknowledging that "[DHS's] preferred method [of civil money penalty calculation] and recommendation is not binding on an [OCAHO] ALJ"); *Visiontron*, 2022 WL 9583754 at *2 (observing that an OCAHO ALJ "properly acknowledged" that DHS's proposed penalties are not binding on OCAHO). However, DHS's penalty calculations are circumscribed by the penalty range it administers. *See* 8 C.F.R. § 274a.10(b). Consequently, if that range is binding on OCAHO, as Interpretation Two holds, then at least one dimension of the penalty calculations would become binding as well, contrary to longstanding OCAHO caselaw. *Farias Enterprises* neither acknowledged nor explained this change in interpretation, making it likely violative of the APA as well if challenged. Moreover, unlike the interpretation of an "assessment," the Order on Remand makes little effort to explain this change other than to agree that it seems "[a]t first glance . . . odd" and then dismiss it with the observation that an ALJ "redetermine[es] . . . DHS' assessment" rather than making an ALJ's own assessment. Order on Remand at 8. Even if this observation is not simply a matter of semantics, *see Edgemont V*, 17 OCAHO no. 1470d, at 7 n.15, it appears insufficiently explanatory under the APA to justify a change from OCAHO's prior interpretations regarding the non-binding nature of DHS penalty calculations. Consequently, these defects further caution against adopting Interpretation Two as OCAHO's prevailing interpretation.

[21] OCAHO's shifting interpretations also raise questions as to what, if any, deference should be accorded to those interpretations by federal courts. Assuming the relevant statutes were ambiguous, OCAHO's interpretation would be subject to deference only if it were not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984). Even if *Chevron* deference remains a valid doctrine in the future, *see Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (granting a petition for writ of certiorari to consider whether the Supreme Court should overrule, or at least clarify, *Chevron*); Petition for Writ of Certiorari, *Loper Bright Enters.*, No. 22-441, 2022 WL 19770137 (Nov. 10, 2022); *see also Relentless, Inc. v. Dep't of Commerce*, No. 22-1219 --S. Ct.--, 2023 WL 6780370 (Oct. 13, 2023) (same); Petition for a Writ of Certiorari, *Relentless, Inc.*, No. 22-1219, 2023 WL 4108515 (June 14, 2023), Interpretation Two would not appear to warrant deference under that standard because it is, at the least, contrary to the FCPIAA and 8 U.S.C. § 1324a(e)(8) for the reasons noted, *supra*. Similarly, even if the relevant regulations were ambiguous, "an agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). Thus, Interpretation Two would warrant less deference—if any at all—than Interpretation One. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019) (noting that a new agency interpretation which does not reflect "fair and considered judgment" does not warrant deference at all (quotations omitted)). To be clear, both the relevant statutes and regulations are unambiguous. *See supra* Parts IV.A.1.a and IV.A.2.a. Thus, questions of federal court deference are not necessarily germane to determining the meaning of an "assessment." Nevertheless, assuming, *arguendo*, the relevant statutes and regulations were ambiguous, the lack of deference that Interpretation Two would warrant is yet another reason to decline to adopt it.

4. Additional Considerations

a. Other Views of an Assessment by OCAHO

As discussed previously, federal courts, parties in OCAHO proceedings, and notable secondary sources have all described or treated a final order issued by an OCAHO ALJ imposing civil money penalties as an assessment. *See Edgemont V*, 17 OCAHO no. 1470d, at 3-5. Although these descriptions are not necessarily dispositive of the meaning of an "assessment," they nevertheless reinforce the ordinary meaning of the term and are fully consistent with Interpretation One. Moreover, neither party addressed these points in its brief, and Complainant did not attempt to reconcile its current position in favor of Interpretation Two with its prior position in favor of Interpretation One or its current public position, which also does not explicitly endorse Interpretation Two. *See Edgemont V*, 17 OCAHO no. 1470d, at 5 n.11. As such, these descriptions provide additional, albeit modest, support for Interpretation One over Interpretation Two.

b. Potentially Analogous Assessments

The undersigned previously considered potentially analogous situations involving assessments to better understand the meaning of that term for OCAHO. *See Edgemont III*, 17 OCAHO no. 1470b, at 9. The parties' briefs ignored those situations, but the Order on Remand addressed them at some length pointing out multiple, ostensible weaknesses in them. Order on Remand at 6-8. The Chief ALJ's points are well-grounded, and the analogies should not be pushed too far. Nevertheless, I find they do offer some, albeit perhaps minimal and imperfect, insight into how to define an assessment for purposes of 28 C.F.R. § 85.5(d).

Beginning with the analogy to tax law, *Edgemont III*, 17 OCAHO no. 1470b, at 9, the undersigned acknowledged that it was far from perfect, but that its definition in that context as an "official recording of liability that triggers levy and collection efforts," *id*. (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), generally tracked the concept of a civil money penalty issued through an administratively final order. Indeed, there can be no levy or collection efforts of a civil money penalty until it is final, and for cases which have proceeded to OCAHO and not been dismissed, the penalty is only final when an ALJ issues a final order (or when the CAHO does on review).

To be sure, the Order on Remand pointed out that a tax assessment is not genuinely final because it may be challenged in federal court. Order on Remand at 6. That observation is surely correct, but the point of the analogy was not to stress its complete finality at the end of all possible federal court challenges—indeed, both DHS and OCAHO final orders may also be challenged in federal court, *see*, *e.g*., 8 U.S.C. § 1324a(e)(8)—but rather its finality at the point when collection efforts may begin, a point which is roughly similar to the administratively final nature of a final order issued by DHS or OCAHO. If a tax assessment by the Internal Revenue Service (IRS) goes unchallenged, it becomes final in the same way an unchallenged administratively final order issued by either DHS or OCAHO becomes final, which suggests that an OCAHO final order may constitute an assessment. Again, this analogy is hardly dispositive, and as the Chief ALJ discussed, neither an OCAHO final order nor a DHS final order is wholly analogous to a tax assessment for a myriad of reasons. Order on Remand at 6-7. Nevertheless, at a conceptual level, an administratively final order issued by either DHS or OCAHO and containing an order imposing civil money penalties functions

similarly to a tax assessment by the IRS.[22]

The undersigned also previously discussed the few federal court interpretations of 28 C.F.R. § 85.5(d), which the Chief ALJ found unenlightening because those cases dealt with distinguishable procedures and a distinguishable law, namely the False Claims Act, codified at 31 U.S.C. §§ 3729 – 3733. *Compare Edgemont III*, 17 OCAHO no. 1470b, at 9 & n.14, *with* Order on Remand at 7-8. The Chief ALJ is correct that civil money penalties for FCA violations are imposed—*i.e.*, assessed—in the first instance by a federal judge, and there is no agency-proposed penalty in the same sense[23] as there is for violations of 8 U.S.C. § 1324a. Order on Remand at 8. Yet, the conceptual point of the discussion of this caselaw was that there appears to be no inherent legal issue with a judge "assessing" a civil money penalty pursuant to 28 C.F.R. § 85.5(d) rather than an enforcement agency. Indeed, as the Chief ALJ noted, Order on Remand at 8 n.8, OCAHO unquestionably assesses civil money penalties for violations of 8 U.S.C. § 1324b, but there is no serious argument that such an assessment is legally incorrect or otherwise improper, *see infra* Part IV.A.5.a n.31. In other words, a conclusion that OCAHO can only assess penalties in circumstances where no other possible agency could does not actually undermine the conclusion that OCAHO can also issue assessments in other circumstances where other agencies can as well, consistent with Interpretation One. Moreover, as discussed in Part IV.A.1, *supra*, the relevant statutory structure does not support an interpretation that OCAHO can only assess a civil money penalty in cases where no other agency possibly could. Nevertheless, the Chief ALJ's broader point about the FCA cases is well-taken, and those cases ultimately provide only limited support for either Interpretation in the context of this case.

5. Policy Considerations

a. Relevance and Analysis

As discussed, *supra*, although the relevant statutes lack a specific definition of the term "assessed," they are nevertheless clear that OCAHO has authority to assess a penalty for violations of 8 U.S.C. § 1324a and that such assessments are not limited solely to DHS. Therefore, the statutes—further buttressed by the plain language of the relevant regulations—resolve the central question of the meaning of an "assessment" in favor of Interpretation One. Generally, "[a]n inquiry into statutory interpretation 'begins with the statutory text, and ends there as well if the text is unambiguous.'" *United States v. Mar-Jac Poultry, Inc*., 12 OCAHO no. 1298, 31 (2017) (quoting *BedRoc Ltd., LLC*

[22] The Chief ALJ correctly pointed out that OCAHO has previously analogized a NIF—and not a final order—to an IRS tax assessment in *United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 889 (1997). Order on Remand at 6-7. However, that discussion occurred in the context of determining when the statute of limitations for violations of 8 U.S.C. § 1324a begins to run for purposes of 28 U.S.C. § 2642 and involved a debate between whether the date of service of a NIF or the date of filing a complaint with OCAHO was "an action, suit or proceeding for the enforcement of any civil fine," 28 U.S.C. § 2462. *See Curran Eng'g Co.*, 7 OCAHO no. 975, at 889-90. Thus, that discussion is considerably distinguishable from the instant discussion of the meaning of the term assessment and, accordingly, has limited analytical value.

[23] For FCA violations, the Department of Justice will generally propose a civil money penalty before a district court judge makes the final assessment. *See United States ex rel. Cushing v. Shah*, No. 8:19-cv-2997-VMC-TGW, 2023 WL 6940267, *9 (M.D. Fla. Aug. 23, 2023) ("As indicated, the government requests a fine of $11,181.00 per false claim be imposed. That amount is the minimum amount in the civil penalty range [pursuant to 28 C.F.R. § 85.5(d)] . . . I recommend that the requested civil penalties be assessed against the defendants."). Thus, in broad strokes, the process is conceptually similar to the proposal of a penalty by DHS in a NIF before an OCAHO ALJ makes a final assessment. However, the processes are too dissimilar to draw dispositive weight from the comparison for purposes of the instant case.

v. United States, 541 U.S. 176, 183 (2004) (plurality opinion)). Further, "when statutory language is sufficiently clear, there is no reason to examine additional considerations of policy," *id*., because "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis in original). In short, the undersigned is tasked with interpreting statutory and regulatory language rather than with weighing the policy wisdom of competing definitions of the term "assessed." *Cf. United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."). As a result, there is no reason to delve into the policy implications of the competing interpretations once the statutory language has resolved the issue. *See, e.g.*, *Corrales-Hernandez*, 17 OCAHO no. 1454e, at 14 (discussing the limitations of policy arguments in the context of questions of statutory interpretation).

Nevertheless, because the Order on Remand raised policy considerations as a relevant subject for defining an assessment, the undersigned will more fully address them. However, at most, the policy considerations either favor Interpretation One or are inconclusive and are certainly not compelling or persuasive enough to override the unambiguous language of both the relevant statutes and regulations.

Congress ascribed three purposes to the FCPIAA: (1) regular adjustments due to inflation to civil money penalties; (2) maintaining a deterrent effect of the penalties and promoting compliance with the law; and (3) improving the collection of penalties. FCPIAA § 2(b). Neither Interpretation One nor Interpretation Two has any significant connection to the first purpose, nor would either Interpretation directly affect the actual collection of penalties. However, whether either Interpretation offers more deterrence or promotion of compliance with the law warrants closer analysis.

The Chief ALJ's decision indicates that Interpretation One would have more deterrent effect than Interpretation Two but raised concerns that the increased deterrence would be more burdensome to respondents, would also deter them from exercising their rights to a hearing before OCAHO, and would potentially raise due process concerns. Order on Remand at 9-10. On the surface, these concerns are worthy of strong consideration; however, upon closer review, they suffer from multiple conceptual flaws which undermine their persuasiveness.

For instance, the Order on Remand posits that Interpretation One would be more burdensome to respondents because it lacks a fixed and determinable—or otherwise easily ascertained—date of assessment because the date of an OCAHO final order is unknown at the time a NIF is served. *See id.* Yet, while the date of initial service of a NIF is fixed, the initial penalty determination—*i.e*., the ostensible "assessment" under Interpretation Two—by DHS is not and may be amended as proceedings progress. *See Edgemont V*, 17 OCAHO no 1470d, at 9 n.19. Therefore, if DHS's proposed penalty were an "assessment," and if DHS may offer a new "assessment" subsequent to serving a NIF, *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), then the date of that new assessment, which is neither fixed nor easily determinable, would appear to create the same alleged burden for respondents as using the date of an OCAHO final order as the date of assessment would.

More saliently, all three policy considerations identified in the Order on Remand also flow

from a pair of intertwined, flawed premises, namely that a potentially increased penalty *range* necessarily and automatically requires an increased *actual* penalty to be imposed and that ALJs lack discretion in determining a civil money penalty to account for unique, case-specific circumstances. These underlying flaws erode the persuasiveness of the policy considerations raised in the Order on Remand and, ultimately, prevent them from unequivocally supporting Interpretation Two.

For example, the Order on Remand raised concerns that using the date of an OCAHO final order as the date of assessment would be overly burdensome to respondents because it would be "depend[e]nt upon factors that the [respondent] cannot foresee and cannot control, such as how long it takes the complainant to file the complaint, how long the ALJ will take to decide the case, and whether there will be CAHO review." Order on Remand at 9 (footnote omitted). This concern vastly understates an ALJ's broad discretion in determining a civil money penalty, including discretion to account for excessive delays in proceedings that are not the fault of a respondent. *See Edgemont V*, 17 OCAHO no. 1470d, at 9 n.18; *Edgemont III*, 17 OCAHO no. 1470b, at 9 n.14.

To be clear, OCAHO conducts its proceedings "expeditiously," and parties are required to "make every effort at each stage of a proceeding to avoid delay." 28 C.F.R. § 68.1. Thus, in a typical case, delay will not be a relevant factor in assessing a civil money penalty, even where the penalty range is updated at least once between the date the NIF was served and the date of the OCAHO final order. However, in situations where, for example, complainant waited nearly three-and-a-half years after serving a NIF to file a complaint, *see, e.g.*, *United States v. Dubose Drilling, Inc.,* 18 OCAHO no. 1487, 1 (2023), or where the penalty range has changed four times since the NIF was served, *see infra* Part IV.B., an ALJ certainly has discretion to account for those delays in determining a reasonable civil money penalty. Although an ALJ may not simply and automatically use any purported delay in proceedings as an excuse to reduce a civil money penalty, delay may nevertheless become a relevant consideration in appropriate cases.[24] Consequently, because an ALJ may ameliorate the effects of an egregious delay in appropriate cases, the purported burden to respondents in using the OCAHO final order date as the date of assessment is not quite as great as the Order on Remand asserts.[25]

The Order on Remand additionally asserted that adhering to Interpretation One "would have

[24] ALJs should also be mindful that delay in proceedings may already factor into consideration of a penalty in other ways. For instance, a respondent's "financial health, the economy, the [respondent's] ability to pay the fine, and the potential effect of the fine on the [respondent] are all appropriate . . . factors to be considered" in assessing a penalty, *United States v. Kobe Sapporo Japanese, Inc*., 10 OCAHO no. 1204, 6 (2013), and each one may change significantly during the course of a delayed proceeding. Similarly, OCAHO generally evaluates these and other penalty factors, such as the size of a respondent's business, *see* 8 U.S.C. § 1324a(e)(5), at the time of the ALJ's final order, rather than at the time DHS conducts its investigation or serves the NIF. *Cf. United States v. Niche, Inc*., 11 OCAHO no. 1250, 10 (2015) ("As set forth in relevant OCAHO precedent, the 'size of the business' is determined based on the current business size at the time the [ALJ] assesses the penalty. Business size is not assessed during any former period of time in the business' history as it would be difficult to account for fluctuations in the economy, business contracts, employee numbers, and revenues."). Thus, a delay in proceedings may already aid a respondent in mitigating a penalty, and ALJs should be cautious in determining whether such delay should necessarily be double-counted as mitigation in assessing a penalty.

[25] As the Order on Remand notes, review by the CAHO may also delay proceedings, resulting in a change to the penalty range in 28 C.F.R. § 85.5(d) in the interim. Order on Remand at 9. Because no change in the applicable penalty range actually occurred during any CAHO review in the instant case, the undersigned has no occasion to consider the impact of that particular type of delay in assessing a penalty. Nevertheless, I note that the CAHO generally possesses the same authorities as an ALJ unless limited by notice or rule, *see* 5 U.S.C. § 557(b), and, presumably, may account for delays the same way an ALJ can.

the undesirable side effect of deterring businesses from seeking to exercise their due process rights under the statute." Order on Remand at 10. However, as noted in *Edgemont V*, 17 OCAHO no. 1470d, at 8-9, there is no empirical, logical, or legal support for this assertion or the conclusion that the possibility of an increased penalty range will deter a respondent from exercising its statutory right to a hearing to contest the proposed penalty in a NIF. More specifically, this assertion incorrectly conflates the penalty range with the final penalty actually imposed, markedly understates the breadth of an ALJ's discretion—almost to the point of trivializing it—in actually imposing such a penalty, and misapprehends the rational, or strategic, behavior of respondents.

Although the date of assessment for purposes of 28 C.F.R. § 85.5(d) defines the applicable civil money penalty range, it does not dictate the actual penalty imposed by an ALJ unless the ALJ elects to impose either a minimum or maximum penalty. *See Edgemont V*, 17 OCAHO no. 1470d, at 8. Further, an ALJ has broad discretion in determining a penalty for violations of 8 U.S.C. § 1324a, and there is no set formula for making that determination, as long as the ALJ considers the factors in 8 U.S.C. § 1324a(e)(5) when assessing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B). *See generally id*. at 9. Although an ALJ may choose to use the midpoint of the penalty range as a starting point, there is no legal requirement to do so, *see id*.; thus, there is also no legal requirement for the range to influence the ALJ's calculations unless the penalty will be the minimum or maximum.

Moreover, because of an ALJ's broad discretion in assessing a penalty, in almost every case (unless DHS proposes a fine in the NIF at the minimum of the penalty range[26]), it will be rational[27] for a respondent to seek a hearing before OCAHO in order to request an ALJ to exercise that discretion and reduce the fine—even if the applicable penalty range may increase in the interim.[28] *See id*. at 8-9. In other words, it is both the amount of the proposed penalty in a NIF and the broad

[26] Because OCAHO cannot lower a fine below the statutory minimum once a violation has been established, *see United States v. Applied Comput. Tech.*, 2 OCAHO no. 367, 524, 529 (1991), if DHS proposes a minimum fine in the NIF, it would only be rational for a respondent to request a hearing before OCAHO if it has viable defenses to some or all of the charges of violations of 8 U.S.C. § 1324a, *see Edgemont V*, 17 OCAHO no. 1470d, at 8-9. In such a case, not only could a respondent obtain a dismissal of some or all of the charges—and, thus, reduce or eliminate the penalty proposed in the NIF—but it could, in certain cases, also obtain attorney's fees from DHS. *Id*. at 9. Moreover, even if a respondent did request a hearing on a minimum penalty without any viable defenses, it could still avoid the impact of any changes to the penalty range by either abandoning or withdrawing the request for hearing—and thereby causing DHS to issue a final order based on the NIF, *see United States v. Greif,* , 10 OCAHO no. 1177, 2-3 (2013)—once it became apparent that the ALJ could not lower the penalty or settling with DHS for the original amount and dismissing the case, *see* 28 C.F.R. § 68.14.

[27] The undersigned recognizes that not all respondents behave rationally, particularly when they may be ignorant of the law. However, formulating a policy interpretation to account for either knowledge an entity does *not* have or an entity's irrational behavior is a fundamentally impossible task. Moreover, even if that task were possible, such policy considerations would not be sufficient or persuasive enough to override the unambiguous statutory and regulatory language discussed, *supra*, in determining the meaning of "assessed" in 28 C.F.R. § 85.5(d).

[28] Even if DHS proposes a penalty at the maximum end of the range, it is still generally rational for a respondent to request a hearing in order to argue to the ALJ that the penalty is excessive and should be lowered, even if the maximum end of the range may increase due to inflation during the proceeding. It runs counter to both logic and OCAHO's recent history, *see Edgemont V*, 17 OCAHO no. 1470d, at 8-9, to believe that a respondent facing a fine at the maximum end of the spectrum would forgo the opportunity to request an ALJ to lower it simply because the possibility exists that the maximum end of the range may increase during the pendency of the ALJ proceeding. Further, if it became apparent that the ALJ both would not lower the proposed penalty and would be required to impose a higher maximum penalty due to intervening adjustments in 28 C.F.R. § 85.5(d), the respondent could still avoid that result by abandoning or withdrawing the request for hearing or settling with DHS for the original amount. *See supra* note 26.

discretion of ALJs in assessing civil money penalties—particularly the discretion to lower the penalty amount from that contained in the NIF—that affect whether a respondent requests a hearing when served with a NIF, rather than the potential penalty range.[29] Indeed, regardless of any inflation-based adjustments to the penalty range, respondents have *always* faced the possibility that an ALJ may increase the penalty from what DHS has proposed, *see Edgemont III*, 17 OCAHO no. 1470b, at 8 n.13, and there is simply no evidence that possibility has deterred any respondent from exercising its statutory right to a hearing under 8 U.S.C. § 1324a(e)(3). In short, the Order on Remand's assertion that Interpretation One would deter respondents from requesting a hearing before OCAHO is unsupported and, accordingly, unpersuasive.

Finally, the due process considerations raised by the Order on Remand do not undermine Interpretation One or favor Interpretation Two. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Respondents facing charges of violating 8 U.S.C. § 1324a are provided with notice of the charges against them and an opportunity for a hearing. *See* 8 U.S.C. § 1324a(e)(3). Further, the FCPIAA, 8 U.S.C. § 1324a, and 28 C.F.R. § 85.5 all provide notice of the maximum penalties respondents may face for such violations. Moreover, through precedential OCAHO caselaw, respondents have had notice that an ALJ may increase the penalty from what DHS has proposed for many years. *See Edgemont III*, 17 OCAHO no. 1470b, at 8 n.13. Overall, nothing about Interpretation One deprives any respondent of either notice or an opportunity to be heard; thus, it does not raise due process concerns[30] sufficient to disfavor it below Interpretation Two.[31]

In sum, the policy considerations identified in the Order on Remand do not clearly favor Interpretation Two and are, at most, equivocal between the two Interpretations. Moreover, because

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[29] As a notable illustrative example, in the instant case, there is no evidence—and Respondent has not argued—that Respondent would not have requested a hearing if it had known that the penalty range would increase before OCAHO issued a final order. To the contrary, notwithstanding the increase in that range, OCAHO reduced the Respondent's penalty from $90,387.20 proposed by DHS to $56,580. *Compare* Complaint, Ex. A *with* Order on Remand at 22. It strains credulity to believe that Respondent regrets requesting a hearing even though its potential penalty range increased over the course of the OCAHO proceeding.

[30] To be clear, "OCAHO adjudicators have an inherent obligation to ensure due process and fundamental fairness are observed in all cases." *United States v. Koy Chinese & Sushi Rest*., 16 OCAHO no. 1416d, 4 (2023). Thus, to the extent that truly unique or unforeseen circumstances in a case may raise due process concerns under Interpretation One and those concerns are timely raised by a respondent, ALJs possess the authority to address such concerns to ensure due process is maintained.

[31] Parenthetically, the undersigned also notes that the treatment of a civil money penalty assessment in cases arising under 8 U.S.C. § 1324b also belies the policy arguments that using the OCAHO final order date as the date of assessment for purposes of 28 C.F.R. § 85.5(d) is unduly burdensome or works some due process hardship on respondents. In cases arising under 8 U.S.C. § 1324b, it is undisputed that the OCAHO final order date is the date of assessment for purposes of 28 C.F.R. § 85.5(d) if a civil money penalty is imposed. *See*, *e.g*., *Ogunrinu*, 13 OCAHO no. 1332j, at 24 ("Accordingly, the undersigned finds that the date of assessment for civil penalties in a § 1324b case is the date of the court's order imposing civil penalties because that is the first date that the court determines that a penalty is appropriate and concretely describes what the penalty will be."). In such situations, respondents face similar alleged concerns about delay, uncertainty, and lack of notice regarding the penalty range as the Order on Remand asserts respondents in proceedings under 8 U.S.C. § 1324a would face under Interpretation One. Yet, there has been no suggestion anywhere—and none was raised by either party or in the Order on Remand—that OCAHO's use of its final order date as the date of assessment under 28 C.F.R. § 85.5(d) in such cases violates due process or otherwise places too great a burden on a respondent.

Interpretation Two would lead to problematic readings of relevant statutes and regulations, *see supra* Parts IV.A.1.a and IV.A.2.a, Interpretation One would be more effective at promoting compliance with the law. Thus, even if policy considerations were relevant in light of the unambiguous statutory language, they would not favor Interpretation Two.

b. The Parties' Arguments

Complainant's Brief does not advance any policy arguments in favor of Interpretation Two. *See* Complainant's Brief at 1-4. Respondent's Brief also does not advance any policy arguments in favor of Interpretation Two because it asserts that the statutory text clearly supports that Interpretation. *See* Respondent's Brief at 5-6 ("Additionally, any policy considerations are irrelevant in the face of the clear statutory text . . . . Policy considerations . . . are best left to the political branches promulgating statutes not courts and litigants without the benefit of public input and sociological studies."). Although Respondent's point regarding the relevance of policy arguments is well-taken, the foundational premise of that point is mistaken. As discussed in Part IV.A.1, *supra*, the relevant statutory language clearly supports interpretation One. Accordingly, the parties have not presented any persuasive policy arguments in favor of Interpretation Two.

6. Conclusion

At bottom, the unambiguous language of the relevant statutes and regulations, ordinary and plain-language definitions of "assessment," OCAHO's consistent historic practice for over thirty years, and other (albeit relatively weaker) considerations all support Interpretation One. Further, policy considerations do not undermine that Interpretation or favor Interpretation Two enough to overcome the clear statutory and regulatory language. Consequently, the undersigned holds that for purposes of 28 C.F.R. § 85.5(d), OCAHO does assess civil money penalties, those penalties are assessed through the issuance of a final order, and the date of assessment is the date of the OCAHO final order.[32] Accordingly, the Order on Remand's conclusion to the contrary was in error, the penalty assessment in the instant case occurs after January 30, 2023, and the correct penalty range is between $272 and $2701 per each of Respondent's violations of 8 U.S.C. § 1324a.

B. The Appropriateness of the Civil Money Penalty for Respondent's Violations of 8 U.S.C. § 1324a(a)(1)(B)

In the Order on Remand, the Chief ALJ determined that the applicable range of civil penalties was a minimum of $224 and a maximum of $2,236 per violation. *See* Order on Remand at 11. In setting the amount of the penalty for each of the violations, the Chief ALJ evaluated the five statutory

[32] This holding also necessarily reiterates OCAHO's longstanding position that no aspect of DHS's civil money penalty calculation is binding on OCAHO adjudicators. Additionally, such a holding avoids the necessary implication of Interpretation Two that DHS's penalty range calculations would be binding on the Attorney General in reviewing cases under 8 U.S.C. § 1324a, *see* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.55, even though the Service's penalty range calculations were unquestionably *not* binding on the Attorney General previously and there is no evidence Congress intended to give DHS authority in this context that was not previously possessed by the Service. Thus, that implication would appear to conflict with both the Attorney General's authority to make "controlling" determinations on questions of immigration law, *see* 8 U.S.C. § 1103(a)(1), and the Attorney General's general retention of authorities in existence prior to the creation of DHS, *see* 8 U.S.C. § 1103(g)(1). Avoiding the potentially problematic scenario in which a DHS Special-Agent-in-Charge purports to bind the Attorney General to a position in an immigration proceeding through the issuance of a NIF is still another reason for OCAHO to decline to adopt Interpretation Two.

factors set forth in 8 U.S.C. § 1324a(e)(5), *see* Order on Remand at 14-19, along with the non-statutory factors of inability to pay and proportionality, *see id.* at 19-22. With regard to the five statutory penalty factors, the Chief ALJ treated the Respondent's small business size as a mitigating factor, *see id.* at 14, found the seriousness of the violations to be an aggravating factor, *see id.* at 17, and treated the other three statutory factors as neutral, *see id.* at 16, 19. Analyzing the non-statutory factor of inability to pay, the Chief ALJ found that Respondent had not met its burden to show that it was unable to pay the proposed penalty; accordingly, the Chief ALJ declined to mitigate the penalty based on that factor. *Id.* at 21. Finally, on the question of proportionality, the Chief ALJ determined that the Complainant's proposed penalty was disproportionate to the violations at issue in light of the factors present in the case. *Id.* Accordingly, the Chief ALJ began her calculation of the penalty in the middle of the penalty range she believed to be applicable and adjusted it based upon the above-mentioned factors, resulting in a penalty of $1,230 per violation, for a total penalty of $56,580 for the forty-six violations. *Id.* at 21-22.

In their briefs on administrative review, neither party takes issue with the Chief ALJ's approach to determining the specific amount of the penalty within what she identified as the applicable penalty range, though they argue for different results in terms of the overall penalty. Complainant asserts that if the CAHO "disagrees with the Chief ALJ on the assessment date of the penalty," the CAHO should nevertheless "not change the methodology that the Chief ALJ utilized." Complainant's Brief at 3 (also arguing that the CAHO "should remain consistent with the non-erroneous method of the Chief ALJ"). Complainant further argues that if the CAHO were to determine that the applicable civil penalty range is a minimum of $272 and a maximum of $2,701 per violation, then the CAHO should follow the Chief ALJ's approach and start with the middle of the range before mitigating and aggravating appropriately. *Id.* According to Complainant, application of the Chief ALJ's methodology within the higher penalty range should result in a penalty of $1,486.50 per violation, for a total penalty of $68,379. *Id.* at 4.

Respondent similarly does not take issue with the Chief ALJ's methodology for determining the ultimate penalty amount, arguing that the Chief ALJ's final penalty of $56,580 "remains appropriate irrespective of [the] date of the 'assessment' under 28 C.F.R. § 85.5 as the penalty is within the regulatory range applicable at the time of the NIF and the regulatory range in effect today." Respondent's Brief at 2. Respondent therefore argues that the Chief ALJ's penalty of $56,580 "should not be adjusted irrespective of the outcome of this administrative review." *Id.* at 3.

As I observed in the Notification of Administrative Review, "OCAHO ALJs have broad discretion in imposing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B)." *Edgemont V*, 17 OCAHO no. 1470d, at 10 (citations omitted). "Although the statutory factors [at 8 U.S.C. § 1324a(e)(5)] must be considered in every case, there is otherwise no single official method mandated for calculating civil money penalties." *United States v. Golden Emp. Grp., Inc.*, 12 OCAHO no. 1277, 2 (2016); *see also United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013) ("OCAHO caselaw has long recognized that there is no single preferred method of calculating penalties."). Generally, "[t]he principal focus must be on the reasonableness of the result achieved, not the particular methodology employed to reach that result," *Fowler Equip. Co.*, 10 OCAHO no. 1169, at 6, and "proportionality and reasonableness are the touchstones in imposing a civil money penalty for violations of 8 U.S.C. § 1324a[,]" *Edgemont V*, 17 OCAHO no. 1470d, at 10.

In light of this broad discretion possessed by OCAHO ALJs in setting penalty amounts, the CAHO has generally been reluctant to disturb an ALJ's reasonable penalty determination on administrative review, despite possessing *de novo* review authority. *E.g.*, *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 3 (2014) ("As long as the ALJ has duly considered each of the required statutory factors and the final penalty assessment is just and reasonable, that penalty assessment need not be disturbed."); *United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 5 (2013) (decision by the CAHO declining to disturb the ALJ's penalty assessment where the CAHO found that "[t]he ALJ complied with her obligation under the statutory in considering the history of previous violations and the required statutory factors"); *United States v. Banafsheha*, 3 OCAHO no. 525, 1266 (1993); *United States v. Wu*, 3 OCAHO no. 434, 424 (1992).

Moreover, in several cases, the CAHO has declined to modify an ALJ's ultimate penalty determination even where the CAHO modified the ALJ's conclusions with respect to particular penalty factors. For instance, in *United States v. Banafsheha*, the CAHO found that the ALJ had improperly enhanced the civil money penalty in the case based on the respondent's misconduct in the litigation. 3 OCAHO no. 525, at 1270-71. However, "applying the appropriate de novo standard of review," the CAHO nevertheless found that there was "ample justification for the enhanced fine levels without considering the misconduct during the litigation[,]" and accordingly declined to modify the overall penalty assessment. *Id.* at 1271. Similarly, in *United States v. Wu*, the CAHO modified the ALJ's decision with respect to the ALJ's analysis of the "seriousness of the violations" penalty factor, but left intact the penalty imposed by the ALJ because the ALJ had, "in fact, increased the civil penalty from the statutory minimum." 3 OCAHO no. 434, at 426.

Complainant argues in its brief that, if the date of assessment is determined to be the date of OCAHO's final order and therefore that a higher penalty range applies, the penalty should be readjusted to reflect the mid-point of the higher range. *See* Complainant's Brief at 3-4. Because the undersigned applies a *de novo* standard of review, *see supra* Part II, and there is no compulsory method for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B) beyond the mandatory consideration of the five statutory factors in 8 U.S.C. § 1324a(e)(5), the undersigned is not bound to apply the same methodology for penalty calculation on review as an ALJ did. *See United States v. Senox Corp*., 11 OCAHO no. 1219, 4 (2014) ("OCAHO case law has long recognized there is no one single permissible method for calculating penalties."); *cf. Edgemont V*, 17 OCAHO no. 1470d, at 9 (noting there is no legal requirement to first calculate a penalty range and then use the midpoint as a baseline in determining the overall penalty). Thus, the undersigned is not required to impose a higher penalty in this case solely because the Chief ALJ erred in determining the date of assessment, and Complainant has asserted no other basis for assessing a higher penalty than the one determined by the Chief ALJ.

Here, I have reviewed *de novo* the Chief ALJ's analysis and application of both the statutory and non-statutory penalty factors along with all relevant portions of the record. Based upon that review, I find no error in the Chief ALJ's analysis and application of each of the relevant penalty factors. Moreover, despite concluding, *supra*, that the applicable penalty range is higher than that used by the Chief ALJ in calculating the penalties, I find that the ultimate penalty set by the Chief ALJ is nevertheless reasonable and proportional even under the higher penalty range, particularly when considered in light of all the facts and circumstances of the case.

In doing so, I also note that through no apparent fault of the parties, this case has been pending before OCAHO for nearly four years, and the applicable penalty range has been adjusted four times since Respondent was first served with a NIF. Considering the unique circumstances of this particular case further reinforces the conclusion that there is no basis to increase the penalty assessment from that made by the Chief ALJ. *See Edgemont III*, 17 OCAHO no. 1470b, at 9 n.14 (noting 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"). Furthermore, increasing the penalty on administrative review would not advance the overall goal of civil money penalties—that 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." *Fowler Equip. Co.*, 10 OCAHO no. 1169, at 6 (citations omitted). The overall penalty set by the Chief ALJ of $56,580 appears sufficient to promote Respondent's future compliance with the employment eligibility verification requirements and is reasonable and appropriate even under the correctly-determined penalty range. Accordingly, I affirm the total penalty assessed by the Chief ALJ and affirm the Chief ALJ's reasoning and conclusions with respect to each of the enumerated penalty factors.

C. Dismissal Pursuant to 28 C.F.R. § 68.14

In their briefs on administrative review, both parties expressly state that they have not reached a settlement in this case. *See* Complainant's Brief at 4; Respondent's Brief at 1-2. More specifically, "[d]espite agreeing on [the] discrete legal issue [of determining the date of assessment], the Parties have been unable to reach a settlement on the issue of the ultimate penalty in the case." Respondent's Brief at 1-2. It is clear from the parties' most recent filings that they have not reached a settlement in this case, even an informal one, and they have certainly not accomplished the requisite "meeting of the minds" required for settlement. *Cf. Heath v. Springshine Consulting & Anonymous Emp.*, 16 OCAHO no. 1421b, 4 (2023) (concluding that a settlement agreement was reached where "the parties had a meeting of the minds . . . regardless of whether the written instrument was valid").

Moreover, as discussed in the Notification of Administrative Review, the "specific regulatory requirements in 28 C.F.R. § 68.14 must be followed in order to effectuate a settlement" in this forum. *Edgemont V*, 17 OCAHO no. 1470d, at 11. Under OCAHO's regulations, the parties may effectuate a settlement agreement either by submitting to the ALJ an agreement containing consent findings and a proposed decision and order, *see* 28 C.F.R. § 68.14(a)(1), or by notifying the ALJ that the parties "have reached a full settlement and have agreed to dismissal of the action," *see* 28 C.F.R. § 68.14(a)(2).[33]

It was clear at the time of the Notification of Administrative Review that the parties had not met the requirements for settlement under § 68.14(a)(1), *see Edgemont V*, 17 OCAHO no. 1470d,

[33] The relevant regulatory language references "the parties or their authorized representatives or their counsel," all in the plural, and notes that "they" must take action to effectuate a settlement, suggesting that *both* parties must agree on a settlement and must either file consent findings or otherwise notify an ALJ that a settlement has been reached and that they agree on dismissal. *See* 28 C.F.R. § 68.14(a). Nevertheless, in certain circumstances, OCAHO has found—and enforced—a settlement and dismissed a complaint where only one party notified the ALJ of a settlement, and both parties clearly did not agree on either consent findings or dismissal. *See Cal. Mantel, Inc.*, 10 OCAHO no. 1168, at 2-12. Because *neither* party in the instant case believes a settlement has been reached or that dismissal is appropriate, however, it does not present a vehicle for clarifying this issue further.

at 11, and it is now clear from the parties' briefing on administrative review that they have similarly not met the requirements for settlement and dismissal under § 68.14(a)(2). On the contrary, the parties have expressly informed the undersigned that they have *not* reached a settlement. *See* Complainant's Brief at 4; Respondent's Brief at 1-2. To be sure DHS's opposition to a settlement appears to be based on its argument that the undersigned should impose a higher penalty than the Chief ALJ did if I determine that the date of an OCAHO final order is the date of assessment in this case for purposes of 28 C.F.R. § 85.5(d), *see* Complainant's Brief at 3-4, even though that argument significantly misapprehends OCAHO caselaw, particularly *Edgemont V*, *see supra* Part IV.B. Nevertheless, it is pellucidly clear that the parties have not reached a settlement. Accordingly, I find no basis to dismiss the instant case pursuant to 28 C.F.R. § 68.14.

V. CONCLUSION

Based on a careful legal analysis of the relevant statutes, regulations, case law, policy considerations, and other pertinent factors, the undersigned concludes the Order on Remand's determination of the date of assessment for purposes of calculating the minimum and maximum civil money penalties applicable to Respondent's conduct under 28 C.F.R. § 85.5(d) was in error. Thus, its calculation of the penalty range was also in error. Because the assessment in this case occurs after January 30, 2023, the correct penalty range is between $272 and $2,701 per violation. *See* 28 C.F.R. § 68.52(c)(8); Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. at 5,780 (to be codified at 28 C.F.R. pt. 85). Nevertheless, the final penalty assessment ordered by the Chief ALJ of $1,230 per violation for a total penalty of $56,580 falls comfortably within the correct range and is both reasonable and proportional. *See Edgemont V*, 17 OCAHO no. 1470d, at 10 ("Overall, proportionality and reasonableness are the touchstones in imposing a civil money penalty for violations of 8 U.S.C. § 1324a."). Respondent has explicitly conceded that the penalty is appropriate, Respondent's Brief at 2-3, and Complainant's arguments for a potentially greater penalty based solely on the correct penalty range are unpersuasive, *see supra* Part IV.B. Accordingly, the undersigned finds no reason to disturb the ultimate penalty assessment in the Order on Remand.

When the CAHO vacates or alters part of an ALJ's decision on administrative review but affirms the ultimate outcome of that decision, OCAHO's practice is to treat the CAHO decision as a modification of the ALJ's order pursuant to 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.54. *See*, *e.g.*, *United States v. New El Rey Sausage Co.*, 1 OCAHO no. 78, 542, 550, 553, 554 (1989) (modifying the ALJ's decision and order with respect to certain legal conclusions); *United States v. Torres*, 1 OCAHO no. 83, 569, 569-70 (1989) (modifying the ALJ's order by replacing certain paragraphs of text, but affirming the remainder of the ALJ's order); *United States v. New Peking, Inc.*, 2 OCAHO no. 329, 250, 258 (1991) (modifying the ALJ's decision and order with respect to a certain legal conclusion made by the ALJ, but leaving intact the civil money penalty imposed on the respondent in the ALJ's order); *Wu*, 3 OCAHO no. 434, at 426 (modifying a specific portion of the ALJ's order, but leaving intact that portion of the order imposing a civil penalty in a particular amount). Accordingly, for the reasons stated above, Part II of the Order on Remand and any statements elsewhere within that Order concluding that the date of service of a NIF is the date of assessment for purposes of 28 C.F.R. § 85.5(d) are VACATED, and the Order on Remand is MODIFIED to reflect that the date of assessment in Respondent's case occurred after January 30, 2023, resulting in a penalty range of $272 to $2,701 for each of Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B). Any other portions of the Order on Remand that have not been vacated or modified as stated above

remain valid and binding on the parties, including the order for Respondent to pay $56,580 in penalties. The parties remain free to work out a payment schedule as appropriate.

Under OCAHO's rules, an ALJ's final order under 8 U.S.C. § 1324a becomes the final agency order sixty days after the date of the order, unless the CAHO modifies, vacates, or remands the order. *See* 28 C.F.R. § 68.52(g). However, if the CAHO enters a final order that modifies or vacates the ALJ's final order, and the CAHO's order is not referred to the Attorney General pursuant to 28 C.F.R. § 68.55, the CAHO's order "becomes the final agency order thirty (30) days subsequent to the date of the modification or vacation." *See* 28 C.F.R. § 68.54(e). As the CAHO has modified the Chief ALJ's order in this case, this final order of the CAHO will become the final agency order thirty days from the date of the order, unless it is referred to the Attorney General for further review.

SO ORDERED.

James McHenry
Chief Administrative Hearing Officer