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Public Interest Comment<sup>1</sup> on

The Department of Homeland Security's Proposed Rule

## Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Homeland Security's (DHS) proposed rule regarding the collection and use of biometrics by U.S. Citizenship and Immigration Services (USCIS) does not represent the views of any particular affected party or special interest but is designed to evaluate the effect of DHS's proposal on overall consumer welfare.

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<sup>1</sup> This comment reflects the views of the authors and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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## Introduction

The notice of proposed rulemaking (NPRM) from DHS would amend regulations on the use and collection of biometrics by USCIS, U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). The proposed rule would authorize DHS to collect biometrics from a larger population of individuals regardless of age, to expand the types of biometric information it collects, and to require DNA test results to verify a claimed genetic relationship.<sup>3</sup> In the context of the rule, immigration benefit requests refer to all requests processed by USCIS.<sup>4</sup> In addition, the rule's provisions removing age restrictions for biometrics collection would apply to Notice to Appear (NTA) issuances related to removal proceedings. DHS estimates that the rule's costs would range from \$2.25 to \$3.51 billion over 10 years (at a 7 percent discount rate), in exchange for qualitative benefits.

This public interest comment begins by summarizing the proposed rule and discussing the statutory authority delegated to DHS. It then evaluates the department's regulatory impact analysis, emphasizing the rule's failure to comply with established requirements for regulatory analysis. Then, our comment argues that the rule's 30-day comment period should be reopened to allow the public to have a meaningful opportunity to comment. We conclude by summarizing the key recommendations included in the comment.

## Summary of the Proposed Rule

DHS is proposing to define the term “biometrics” and use it to replace any references in its regulatory code to individual modalities (e.g., fingerprinting) to expand the number of modalities it collects, stores, and uses to enforce and administer immigration laws.<sup>5</sup> The department is also proposing to expand the instances for which it collects “biometrics” beyond its current practice of doing so to conduct background checks, produce documents, and verify identities to collecting biometrics “for any immigration benefit request.”<sup>6</sup> Furthermore, DHS proposes to alter its policy of requiring mandatory submission of biometrics only for certain benefit requests and enforcement actions to a policy that presumes that “every individual requesting a benefit before or encountered by DHS is subject to” biometrics collection unless the requirement is specifically waived or exempt by the department.<sup>7</sup> The department also proposes to specify that biometric collection

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<sup>3</sup> DHS, “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services,” 85 FR 56338, September 11, 2020. Available at: <https://www.federalregister.gov/d/2020-19145>.

<sup>4</sup> *See*, 85 FR 56339, footnote 2.

<sup>5</sup> This would affect the collection and use of biometric data by the U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).

<sup>6</sup> The agency notes that “for the purposes of this rule, [it] is including all requests processed by USCIS in the term ‘benefit request’ or ‘immigration benefit request’ although the form or request may not be to request a benefit.” <https://www.federalregister.gov/d/2020-19145/p-67>.

<sup>7</sup> 85 FR 56340.

applies to “any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens ... without regard to age.”<sup>8</sup> Finally, DHS proposes that biometric collection may replace the need to provide DHS with documentary evidence for establishing “good moral character” (a prerequisite for approval of certain immigration benefits)—possibly reducing the administrative burden for certain applicants. However, the department also proposes to eliminate its current policy of presuming good moral character for applicants under the age of 14 and alter its regulations to clarify that USCIS may consider a timeframe longer than the currently-stated three years in its assessment of a petitioner’s conduct.<sup>9</sup>

DHS asserts that its current reliance on documentary evidence for identity management is insufficient, in part, because:

... there is no guaranteed way to prevent the manufacturing, counterfeiting, alternation ... or use of identity documents or other fraudulent documents to circumvent immigration laws or for identity theft.<sup>10</sup>

Justifying its greater use of biometrics, DHS notes that “biometric identifiers are not transferrable,” and it “believes that [relying more on biometrics is] the best approach to address the vulnerabilities in the immigration process.”<sup>11</sup> The department also describes this change as part of its programmatic shift towards a “person-centric model” that includes implementation of “continuous immigration vetting” of aliens in the U.S.<sup>12</sup> Under the current proposal, aliens—including permanent residents—would be required to submit biometrics unless/until they became U.S. citizens.

Currently, the only biometric data that DHS requires include photographs, fingerprints, and signatures. It collects these data for certain immigration benefit requests and for law enforcement purposes—which includes any time an alien is apprehended or arrested. Additionally, the department allows voluntary submission of DNA evidence for family-based requests (i.e., U.S. citizens petitioning for parents, siblings, or children to live in the U.S. as permanent residents) but may require blood tests in cases where “other forms of evidence have proven inconclusive.”<sup>13</sup>

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<sup>8</sup> 85 FR 56338.

<sup>9</sup> Establishing good moral character is a requirement—in addition to other documentary evidence and qualifications—for Violence Against Women Act (VAWA) [self-petitioners](#) and T nonimmigrant status [applicants](#).

<sup>10</sup> 85 FR 56354, <https://www.federalregister.gov/d/2020-19145/p-209>.

<sup>11</sup> 85 FR 56354.

<sup>12</sup> 85 FR 56347. According to DHS, continuous vetting “require[s] that aliens be subjected to continued and subsequent evaluation to ensure they continue to present no risk of causing harm subsequent to their entry” (85 FR 56340).

<sup>13</sup> 8 CFR 204.2(d)(2)(vi).

Relatedly, DHS notes that it currently reserves the ability to request biometric evidence on a case-by-case basis whenever the agency determines that supporting documents (e.g., birth certificates, marriage licenses) are either insufficient or unavailable. Notably, the term “biometrics” is not currently defined anywhere within the agency’s regulatory code.<sup>14</sup>

The department proposes to define biometrics as “the measurable biological (anatomical and physiological) or behavioral characteristics used for identification of an individual,” with a list of specific biometrics modalities that it may request from individuals:

- Fingerprint;
- Palm print;
- Photograph (including facial images specifically for facial recognition, as well as photographs of physical or anatomical features such as scars, skin marks, and tattoos);
- Signature;
- Voice print;
- Iris image;
- DNA (DNA test results, which include a partial DNA profile attesting to genetic relationship).<sup>15</sup>

DHS states that it is not necessarily implementing an “absolute biometrics collection requirement” (i.e., the collection of every listed biometric from everyone DHS encounters across all transactions).<sup>16</sup> But the codification of regulatory requirements presuming the collection of biometrics unless expressly exempt or waived by DHS means that the extent to which the proposal functions, in practice, as an “absolute biometrics collection requirement” is a matter of implementation. With the exception of limiting DNA collection to verification of claims regarding familial relationships, the current proposal does not place limits on DHS’s discretion to collect any of the aforementioned biometrics. Additionally, DHS does not include in its proposal any limits to storing these data indefinitely.

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<sup>14</sup> 8 CFR 103.2(b)(9). The agency notes elsewhere in its proposal that over time it has become common practice to refer to identifying features like fingerprints, signatures, and photographs, collectively, as “biometrics” and that other law enforcement agencies also use the term which includes, but is not limited to, the aforementioned modalities.

<sup>15</sup> 85 FR 56355, <https://www.federalregister.gov/d/2020-19145/p-214>.

<sup>16</sup> 85 FR 56340. The agency elaborates by noting that: “Rather, the purpose of this rule is to provide notice that every individual requesting a benefit or encountered by DHS is subject to the biometrics requirement unless DHS waives or exempts it.”

## Statutory Authority

DHS states that several sections of the Immigration and Nationality Act (INA) provide it with “general and specific authority to collect or require submission of biometrics.”<sup>17</sup> The department begins by citing its “general authority to ... administer and enforce immigration laws, including issuing forms, regulations, instructions, other papers, and such other acts the Secretary of Homeland Security ... deems necessary to carry out the INA.”<sup>18</sup> The department also notes that the INA provides that the Secretary and any immigration officers will:

... have power ... to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.<sup>19</sup>

Additionally, the department cites a series of statutory authorities to support its proposed action related to terrorism and national security, document production, identity verification, and background checks.<sup>20</sup>

## Parameters Outlined by Congressional and Executive Mandates

The department’s proposal to replace any reference to individual modalities in its codified regulations with the term “biometrics” or “biometric identifiers” does not comply with existing congressional mandates specifying how DHS should exercise its delegated authority in particular contexts. For instance, although DHS is correct that some statutes use the term biometrics while not specifying particular modalities, other statutes on which it relies for authority do, in fact, specify methods of identification to be used in certain contexts (i.e., the collection of fingerprints to register aliens).<sup>21</sup> Another statute is even more narrow—requiring “three identical photographs...signed by and furnished by each applicant for naturalization or citizenship.”<sup>22</sup> It is unclear whether the department has the statutory authority to override the specific requirements provided by Congress and replace them with expanded authority to collect additional personally identifiable information (PII).

Additionally, the department does not explain how this expansion of PII in the current proposal complies with the Fair Information Practice Principles articulated in the Privacy Act of 1974

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<sup>17</sup> 85 FR 56339.

<sup>18</sup> 8 USC §1103(a).

<sup>19</sup> 8 USC §1225(d)(3).

<sup>20</sup> 85 FR 56339-56341, <https://www.federalregister.gov/d/2020-19145/p-65>.

<sup>21</sup> 8 USC §1304(a).

<sup>22</sup> 8 USC §1444(a).

“regarding the collection, use, dissemination, and maintenance of ... PII.”<sup>23</sup> For instance, DHS’s own Privacy Impact Assessments routinely highlight the principle of data minimization stating that: “DHS should only collect PII that is directly relevant and necessary to accomplish specified purpose(s).”<sup>24</sup> The privacy impact assessment that accompanies the current proposal admits that the expanded collection of PII by USCIS creates “a risk of over-collection of information” and states that the risk is only partially mitigated by its current procedures regarding access to the data.<sup>25</sup>

Furthermore, DHS states in the proposed rule that “there could be some unquantified impacts related to privacy concerns” but that its proposal “would not create new impacts in this regard but would expand the population that could have privacy concerns.”<sup>26</sup> However, this is an inaccurate assessment given that DHS proposes to expand both the number of people for whom it collects PII and the amount of PII it collects while planning to retain these data indefinitely. The issue of appropriately considering the privacy risks and potential costs related to the current proposal to substantially expand the collection, use, and storage of sensitive PII is particularly relevant given that DHS’s Office of Inspector General published a report on September 21, 2020 finding that Customs and Border Protection (CBP), an agency within DHS, “did not adequately safeguard sensitive data” resulting in a data breach that compromised the PII of around 184,000 travelers.<sup>27</sup>

Interestingly, among the list of statutes DHS cites in the proposed rule, only two contain references to the phrase “biometric identifiers.” The first specifies conditions for regulations related to the issuance of permanent resident identification cards.<sup>28</sup> The second covers “visas and other travel and entry documents” provided to aliens. Although the statute does not specify which modalities the agency should collect, it does say that they should be chosen “from among those biometric identifiers recognized by domestic and international standards organizations.”<sup>29</sup> This parallels the policy detailed in Executive Order (EO) 13609 for agencies to consider engaging in international regulatory cooperation in the development of proposed and final regulations to avoid “differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts [which] might not be necessary.”<sup>30</sup> DHS does not specify whether it considered international regulatory approaches in designing the current proposal.

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<sup>23</sup> 5 USC §552(a).

<sup>24</sup> <https://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp030-tvs-may2017.pdf>.

<sup>25</sup> [https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnciv-february2019\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnciv-february2019_0.pdf)

<sup>26</sup> 85 FR 56343, 56364, 56385.

<sup>27</sup> <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf>.

<sup>28</sup> 8 USC §1101(a)(6): “shall...include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable,”

<sup>29</sup> 8 USC §1732(b)(1).

<sup>30</sup> EO13609, Sec. 1.

Finally, DHS claims that its proposal to implement “continuous immigration vetting” and expand its authority to collect, use, and store biometrics is required by EO 13780 (“Protecting the Nation from Foreign Terrorist Entry into the United States”).<sup>31</sup> For instance, EO 13780 directs DHS to “implement uniform screening and vetting standards for all immigration programs” and expedite the completion of its biometric entry-exit tracking system.<sup>32</sup>

Although Congress has never specified which biometric modalities DHS should use, it has provided general criteria for the implementation of biometrics. For instance, any technology used for identity verification should be “cost-effective [and] efficient”<sup>33</sup> and DHS “shall operate the biometric entry and exit system so that it ... screens travelers efficiently and in a welcoming manner.”<sup>34</sup> As we detail below, the department does not provide sufficient insight into its process for deciding on the current regulatory approach. Interestingly, DHS has done so in prior rulemakings. For example, in 2004 the department issued an interim final rule related to biometric collection for its entry-exit system, which stated that it determined which biometric identifiers to collect partly because:

... two fingerprints and photographs [were] less intrusive than other forms of biometric collections and because the combination of these [were] an effective means for verifying a person’s identity.<sup>35</sup>

## Regulatory Analysis

EO 12866 directs federal agencies to conduct regulatory analyses of significant regulatory actions. EO 12866 provides a “regulatory philosophy” to guide regulators through the rulemaking process, including determining whether to regulate in the first place:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.<sup>36</sup>

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<sup>31</sup> 82 FR 13209.

<sup>32</sup> EO 13780, Sec. 5 and Sec. 8(a).

<sup>33</sup> 8 USC §1379(2)

<sup>34</sup> Public Law 108-458-DEC. 17, 2004.

<sup>35</sup> 69 FR 471, <https://www.federalregister.gov/d/03-32331/p-30>.

<sup>36</sup> Executive Order 12866, 58 FR 51735, October 4, 1993, Sec. 1(a). Available at: [https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).



To guide agencies in the application of the regulatory philosophy, EO 12866 lays out 12 principles of regulation that form the basis of the requirements for regulatory analysis. The primary components of a regulatory impact analysis are problem identification, assessing alternatives, and estimating benefits and costs. Accordingly, if regulation is needed, regulators should select the regulatory approach that maximizes net benefits. Subsequent guidance (e.g., OMB Circular A-4) and executive orders (e.g., EO 13563, EO 13771) expand on the directives in EO 12866 and supplement its provisions.

## Problem Identification

The first two principles of regulation relate to how agencies identify the problem to be solved and determine whether it requires a regulatory solution.<sup>37</sup> Often, the problem involves a market failure (e.g., externalities, market power, asymmetric information, etc.) or another distinctly essential “compelling public need.”<sup>38</sup> Furthermore, agencies are directed to “assess the significance of that problem,”<sup>39</sup> which entails explicitly explaining the market failure or providing “a demonstration of compelling social purpose and the likelihood of effective action.”<sup>40</sup> Finally, the proposed action should contain clear evidence that federal regulation is the best way to solve the problem, showing that the agency has considered whether other methods of addressing the issue are more appropriate.

DHS’s NPRM does not clearly identify the problem it intends to address through regulation, nor does it assess the extent and significance of the problem. Consequently, DHS also does not justify why its proposed changes to existing regulations are the “best solution.”<sup>41</sup> In this section, we extract the ostensible problems DHS intends to address, highlight weaknesses with DHS’s analysis, and suggest indicators and metrics that could clarify the need for DHS’s proposal.

Although not equivalent to identifying a problem, DHS explains the “purpose” of the proposed rule in multiple sections.<sup>42</sup> First, in the summary of the preamble, DHS suggests that the rule intends to accomplish five objectives: 1) provide DHS flexibility to change biometrics collection to meet emerging needs; 2) expand using biometrics from background checks and document production to “identity verification and management in the immigration lifecycle;” 3) reduce dependence on paper documents; 4) “preclude imposters;” and 5) make DHS’s biometrics terminology more internally consistent.<sup>43</sup> Next, the Executive Summary (Section II) includes a subsection focused on the “Purpose and Summary of the Regulatory Action,” which summarizes

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<sup>37</sup> Executive Order 12866, Sec. 1(b)(1)-(2).

<sup>38</sup> Executive Order 12866, Sec. 1(a).

<sup>39</sup> Executive Order 12866, Sec. 1(b)(1).

<sup>40</sup> Office of Management and Budget (OMB), “Circular A-4,” September 17, 2003, p. 4. Available at: <https://www.reginfo.gov/public/jsp/Utilities/a-4.pdf>.

<sup>41</sup> OMB 2003, p. 6.

<sup>42</sup> See, e.g., NPRM sections II(A), III, V(A)(2).

<sup>43</sup> 85 FR 56338.



some of the department’s responsibilities, recounts how DHS “has decided that the more limited focus on background checks and document production is outdated,” and advances its “plans to implement a program of continuous immigration vetting.”<sup>44</sup>

Later on, Section III (“Background and Purpose”) describes the department’s authority for collecting and using biometrics contained in statutes and guidance and its functional use of biometrics in the benefit adjudications process; however, this section does not characterize the need for the proposed changes subsequently outlined in Section IV (“Discussion of Proposed Changes”).<sup>45</sup> Various reasons for its proposed changes are interspersed throughout Section IV, but they do not systematically identify the underlying problems.<sup>46</sup>

Finally, Section V (“Statutory and Regulatory Requirements”) includes additional subsections on the NPRM’s background and purpose. The regulatory analysis for EO 12866 claims that “substantial populations associated with immigration benefit requests ... do not routinely submit biometrics” because collection is not mandatory for them, implying that the collection rate is too low.<sup>47</sup> Then, the department argues that using biographical information (e.g., birth certificates, marriage licenses, physical characteristics, etc.) is not a consistent substitute and that some individuals may pose risks or be vulnerable to harm.<sup>48</sup> DHS provides minimal detail on the pervasiveness of inadequate biographical information or to what extent those information limits are directly related to the suggested harms. Also, DHS’s “Regulatory Flexibility Analysis” assessing the impact on small entities lays out the department’s reasons for considering the action, which covers similar ground to previous descriptions in a more succinct manner.<sup>49</sup> In short, DHS decided its discretionary approach for biometrics collection is outdated because some individuals may present a risk, and thus it should expand biometrics collection by making it routine and mandatory for a larger population.

Thus far, DHS’s stated purpose for the rule seems to revolve around a biometrics collection rate it believes to be inadequate. But the department does not demonstrate the potential probability or existing prevalence of the risks or harms that may result because of the current collection rate. The department’s discussion of the rule’s benefits indirectly points to more specific information on the possible harms in two areas.

First, DHS suggests that individuals encounter an unreliable system when requesting immigration and naturalization benefits. It asserts that the system puts individuals at risk of identity theft and

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<sup>44</sup> 85 FR 56340.

<sup>45</sup> *See*, 85 FR 56347-56350.

<sup>46</sup> *See*, e.g., 85 FR 56350: “DHS’s use of biometrics for criminal history background checks and document production is outdated and not fully in conformity with current biometrics use policies by government agencies.”

<sup>47</sup> 85 FR 56368.

<sup>48</sup> 85 FR 56368.

<sup>49</sup> 85 FR 56388.

having legitimate requests denied.<sup>50</sup> It also suggests that DNA testing is “a quicker, less intrusive, and more effective technology” for verifying claimed genetic relationships.<sup>51</sup> Elsewhere, DHS acknowledges that petitioners may already submit DNA test results on a voluntary basis when primary evidence is inconclusive,<sup>52</sup> making it unclear why existing provisions are not sufficient to address the problem.

Second, DHS indicates that the proposed rule would enhance the department’s identity verification and management by reducing fraud, decreasing administrative burden, identifying criminal activity, and protecting vulnerable groups.<sup>53</sup> DHS also argues that the new regulations will help it “keep up with technological developments” and “adjust collection practices,”<sup>54</sup> as it evolves to a person-centric model for records management with continuous vetting.<sup>55</sup> But beyond the rhetoric, DHS does not provide conclusive—or even suggestive—data to establish the significance of these problems is lacking. For instance, DHS’s primary example of a vulnerable group are children under 14 at risk of gang affiliation, trafficking, forced labor exploitation, and alien smuggling. DHS suggests that under current regulations, some individuals who do not routinely submit biometrics “may pose a risk to vulnerable populations” and children under 14 “may be vulnerable” to exploitation.<sup>56</sup> Specific evidence to substantiate the extent of these harms is not provided, which falls short of the requirements of EO 12866.

Overall, the NPRM communicates that DHS has made certain determinations about what action it should take without sufficiently explaining the underlying problems that inform those decisions. Throughout these sections, DHS also conflates its delegated authority with a need for the regulatory action. While executive branch guidance instructs agencies to promulgate regulations required by law or needed to interpret the law,<sup>57</sup> it does not give agencies free reign to establish or update regulations simply because they have been delegated authority. DHS must still demonstrate the problems that necessitate its regulatory response or refer to the statutory authority that compels a regulatory action.

DHS should make additional efforts to characterize the problems requiring a regulation. To illustrate, we suggest examples of metrics that DHS could use to assess the significance of the problem. First, certain indicators may be related to the reliability of the system for individuals submitting biometrics:

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<sup>50</sup> 85 FR 56344, 56365. *Also see*, Table 1: Summary of Provisions and Impacts.

<sup>51</sup> 85 FR 56365.

<sup>52</sup> *See*, 85 FR 56350, 56372, 56385; *also see*, e.g., footnote 134: “Currently, DNA evidence is only used as secondary evidence, after primary evidence (e.g., medical records; school records) have proved inconclusive.”

<sup>53</sup> 85 FR 56344, 56365. *Also see*, Table 1: Summary of Provisions and Impacts.

<sup>54</sup> 85 FR 56366.

<sup>55</sup> 85 FR 56347.

<sup>56</sup> 85 FR 56368.

<sup>57</sup> Executive Order 12866, Sec. 1(a). *Also see*, OMB 2003, p. 3; OMB 2011, p. 2.

- Is there evidence of identity theft? What sorts of information appear to be more regularly compromised?
- How many requests are denied each year relative to total applications? Is this trend increasing for certain forms or benefits? Are particular relationships harder to prove?
- How regularly do applicants need to submit secondary evidence to prove a claimed genetic relationship because primary evidence is lacking? How often does the secondary evidence fail to verify the claimed relationship? How has this trend changed in recent years?

Second, these indicators may be related to the effectiveness of DHS’s identity verification and management:

- What instances of fraud are common in the immigration benefits system? What is the return on investment for past efforts to reduce fraud (i.e., how costly is fraud itself relative to the cost of mitigating the fraud)?
- To what extent are administrative burdens at USCIS associated with immigration benefit requests or biometrics collection? Are these administrative burdens at USCIS changing over time?
- Has the amount of NTAs changed over time? What proportion of NTAs are for vulnerable populations, as defined by the rule? Does the process for NTAs produce information that suggests how prevalent exploitation-related issues are in removal proceedings?

**Recommendation 1:** DHS should provide evidence to identify the problems it seeks to solve through regulation and provide detail on the extent and significance of each problem.

## Assessing Alternatives

After identifying the problem to be solved, agencies are directed to assess alternative approaches for accomplishing the regulatory objective. Any regulatory analysis that fails to consider alternatives is incomplete. As Executive Order 12866 instructs, assessing “all costs and benefits of available regulatory alternatives” is critical to decide both “whether and how to regulate.”<sup>58</sup> These instructions further specify considering alternatives to direct regulation, prioritizing flexible approaches, and tailoring regulations to impose the least burden on society.<sup>59</sup>

DHS’s NPRM does not consider any alternatives to its proposed regulatory action. Before finalizing the proposed rule, DHS must evaluate alternative regulatory approaches to its desired policy. Of course, identifying “appropriate alternatives” is a process that requires discretion,

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<sup>58</sup> EO 12866, Sec. 1(a).

<sup>59</sup> EO 12866, Sec. 1(b)(3), 1(b)(8), 1(b)(11).

including balancing thoroughness and an agency’s analytical constraints.<sup>60</sup> But analytical constraints are not an argument for imposing burdens on the public without justification. At a minimum, Circular A-4 suggests analyzing at least three options of varying stringency (not including the baseline)—the agency’s preferred approach, a more stringent option, and a less stringent one.<sup>61</sup> At times, DHS implicitly considers a “no action” approach when comparing its proposal to the baseline.<sup>62</sup> OMB guidance states that such an analytical approach, on its own, is inadequate.<sup>63</sup> Furthermore, DHS does not extend its analysis of the baseline in a manner that contemplates how to tailor the approach to impose a minimal societal burden.

Since DHS does not assess any alternative approaches to its proposal, we illustrate ways it could do so as a starting point. Circular A-4 guides agencies on how to “explore modifications of some or all of a regulation’s attributes or provisions to identify appropriate alternatives.”<sup>64</sup> For instance, modifications may incorporate different enforcement methods, degrees of stringency, and options for voluntary action.<sup>65</sup> We suggest alternatives to the following four proposed changes included in the leftmost column of the NPRM’s Table 1:

1. Expand required collection of biometrics without regard for age or citizenship status for immigration benefit requests;
2. Define and increase the collection of biometric modalities to include palm prints, facial and iris images, and voice prints;
3. Require, request, and accept DNA, or DNA test results, to verify claimed genetic relationships; and
4. Remove age restrictions for biometrics collection for NTA issuances.

In general, targeted approaches that could reap similar benefits to broader approaches, while mitigating costs, should be sought out. Even based on a cursory analysis of these proposed changes, some initial ideas for alternative approaches are evident:

- Instead of proposing PRA changes to 64 USCIS forms,<sup>66</sup> could DHS tailor the revisions to a subset of forms that appear to be driving the identified problems (Proposal 1)?
  - Based on existing data, do certain benefit requests appear to be less reliable (e.g., relatively high proportion of rejections or appeals) or at a greater risk of fraud (e.g., relatively high proportion of benefits rescinded or not renewed)?

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<sup>60</sup> OMB 2003, p. 7.

<sup>61</sup> OMB 2003, p. 16.

<sup>62</sup> *See, e.g.*, 85 FR 56369-56373. Executive Order 12866 instructs agencies to include “the alternative of not regulating” (Sec. 1(a)).

<sup>63</sup> OMB 2003, p. 16: “It is not adequate simply to report a comparison of the agency’s preferred option to the chosen baseline.”

<sup>64</sup> OMB 2003, p. 7.

<sup>65</sup> OMB 2003, pp. 7-8; OMB 2011, pp. 2, 5-7.

<sup>66</sup> These range from minor non-substantive changes to major revisions. *See*, Table 24: Impacts to USCIS Forms, 85 FR 56390-XX.

- Based on existing data, do certain applicant-petitioner relationships require more oversight or scrutiny (e.g., Petition for Alien Fiancée) than others (e.g., Petition for Alien Relative)?
- Based on existing data, do certain benefit requests require secondary evidence at a relatively higher rate?<sup>67</sup>
- Has DHS considered an alternative version of rule that increases collection (Proposals 1 & 4) but does not expand the definition of biometric modalities (Proposal 2), or vice versa?
- Has DHS considered altering the age requirement rather than removing all age restrictions (Proposals 1 & 4)? For instance, DHS could propose to replace the current age threshold of 14 with 10. Or it could determine whether evidence suggests the age at which children are most vulnerable to exploitation and tailor the requirement to that age.
- Because individuals can already volunteer to submit DNA or DNA tests in certain situations,<sup>68</sup> has DHS considered expanding voluntary DNA testing as an alternative (Proposal 3)?
  - Based on existing data, do certain claimed genetic relationships require secondary evidence at a relatively higher rate?<sup>69</sup>

Clearly, alternative options to DHS’s proposed changes exist. DHS should supplement its proposed rule with an updated regulatory impact analysis that includes identifying, assessing, and selecting among alternative regulatory approaches. DHS has demonstrated its capacity to assess alternatives with respect to biometric information in the past. For instance, in its 2004 interim final rule covering biometric requirements for the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT).<sup>70</sup> The department considered three alternatives and selected its preferred approach “because it was significantly more cost effective than the other two, was less manpower intensive, and eliminated the major concerns ... about boarding processes and time issues at gates.”<sup>71</sup> Prior to finalizing this proposed rule, DHS should follow OMB guidance and its prior practice by analyzing alternatives.

**Recommendation 2:** DHS should identify and assess alternative regulatory approaches and justify its preferred option in light of those alternatives.

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<sup>67</sup> See, e.g., 8 CFR 103.2(b); 8 CFR 204.2.

<sup>68</sup> 85 FR 56350; 85 FR 56385: “DHS will not be conducting a DNA test for all the applications or petitions where a genetic relationship is relevant or claimed. Instead, DHS will only require or request DNA when a claimed genetic relationship cannot be verified through other/documentary means. In addition, applicants can volunteer on their own to submit DNA, but DHS has no method to project the number of people who will submit it.”

<sup>69</sup> See, e.g., 85 FR 56353.

<sup>70</sup> DHS, “Implementation of the United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”); Biometric Requirements,” January 5, 2004, 69 FR 467. Available at: <https://www.federalregister.gov/d/03-32331>.

<sup>71</sup> 69 FR 478.

## Estimating Impacts

Despite the aforementioned issues—inadequate problem identification and no assessment of alternatives—DHS proposes a rule that will have real impacts with associated costs and benefits. In this section, we explore the projected effects of the rule and discuss DHS’s estimates of the resulting costs and benefits. We focus minimal attention on the specific cost calculations because there are more significant problems with other components of impact analysis. However, even taking the cost calculations at face value, there is a large imbalance between the annualized costs of \$320.4 million (lower bound estimate) and the qualitative benefits of the rule.<sup>72</sup>

Circular A-4 offers an important reminder of the underlying motivation for regulatory impact analysis: “(1) learn if the benefits of an action are likely to justify the costs or (2) discover which of various possible alternatives would be the most cost-effective.”<sup>73</sup> Since DHS presented no alternative options to its preferred approach, our analysis focuses on whether the benefits of the proposed rule are likely to justify its costs.

### *Population Affected*

Before diving into the cost and benefit estimates, summarizing DHS’s estimates of the population-level effects is a helpful starting point for understanding the expansiveness of the proposed rule and its projected impacts. The proposed rule identifies three main affected populations:

1. Individuals submitting biometrics collection for immigration benefit requests (i.e., all requests processed by USCIS in the context of this rule);
2. Individuals submitting DNA or DNA test results to prove a claimed genetic relationship; and
3. Individuals submitting biometrics related to NTA issuances.

Under the NPRM, biometrics collections for immigration benefit requests are expected to increase by 2.17 million annually, with the generalized collection rate across all forms increasing from 46 percent to a projected 71 percent.<sup>74</sup> The increase in submissions will come from an expansion of the age-eligible population covered by forms already routinely collected, broader routine collection of certain forms, and to a lesser extent, the expansion of the age-eligible population covered by forms with low filing volumes, forms that are not broadly collected, etc.<sup>75</sup> DHS estimates the baseline number of collections as 3.90 million annually;<sup>76</sup> so after the net increase of

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<sup>72</sup> See, 85 FR 56346, Table 2: OMB A-4 Accounting Statement.

<sup>73</sup> OMB 2003, p. 2.

<sup>74</sup> 85 FR 56343.

<sup>75</sup> 85 FR 56343.

<sup>76</sup> This includes the 280,767 collections for Form I-539.

2.17 million collections, DHS will be conducting biometrics collections and charging a fee for 6.07 million individuals each year.<sup>77</sup>

The NPRM affects DNA collections for both principal petitioners/applicants and eligible dependents. The principal petitioner population would increase from a baseline of 7,589 to 344,239, for a net increase of 336,650. The eligible dependent population would rise from 11,383 to 480,226, for a net increase of 468,843. In total, DHS estimates that 805,493 additional individuals could be affected as a result of the rule's DNA collection provisions.<sup>78</sup> DHS suggests these numbers are not necessarily equivalent to the annual volumes of DNA tests, so it estimated the costs for a range of percentages of this population.<sup>79</sup>

Lastly, NTA issuances also require biometrics collection, although individuals are exempt from the collection fee as NTAs are not immigration benefits requests. DHS anticipates that the population submitting biometrics associated with NTAs will potentially rise by 62,716 annually. This increase results from additional biometrics collections from individuals under the age of 14.<sup>80</sup>

Cumulatively, the proposed rule would affect 6.21 million individuals annually, with 2.31 million being otherwise new collections, based on DHS's estimates.<sup>81</sup>

### *Costs*

DHS's estimates of the proposed rule's costs are the most extensive aspect of the regulatory impact analysis. The discussion of costs is also the only section that includes monetized estimates. However, it focuses almost exclusively on direct costs without assessing potential indirect effects of the proposal. The main categories considered are the direct costs to individuals and costs incurred by the federal government. We also include the NPRM's sections on Other Impacts and the Regulatory Flexibility Analysis with the costs because they reflect some of the rule's indirect effects.

For simplicity, this public interest comment focuses on the lower-bound estimate of monetized costs to compare the best-case cost scenario against claimed benefits. The lower-bound costs to individuals are monetized at \$2.2504 billion over 10 years, or \$320.4 million annually, at a 7 percent discount rate using the DNA-low estimates.<sup>82</sup> These costs are associated with an increase in biometrics submissions—stemming from new biometrics fee payments, time-related

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<sup>77</sup> See, Table 15.

<sup>78</sup> See, Table 19.

<sup>79</sup> See, Table 21.

<sup>80</sup> 85 FR 56380.

<sup>81</sup> We use the lower-bound estimate for annual DNA collections in Table 21 in order to emphasize that our concerns remain even under the most conservative projections.

<sup>82</sup> See, Table 22, 85 FR 56383.



opportunity costs and traveling expenses, and new fees paid to the FBI for Criminal History Record Information checks related to NTAs—and new DNA submissions.<sup>83</sup>

The affected population includes many individuals who would have already submitted biometrics to DHS but under the proposal would be required to submit additional modalities. DHS determines that the baseline population would not incur quantified costs (including time-related opportunity costs) for submitting additional biometric modalities.<sup>84</sup> DHS also concludes that “this rule would not create new impacts [related to privacy risks from collection and retention of biometrics] but would expand the population that could have privacy concerns.”<sup>85</sup> A key problem with that conclusion is that expanding the number and type of biometric modalities collected would likely also increase privacy risks to individuals. These qualitative costs would affect both new and baseline submissions. Different types of biometric information entail unique privacy risks—e.g., fingerprints and facial images used for facial recognition do not involve identical privacy concerns.

DHS’s privacy compliance process includes a Privacy Threshold Analysis (PTA) “to determine if the system or program is privacy-sensitive and requires additional privacy compliance documentation” and a Privacy Impact Assessment (PIA) “to identify and mitigate privacy risks of systems and programs” and better inform the public.<sup>86</sup> As DHS guidance instructs, the department should conduct a PIA when “[d]eveloping or procuring any new technologies or systems that handle or collect personally identifiable information” or when reviewing Information Collection Requests under the PRA.<sup>87</sup> Such documentation is essential to understanding the privacy risks associated with the NPRM. In compliance with department guidance, the PIA should explain how “the proposed rule may impact privacy and how the Department proposes to address that impact,” and DHS should give the public an opportunity to comment on the proposed rule in light of the information contained in the PIA.<sup>88</sup>

**Recommendation 3:** DHS should conduct a Privacy Threshold Analysis and a Privacy Impact Assessment for its NRPM and publicly disclose the results before finalizing the rule.

The NPRM also reports estimated costs to the federal government, in terms of the costs of incremental new collections, collecting additional biometric modalities, and facilitating DNA collection. Based on the diminishing cost structure for district-level processing of biometric collections, DHS does not anticipate additional costs to the government as a result of the 2.17

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<sup>83</sup> 85 FR 56381-3.

<sup>84</sup> 85 FR 56380-1.

<sup>85</sup> 85 FR 56385. Also see, 85 FR 56343.

<sup>86</sup> DHS, “Privacy Compliance Process,” accessed October 12, 2020, <https://www.dhs.gov/compliance>.

<sup>87</sup> DHS, “Privacy Impact Assessment Official Guidance 2010,” pp. 6-7. Available at:

[https://www.dhs.gov/sites/default/files/publications/privacy\\_pia\\_guidance\\_june2010\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_pia_guidance_june2010_0.pdf).

<sup>88</sup> DHS, *Privacy Policy Guidance Memorandum*, Memorandum Number: 2008-02, December 30, 2008, p. 4.

million new annual submissions (out of a total 6.07 million submissions).<sup>89</sup> Despite this diminishing cost structure, there is a real fixed-cost for each additional processed unit, and DHS does not provide evidence to suggest that each district is even currently within the processing volume that is covered by the fixed price per month. As DHS admits, it is certainly possible that individual districts would rise above the fixed price per month baseline, even if the aggregate numbers stay below the maximum monthly volume of biometric submissions allowed by the current Application Support Center contract (1,633,968).<sup>90</sup> Further, what happens when a district goes above a volume of 95,256 appointments in a month, as shown in Table 23? DHS states, “While the above discussion centers on USCIS budgetary costs, it is possible that real resource costs to the economy could accrue to higher volumes.”<sup>91</sup> For example, the discussion of budgetary costs does not account for the full opportunity cost associated with additional biometric collection appointments, including storage and data management requirements, hours for USCIS employees, and resources required by contractors for processing collections. Even absent quantification of these costs, they should be seriously weighed relative to claimed benefits, such as the qualitative reductions in administrative burdens. In light of the USCIS budgetary problems, imposing additional costs on the agency could be impractical.<sup>92</sup>

Second, DHS will incur costs related to collecting additional biometric modalities. The department suggests that these costs, which include unit cost estimates of new technologies for biometrics collection, might be minimal because some of its existing equipment might be sufficient for those collections.<sup>93</sup> Perhaps a more significant question, which goes largely unanswered, is whether there are associated costs with storing and sharing additional biometric modalities.

Third, DHS discusses the costs of facilitating DNA collection. While many DNA submissions made in the United States are simply paid by applicants, DHS acknowledges that the Department of State (DOS) will facilitate submissions in countries without an USCIS office with DHS reimbursing them for that facilitation.<sup>94</sup> Although DHS assessed the costs to individuals for DNA testing (i.e., associated DNA testing fees), DHS indicates that it “is unable to project how many new DNA tests facilitated by DOS will take place annually.”<sup>95</sup> We suggest that DHS consider the following methodology. At issue appears to be determining what proportion of DNA submissions

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<sup>89</sup> See, Table 23, 85 FR 56384.

<sup>90</sup> 85 FR 56384.

<sup>91</sup> 85 FR 56384.

<sup>92</sup> See, e.g., <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce>; <https://www.aila.org/infonet/uscis-statement-fiscal-outlook>; <https://federalnewsnetwork.com/workforce/2020/07/with-improved-financial-outlook-uscis-buys-more-time-to-avoid-employee-furloughs/>; <https://www.jdsupra.com/legalnews/uscis-budget-crisis-what-you-should-know-83224/>.

<sup>93</sup> 85 FR 56384.

<sup>94</sup> 85 FR 56385.

<sup>95</sup> 85 FR 56385.

incur an additional cost for facilitation and transmission by DOS; presumably, individuals making DNA submissions to DOS would pay the base collection fee regardless. But could DHS use a similar method to estimate these facilitation costs as it did for estimating the costs incurred by individuals (testing fees, not travel costs)? The department derived the costs paid by individuals using historical data on DNA submissions at international facilities (see Tables 9, 19, 20, 21). Notably, the submissions data include the collecting agency (either USCIS or DOS), and DHS calculates the average cost per DNA test facilitated by DOS in Table 24. If DHS applied the historical facilitation share for DOS to the estimates for associated costs in Tables 20 and 21, it could assess the plausible number of future DNA tests facilitated overseas by DOS. Furthermore, some of the reasons DHS cites for being able to project DOS facilitation rates similarly apply to estimating the costs to individuals (e.g., “DHS will only require or request DNA when a claimed genetic relationship cannot be verified through other/documentary means”).<sup>96</sup>

**Recommendation 4:** DHS should estimate the costs of facilitating DNA collection, using a similar method as it did for estimating the costs incurred by individuals.

Besides these categories of direct costs, DHS reports impacts in two additional sections that should also be considered costs. In the section Other Impacts, DHS confirms that in addition to extending the authority of USCIS, the NPRM would also “authorize biometric collection from aliens regardless of age during enforcement actions requiring identity verification.”<sup>97</sup> This means that other DHS components, such as ICE and CBP, would have authority to collect biometrics and conduct DNA testing for law enforcement purposes.<sup>98</sup> ICE uses DNA collection “to identify instances of fraudulent claims of biological relationships at the border,”<sup>99</sup> and the rule extends their authority to collect DNA and other biometric modalities from individuals under 14.<sup>100</sup> Even if these are indirect effects of the proposed rule, the associated costs and claimed benefits should be incorporated into the regulatory impact analysis and reported in the OMB accounting tables (Tables 1 and 2), as instructed by OMB guidance.<sup>101</sup>

DHS claims that the only costs of these provisions will be related to new guidance that changes the operational procedures. The analysis estimates that DHS will incur training costs of \$288,373

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<sup>96</sup> 85 FR 56385.

<sup>97</sup> 85 FR 56386.

<sup>98</sup> 85 FR 56388; also *see*, 85 FR 56386: “Currently, the use of DNA is almost exclusively used to support the investigation of criminal cases when ICE is prosecuting aliens. The removal of age limits for the collection of biometrics and simultaneously authorizing DNA testing in order to verify a claimed genetic relationship under the proposed rule will assist ICE in performing functions necessary for effectively administering and enforcing immigration and naturalization laws.”

<sup>99</sup> 85 FR 56386.

<sup>100</sup> 85 FR 56388.

<sup>101</sup> OMB 2003, p. 26.

annually in the first year.<sup>102</sup> But two more areas of costs potentially exist. One is the cost of conducting additional DNA testing. Without providing detail, DHS claims that its current equipment is sufficient to expand.<sup>103</sup> Even if DHS has sufficient mobile biometric devices and databases, are there associated expenses for processing and transmitting the acquired data? Are the mobile biometrics devices able to collect DNA and verify claimed genetic relationships,<sup>104</sup> or will ICE rely on other resources? Notably, DHS also conducted a pilot program in FY 2019, spending \$5.28 million on 50,000 rapid DNA testing kits.<sup>105</sup> Will DHS be relying on its stock of DNA tests acquired through the pilot program? Table S2 indicates that at least 46,000 unaccompanied minors were taken into ICE custody from FY 2015 to FY 2018. Based on these data, how many more DNA tests does ICE expect to require each year? Meanwhile CBP admissions number in the millions annually, and roughly 15 million would be “new populations for purpose of this rule.”<sup>106</sup> It seems unlikely that potentially testing millions of additional individuals will not increase expenses. DHS should supplement its analysis with evidence of its capabilities in these areas.

DHS indicates that requiring DNA samples for law enforcement purposes imposes no monetary costs on individuals.<sup>107</sup> Nevertheless, associated privacy concerns still exist, as DHS acknowledges.<sup>108</sup> Even if individuals’ valuation of privacy cannot be quantified in this context, DHS must include these privacy-related costs in its weighing of costs and benefits. Similar to the privacy related concerns associated with USCIS and DOS collections, the expansion of ICE and CBP authority increases privacy risks for an estimated tens of thousands to millions of individuals (based on the data from Tables S1 and S2). DHS’s Privacy Impact Assessment for the proposed rule should acknowledge the privacy implications related to ICE and CBP to facilitate informed

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<sup>102</sup> 85 FR 56387.

<sup>103</sup> 85 FR 56386: “The current equipment, including the mobile biometrics units and the databases used to record the case files of aliens in custody, have the capabilities and capacity to include biometrics for the new population cohorts of under 14 years old and over 79 years old.”

<sup>104</sup> DHS’s analysis suggests that its mobile biometrics applications are not equipped to collect DNA from individuals. *See*, 85 FR 56386: “Currently, when ICE arrests an alien, fingerprints are collected as part of the process of building an A-file on the alien. A handheld mobile biometrics application called “EDDIE” is used to facilitate the collection and recordkeeping of aliens in ICE custody. This handheld application effectively and efficiently collects fingerprints and photographs in about 30 seconds, which are then transferred to IDENT.”

<sup>105</sup> 85 FR 56386.

<sup>106</sup> 85 FR 56387.

<sup>107</sup> 85 FR 56387: “Unlike collection at the ASCs, there is no appointment made, no time to travel to a collection site, no biometrics services fee, and CBP is not charged a fee by the FBI for criminal history information (where necessary).”

<sup>108</sup> *See*, 85 FR 56388: “DHS recognizes that some individuals who submit biometrics/DNA could possibly be apprehensive about doing so and may have concerns germane to privacy, intrusiveness, and security[.] Data security can be considered a cost. For example, companies insure against data breaches, as the insurance payment can be a valuation proxy for security. In terms of this proposed rule, data security is an intangible cost, and we do not rule out the possibility that there are costs that cannot be monetized that accrue to aspects of privacy and data security.”

decision-making, transparency, and accountability.<sup>109</sup> DHS should offer the public the opportunity to comment on the NPRM in light of the PIA before finalizing the rule.

The second section with costs not included in the primary cost analysis is the Regulatory Flexibility Analysis, which discusses the negative effects on the EB-5 immigrant investor program. The RFA focuses on the impacts on small entities, specifically those operating through the Regional Center Program. DHS's analysis concluded "that a significant number of regional centers may be small entities" but was not able to determine the impact on the small entities.<sup>110</sup> In total, DHS suggests that "[t]he entire cohort of 884 currently approved regional centers could also be considered small entities." DHS expects the costs to be minimal, although "if the costs related to biometrics and the service fee are incurred to regional centers via the principal, it is possible that the costs could be passed on to investors."<sup>111</sup> Despite the small probability of these effects, a fuller analysis incorporated into the benefit-cost analysis would be valuable. If the economic benefits of the EB-5 program are sizable, as some estimates suggest,<sup>112</sup> then increasing the marginal costs faced by immigrant investors would have negative economic effects.

**Recommendation 5:** DHS should report the impacts from the "Other Impacts" and "Regulatory Flexibility Analysis" sections along with the costs in Table 1 (Summary of Provisions and Impacts) and Table 2 (OMB A-4 Accounting Statement). In other words, DHS should include any costs related to ICE and CBP actions and the small entity impacts in its cost estimates.

### *Benefits*

Compared to the discussion of costs, which spans multiple pages, the discussion of benefits takes up less than one Federal Register page and is entirely qualitative.<sup>113</sup> Individuals would gain a "more reliable system for verifying their identity when submitting a benefit request," which would reduce the risk of identity theft, mitigate the probability of denying "an otherwise approvable benefit," and offer individuals "a more expedient, less intrusive, and more effective technology" (i.e., DNA testing) for verifying a claimed genetic relationship.<sup>114</sup> Notably, the benefits associated with DNA

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<sup>109</sup> See, DHS, *Privacy Policy Guidance Memorandum*, Memorandum Number: 2008-02, December 30, 2008, p. 2. Available at: <https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2008-02.pdf>.

<sup>110</sup> 85 FR 56388.

<sup>111</sup> 85 FR 56389.

<sup>112</sup> A 2014 Brookings Institution analysis estimated that "the program has created 85,500 direct full-time jobs and attracted approximately \$5 billion in direct investments since its inception, with nearly half of this figure accruing since just 2010." Audrey Singer and Camille Galdes, "Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development," February 2014, [https://www.brookings.edu/wp-content/uploads/2016/06/EB5\\_Report.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/EB5_Report.pdf).

<sup>113</sup> 85 FR 56385.

<sup>114</sup> 85 FR 56385.

testing may be achieved under the baseline scenario, given the voluntary options for DNA submissions. In order to claim the benefits of a more reliable system to DNA testing, DHS should explain how its expansion of authority is actually an improvement over the status quo.

The benefits to the federal government include greater capabilities to “identify criminal activity and protect vulnerable populations,” such as determining whether petitioners have violated the International Marriage Broker Regulation Act or identifying which children are at risk of exploitation.<sup>115</sup> As we pointed out in the problem identification stage, DHS provides minimal evidence to establish the nature and significance of these harms. In fact, when commenting on the identity verification for vulnerable populations, “DHS does not have specific data to identify the entire scope of this problem.”<sup>116</sup> Of course, data limitations are not necessarily a reason to dismiss regulatory action, but agencies still have the responsibility to ground regulatory solutions in the problems they intend to address.

Importantly, these benefits are not discussed in the context of specific planks of DHS’s proposal. For DHS to prove that its preferred approach is the most cost-effective option available, it should justify the necessity of each and every component. Otherwise, costly proposed actions that produce little benefit could be included in the final rule. An assessment of alternatives would clarify those choices for DHS and for the public.

Furthermore, we have reason to believe that DHS’s proposed rule could easily become less burdensome by removing certain components. The benefits of protecting vulnerable populations appear to primarily stem from new collections of biometrics from individuals under 14 related to NTAs, which are estimated to affect 63,000 individuals annually. In other words, these claimed benefits are separable from the extremely costly provisions for expanding biometrics collections related to immigration benefit requests, which would affect over 6 million individuals annually. If DHS simply conducted an analysis of marginal benefits from specific components of the NPRM, both it and the public would be better equipped to evaluate this matter.

### ***Benefit-Cost Analysis***

The NPRM offers essentially no analysis justifying the costs of the proposed rule in light of its benefits. As a result, we do that here. DHS’s NPRM would incur multi-billion-dollar costs in exchange for only qualitative benefits. Furthermore, the department’s RIA does not factor in indirect costs, such as the negative implications on entrepreneurship and economic growth, nor adequately articulate the potential privacy risks associated with the proposal.<sup>117</sup> In addition,

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<sup>115</sup> 85 FR 56385.

<sup>116</sup> 85 FR 56385.

<sup>117</sup> See, OMB Circular A-4, p. 26: “Ancillary Benefits and Countervailing Risks.”

qualitative benefits and costs should be categorized and ranked (e.g., in terms of “certainty, likely magnitude, and reversibility”) for clearer comparison.<sup>118</sup>

EO 12866 directs agencies to “adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>119</sup> DHS must provide a clear-eyed reasoning for moving forward with its proposal that explicitly acknowledges the costs and how the claimed benefits justify their imposition on individuals, including U.S. citizens and legal permanent residents. OMB Circular A-4 instructs:

“For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs.”<sup>120</sup>

More detail on the nature of the unquantified benefits, including the relative magnitude and likelihood of qualitative effects, would aid in comparing different alternative regulatory approaches. Then, the public could more confidently ascertain whether, for example, an alternative approach could mitigate the privacy risks that DHS’s preferred proposal introduces. Commenters would also be better equipped to contrast qualitative benefits and costs.

Finally, analytical options exist for integrating qualitative effects into benefit-cost analysis, despite the difficulties of comparing qualitative and quantitative effects. OMB Circular A-4 recommends that agencies use break-even analysis (i.e., threshold analysis) to evaluate the significance of qualitative effects. Specifically, break-even analysis helps answer the question: “How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?”<sup>121</sup> Without such information, DHS’s analysis does not adequately inform the public of the proposed rule’s projected effects.

**Recommendation 6:** DHS should revise its regulatory impact analysis to explicitly evaluate whether the claimed benefits of the proposed rule justify its extensive costs, using analytical methods such as ranking the importance of qualitative effects and break-even analysis.

## Retrospective Review

In addition to requirements for centralized review and regulatory analysis, multiple executive orders direct agencies to conduct retrospective review of existing regulations. A key component

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<sup>118</sup> OMB 2003, p. 45.

<sup>119</sup> Executive Order 12866, Sec. 1(b)(6).

<sup>120</sup> OMB 2003, p. 27.

<sup>121</sup> OMB 2003, p. 2.



of effective regulatory policy is incorporating retrospective review into the rulemaking process. In fact, planning for retrospective review when designing a regulation is critical to implementing an *ex post* evaluation of a rule by comparing measured outcomes against original goals.<sup>122</sup>

EO 12866 requires agencies to carry out a program to “periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated.”<sup>123</sup> Building off these requirements, Executive Order 13563 directs agencies to retrospectively analyze regulations “that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”<sup>124</sup> President Trump’s Executive Order 13777 added to the infrastructure for regulatory review by directing agencies to establish a Regulatory Reform Task Force and instructing each agency’s Task Force to identify regulations for repeal, replacement, or modification.<sup>125</sup>

Therefore, DHS should implement those presidential directives by planning for retrospective review as it revises USCIS’s policies on collection and use of biometrics. Specifically, DHS should identify data to collect and metrics to track that would help it evaluate the success of its proposed regulation. This process underscores the importance of problem identification because having a clear sense of what the regulation is attempting to solve makes evaluating regulatory performance more straightforward.

DHS should also commit to a periodic review of its biometrics policies and set a specific time in the future for the first review. Periodic review is even more important because the “technology for collecting and using biometrics has undergone constant and rapid change.”<sup>126</sup> DHS should also identify key questions for future evaluation. For instance, what positive and/or adverse effects can be attributed to the rule? Have the rule’s expected benefits been realized? What unforeseen costs have materialized? Finally, DHS can use the results of the *ex post* analysis to verify the accuracy and appropriateness of the assumptions and decisions included in the initial rule.

**Recommendation 7:** DHS should incorporate plans for retrospective review in its final rule, including data to collect and metrics to track that could help evaluate the regulation’s success.

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<sup>122</sup> Marcus C. Peacock, Sofie E. Miller, and Daniel R. Pérez, “A Proposed Framework for Evidence-Based Regulation,” GW Regulatory Studies Center Working Paper, February 2018, p. 6. Available at: <https://regulatorystudies.columbian.gwu.edu/proposed-framework-evidence-based-regulation>.

<sup>123</sup> EO 12866, Sec. 5(a).

<sup>124</sup> Executive Order 13563, 76 FR 3821, January 21, 2011, Sec. 6(a). Available at: [https://www.reginfo.gov/public/jsp/Utilities/EO\\_13563.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf).

<sup>125</sup> Executive Order 13777, 82 FR 12285, March 1, 2017, Sec. 3. Available at: <https://www.federalregister.gov/d/2017-04107>.

<sup>126</sup> 85 FR 56355.

## Executive Order 13771

Executive Order 13771 overlays a regulatory budgeting framework on executive agencies' process for regulatory analysis. The framework includes both a regulatory two-for-one and an incremental cost allowance. Currently, the rule is designated as "Other" on Reginfo.gov.<sup>127</sup> Because DHS's rule is considered economically significant under EO 12866, it should be included as a significant regulatory action under EO 13771. At a minimum, DHS should disclose why its rule is marked as "Other" and exempt from EO 13771.

According to OMB guidance, DHS's rule meets the criteria for a significant regulatory action.<sup>128</sup> Each new significant regulatory action must be offset by two deregulatory actions.<sup>129</sup> Furthermore, the incremental costs of the significant regulatory action contribute to the issuing agency's cost allowance for that fiscal year.<sup>130</sup> To comply with these requirements, agencies must document the incremental costs of significant regulatory actions. In practice, this means to "assess the rule's unique pattern of costs (assuming they persist perpetually, as described below), calculate the present value of those costs, and then amortize the present value costs in equal increments over an infinite time horizon."<sup>131</sup> DHS should also document its methodology for converting its cost figures from a finite (in this case, a 10-year time period) to a perpetual time horizon.<sup>132</sup>

**Recommendation 8:** DHS should comply with EO 13771 by converting its rule's costs from a 10-year to an infinite time horizon and report the incremental costs to the public. It should designate the rule a significant regulatory action and offset its incremental costs according to the department's cost allowance.

## Public Participation

The department's decision to accept comments for only 30 days instead of 60 is not consistent with the principles and requirements of EO 13563 regarding public participation which states:

Regulations shall be adopted through a process that involves public participation  
... To the extent feasible and permitted by law, each agency shall afford the public

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<sup>127</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=1615-AC14>.

<sup>128</sup> OMB, "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'," April 5, 2017, M-17-21, Q2. Available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

<sup>129</sup> OMB 2017, M-17-21, Q5, EO 13771, Sec. 1.

<sup>130</sup> OMB 2017, M-17-21, Q8; EO 13771, Sec. 2.

<sup>131</sup> Dooling, Febrizio, and Pérez 2019, "Accounting for regulatory reform under Executive Order 13771," p. 13. Available at: <https://www.brookings.edu/research/accounting-for-regulatory-reform-under-executive-order-13771/>.

<sup>132</sup> Dooling, Febrizio, and Pérez 2019., p. 19.

a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.<sup>133</sup>

Relatedly, in 2011 the Administrative Conference of the United States (ACUS) issued recommendations on best practices to improve rulemaking outcomes focused on balancing the value of receiving robust public input with the desire to conduct rulemaking efficiently. ACUS recommended that agencies “use a comment period of at least 60 days” for regulatory actions deemed “significant” by EO 12866. ACUS also recommended that agencies should provide an explanation for not doing so whenever they felt shorter comment periods were appropriate.<sup>134</sup>

The current proposal by DHS is an economically significant rule that the department estimates is likely to have a 10-year cost of between \$2.25 billion and \$4.26 billion. The department’s proposal also involves complex (and controversial) policy issues including a substantive expansion of its regulatory authority to collect biometric PII for all department transactions from more than 6 million people annually, including U.S. citizens and regardless of age.

Allowing the public to have a meaningful opportunity to comment could result in DHS receiving valuable feedback it could use to improve its analysis supporting a final rule. Scholars have found that rules supported by lower-quality analyses could result in relatively more costly or less effective outcomes.<sup>135</sup>

**Recommendation 9:** DHS should reopen the comment period of this proposed rule for an additional 30 days. If DHS chooses not to do so, it should include an explanation detailing its decision to limit the comment period to 30 days in its final rule.

## Conclusion

DHS is proposing to substantially expand its collection, use, and storage of biometric information, to include U.S. citizens, and without regard to age. Overall, the NPRM communicates that DHS has made certain determinations about what action it should take without sufficiently explaining the underlying problems that inform those decisions. DHS also conflates its delegated authority with a need for the regulatory action. While executive branch guidance instructs agencies to promulgate regulations required by law or needed to interpret the law, it does not give agencies free reign to establish or update regulations simply because they have been delegated authority.

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<sup>133</sup> Executive Order 13563, Sec. 2(a) and 2(b).

<sup>134</sup> Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments, [76 Fed. Reg. 48,791](#) (August 9, 2011).

<sup>135</sup> Jerry Ellig. “Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center’s Regulatory Report Card, 2008–2013.” Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2016.

DHS must still demonstrate the problems that necessitate its regulatory response or refer to the statutory authority that compels a regulatory action.

In this public interest comment, we recommend that DHS:

1. Provide evidence to identify the problems it seeks to solve through regulation and provide detail on the extent and significance of each problem.
2. Identify and assess alternative regulatory approaches and justify its preferred option in light of those alternatives.
3. Conduct a Privacy Threshold Analysis and a Privacy Impact Assessment for its NRPM and publicly disclose the results before finalizing the rule.
4. Estimate the costs of facilitating DNA collection, using a similar method as it did for estimating the costs incurred by individuals.
5. Report the impacts from the “Other Impacts” and “Regulatory Flexibility Analysis” sections along with the costs in Table 1 (Summary of Provisions and Impacts) and Table 2 (OMB A-4 Accounting Statement). In other words, DHS should include any costs related to ICE and CBP actions and the small entity impacts in its cost estimates.
6. Revise its regulatory impact analysis to explicitly evaluate whether the claimed benefits of the proposed rule justify its extensive costs, using analytical methods such as ranking the importance of qualitative effects and break-even analysis.
7. Incorporate plans for retrospective review in its final rule, including data to collect and metrics to track that could help evaluate the regulation’s success.
8. Comply with EO 13771 by converting its rule’s costs from a 10-year to an infinite time horizon and report the incremental costs to the public. It should designate the rule a significant regulatory action and offset its incremental costs according to the department’s cost allowance.
9. Reopen the comment period of this proposed rule for an additional 30 days. If DHS chooses not to do so, it should include an explanation detailing its decision to limit the comment period to 30 days in its final rule.