



**COMMITTEE ON
IMMIGRATION & NATIONALITY LAW**

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Submitted via <https://www.regulations.gov>

Lauren Alder Reid, Assistant Director,
Office of Policy,
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer, U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
725 17th Street NW, Washington, DC 20503

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

Dear Ms. Alder Reid:

On behalf of the Immigration and Nationality Law Committee of the New York City Bar Association¹ (“City Bar”) we submit this comment, asking the Department of Justice (“DOJ”) and Department of Homeland Security (“DHS”) to withdraw the above-referenced Proposed Rule, posted in the Federal Register on June 15, 2020 (85 Fed. Reg. 36264) (the “Proposed Rule”) and, if the agencies wish to reissue it, that they provide—at bare minimum—the 60-day period for public comment contemplated by Executive Order 12866. The 30 day timeline is both inadequate and arguably seems calculated to minimize public participation in commenting, given the expansive complexity of the Proposed Rule, the especially vulnerable population who would be affected by the Proposed Rule, and the unprecedented burdens imposed by the ongoing national health emergency.

¹ With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

The Proposed Rule would radically alter the substantive and procedural rules governing all adjudications of applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Proposed Rule redefines, or codifies for the first time, substantive definitions of concepts refined through decades of case law and analysis, including *particular social group*, *political opinion*, *persecution*, and *nexus*; and sweepingly extends grounds for discretionary denials. At the same time, the Proposed Rule would radically alter existing procedures and would compromise due process: allowing immigration judges to pretermite asylum claims without full and fair hearings, raising the standards for credible and reasonable fear interviews for asylum seekers presenting at the border, and decreeing that those who are permitted to present their claims before the immigration court be placed in asylum- or withholding-only proceedings thereby preventing them from raising certain defenses or pursuing other forms of relief.

Any one of these substantial changes alone would call for the use of a 60-day comment period. By Executive Order:

[e]ach agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. . . . In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Executive Order 12866 at 6, 58 Fed. Reg. No. 190 (Oct. 4, 1993).

Indeed, the complexity of the Notice of Proposed Rule Making (“NPRM”) warrants a comment period longer than 60 days. The inadequacy of the current shortened comment period is further underscored by the high stakes facing the persons to be affected by the Proposed Rule - applicants for protection who have fled a significant risk of torture, trafficking, persecution, or other harm. Guidance on rulemaking prepared by the Office of the Federal Register explains:

In general, agencies will specify a comment period ranging from 30 days to 60 days in the “Dates” section of the *Federal Register* document, but the time period can vary. For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more. Agencies may also use shorter comment periods *when that can be justified*.²

The net effect of contracting instead of expanding the comment period for an NPRM embodying radical departures from prior policy, combined with an ongoing pandemic the effects of which also fall heavily on the regulated community, is to severely impair the capacity for public comment, depriving the agencies of the benefit of significant subject-matter expertise and depriving the public of its right to comment on an extraordinarily significant rulemaking.

² Office of the Federal Register, “A Guide to the Rulemaking Process Prepared by the Office of the Federal Register,” https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. (emphasis added) (all websites last visited July 14, 2020).

There has not been a proposed change to asylum law that is as extensive as this Proposed Rule since Congress rewrote the Immigration and Nationality Act through the Illegal Immigration Reform and Immigration Responsibility Act of 1996. Under any circumstances, allowing only 30 days to respond to a NPRM of this scope and complexity would be unreasonable, but allotting this very short timeframe in the middle of a pandemic that is unprecedented in our lifetime³ has made it impossible for us to submit additional comments on substantive provisions of the Proposed Rule.

Until recently, New York City has been the epicenter of the COVID-19 pandemic. With over 400,000 coronavirus cases, New York state has a higher incidence of the disease than any other state in the country.⁴ While the New York City government is no longer prohibiting offices from reopening, the New York City Health Department continues to recommend that the “best way to protect your employees and prevent the spread of COVID-19 is to continue remote work policies as long as possible.”⁵ The City Bar’s building remains closed until, at the earliest, Labor Day. Many members of our Committee are struggling to prioritize their client caseloads and advocacy work as the Executive Office for Immigration Review makes decisions on a day-to-day basis whether the courts will be open or closed.⁶ At the same time, those who are directly affected by COVID-19, are caring for relatives affected by the virus, or caring for children in the home⁷ are challenged by those unprecedented changes wrought by the virus.

The Immigration and Nationality Committee takes its role within the City Bar very seriously and has, over the past two years, submitted detailed, comprehensive comments on more than a dozen regulatory changes proposed during this administration. Specifically, the Immigration and Nationality Committee has submitted the following comments:

- Comment Letter Urging EOIR to Withdraw Rule That Would Dramatically Increase Fees for Immigration Court Filings and Appeals, March 30, 2020.⁸

³ For example, the United States Citizenship and Immigration Services recognized the extraordinary challenges posed by the pandemic in the context of adjudicating applications by, inter alia, automatically extending by 60 days, the due date for Requests for Evidence issued between March 1, 2020 and September 11, 2020. See United States Citizenship and Immigration Services, USCIS Response to COVID-19, <https://www.uscis.gov/about-us/uscis-response-covid-19>.

⁴ See Worldometer, Coronavirus, <https://www.worldometers.info/coronavirus/country/us/>.

⁵ NYC Health, Reopening New York City: Frequently Asked Questions What Offices Need to Know (June 28, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-reopening-offices-guidance.pdf>.

⁶ See Executive Office for Immigration Review, EOIR OPERATIONAL STATUS DURING CORONAVIRUS PANDEMIC, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>.

⁷ See Deb Perelman, In the Covid-19 Economy, You Can Have a Kid or a Job. You Can’t Have Both, THE NEW YORK TIMES, Jul. 2, 2020, <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html?searchResultPosition=1>; Patricia Cohen and Tiffany Hsu, Pandemic Could Scar a Generation of Working Mothers, THE NEW YORK TIMES, June 3, 2020, <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html>.

⁸ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-drastic-eoir-fee-increases-comments>.

- Opposition to Proposed Procedures for Asylum and Bars to Asylum Eligibility: Comments, Jan. 21, 2020.⁹
- Opposition to Proposed Rule Governing Employment Authorizations for Asylum Seekers, Jan. 13, 2020.¹⁰
- Opposition to Proposed Third-Country Asylum Agreements: Comments, Dec. 19, 2019.¹¹
- Opposition to Fee Increases for USCIS Applications: Comments, Dec. 19, 2019.¹²
- Opposition to DHS Proposed Rule Regarding Special Immigrant Juvenile Petitions: Comments, Nov. 15, 2019.¹³
- Opposition to Proposed Expansion of DNA Collection from Immigration Detainees, Nov. 12, 2019.¹⁴
- Opposition to Removal of the 30-Day Processing Provision for EAD Cards: Comments, Nov. 06, 2019.¹⁵
- Opposition to Interim Rule and Subsequent Organizational Changes to EOIR, Oct. 23, 2019.¹⁶
- Comments Opposing DHS/DOJ Interim Final Rule Limiting Asylum Eligibility, Jan. 08, 2019.¹⁷

⁹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-procedures-for-asylum-and-bars-to-asylum-eligibility-comments>.

¹⁰ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-rule-governing-employment-authorizations-for-asylum-seekers>.

¹¹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-third-country-asylum-agreements-comments>.

¹² See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-fee-increases-for-uscis-applications-comments>.

¹³ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-dhs-proposed-rule-regarding-special-immigrant-juvenile-petitions-comments>.

¹⁴ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-expansion-of-dna-collection-from-immigration-detainees>.

¹⁵ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-removal-of-the-30-day-processing-provision-for-ead-cards-comments>.

¹⁶ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-interim-rule-and-subsequent-organizational-changes-to-eoir-letter>.

¹⁷ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comments-opposing-dhsdoj-interim-final-rule-limiting-asylum-eligibility>.

- DHS Comment: Inadmissibility on Public Charge Grounds, Dec. 11, 2018.¹⁸
- Comment on DHS Proposed Change to Fee Waiver Rule, Nov. 27, 2018.¹⁹
- Comments on Proposed DHS Rulemaking regarding the Flores Settlement, Nov. 06, 2018.²⁰

The Proposed Rule includes potentially the most significant changes that have been initiated by this administration. Our Committee does not lightly make the decision to not submit additional substantive comments—yet there is simply not time for the Committee to do an adequate job responding to the provisions and statements in the NPRM that we have identified as problematic and potentially unlawful within the 30-day framework.

Within three days of the publication of the proposed rule, more than 500 organizations signed on to a letter requesting that the Departments of Justice and Homeland Security extend the comment period to a minimum of 60 days.²¹ That letter cited to Executive Order 13563 which directs agencies to “...afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”²² It is our understanding that neither agency has responded to the letter.

In contrast, other agencies have recognized the unique challenges posed by the COVID-19 pandemic and adopted a flexible approach to rulemaking. For example, the Bureau of Consumer Financial Protection (the “Bureau”) recently extended a comment period from an initial 60 days to add an additional 90 days after receiving comments from the public that the COVID-19 pandemic affected the public’s ability to timely comment. It issued a new NPRM in the Federal Register stating:

The SNPRM provided a 60-day public comment period that was set to close on May 4, 2020. In light of the challenges posed by the COVID-19 pandemic, and in response to requests from stakeholders to give interested parties more time to conduct outreach to relevant constituencies and to properly address the many questions presented in the SNPRM, the Bureau extended the comment period until June 5, 2020. Since extending the

¹⁸ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/dhs-comment-inadmissibility-on-public-charge-grounds>.

¹⁹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comment-on-dhs-proposed-change-to-fee-waiver-rule>.

²⁰ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comments-on-proposed-dhs-rulemaking-re-flores-settlement>.

²¹ See AILA and Partners Send Letter Requesting Asylum Rule Comment Period Extension (June 18, 2020), No. 20070105 at <https://www.aila.org/advo-media/aila-correspondence/2020/request-asylum-rule-comment-period-extension>. As a matter of ordinary practice, the City Bar does not sign on to coalition letters and did not sign on to this letter. However, we agree with the points it makes and wish to ensure that the letter becomes a part of the administrative record.

²² *Id.*

comment period, the Bureau has received requests from a consumer advocacy group, a debt collection trade association, and three State Attorneys General to extend the comment period for an additional 60 day period. These stakeholders state that the COVID-19 pandemic continues to make it difficult to respond to the SNPRM thoroughly. **The Bureau agrees that the pandemic makes it difficult to respond to the SNPRM thoroughly** and to determine when stakeholders will be able to do so. To ensure that stakeholders have the time they need to provide such responses, the Bureau concludes that an extension of the SNPRM comment period to August 4, 2020, is appropriate. This extension should allow interested parties more time to prepare responses to the SNPRM without delaying the rulemaking on this topic. The SNPRM comment period will now close on August 4, 2020.²³ [Emphasis added].

There the Bureau more than doubled the comment period from an initial 60 days to 150 days based on requests from three commenters. Yet the Departments of Justice and Homeland Security has yet to respond to a request by more than 500 organizations to extend the comment period from 30 days to 60 days.

Similarly, the Commodity Futures Trading Commission (“CFTC”) also extended comment periods based on the pandemic, stating, “These extensions reflect my commitment to providing market participants with additional flexibility during this pandemic. Commenters on recently proposed rules will now have at least 90 days, and in many cases more, to provide feedback that we value tremendously as we seek to finalize rules,” said CFTC Chairman Heath P. Tarbert.²⁴ The Federal Deposit Insurance Corporation (“FDIC”) likewise extended a rulemaking by 60-days “[i]n light of the challenges associated with COVID-19.”²⁵ And the FDIC and Federal Reserve System, again, extended by 30 days a comment period regarding resolution plans for foreign banks, “in light of the challenges arising from the COVID-19 emergency.”²⁶

In short, when the public stakeholders are part of the financial industry, the government has been responsive to concerns raised regarding the pandemic and the difficulties for stakeholders to comply with ordinary deadlines. We request the same consideration and courtesy here.

The City Bar would very much like to have the opportunity to submit further comments on many aspects of this proposed rule, as it has on more than a dozen proposed immigration rules over the past two years. However, given the current challenges posed by COVID-19 and the unexplained comment period of only 30 days, it is not possible for us to do so at this time.

²³ 85 Fed. Reg. (May 21, 2020).

²⁴ CFTC Extends Certain Comment Periods in Response to COVID-19, (Apr. 10, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8146-20>.

²⁵ FDIC Extends Comment Period on Modernizing Brokered Deposit Restrictions (Apr. 3, 2020), <https://www.fdic.gov/news/press-releases/2020/pr20045.html>.

²⁶ Agencies extend comment period on updates to resolution plan guidance for large foreign banks (Apr. 27, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200427a.htm>.

For these reasons, we urge the agencies to withdraw this rulemaking and provide a meaningful opportunity for stakeholders to submit comments. The asylum system should not be rewritten via regulation in this manner, especially without giving the public adequate time to comment in the midst of a pandemic. This departure from the normal procedures of rulemaking is deeply troubling; the likely effects of the proposed rule, eradicating most asylum protections, is more troubling still.

Respectfully,

A handwritten signature in black ink, appearing to read "Victoria F. Neilson". The signature is fluid and cursive, with the first name "Victoria" being more prominent.

Victoria F. Neilson, Chair
Immigration & Nationality Law Committee