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Public Interest Comment¹ on

The Department of Homeland Security's Proposed Rule

Affidavit of Support on Behalf of Immigrants

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REGULATORY STUDIES CENTER

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 amending its regulations governing the affidavit of support requirements under the Immigration and Nationality Act 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.

¹ This comment reflects the views of the author 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>. This comment has been reformatted and edited for clarity. The original version submitted to the agency is publicly available on Regulations.gov: <https://beta.regulations.gov/comment/USCIS-2019-0023-0244>.

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Introduction

DHS is proposing to amend its regulations governing the affidavit of support requirements under section 213A of the Immigration and Nationality Act. The department estimates that the notice of proposed rulemaking (NPRM) will produce direct net costs of up to \$2.0 billion over 10 years. In exchange, the proposal would produce qualitative benefits related to the department's policy priorities. DHS lacks data in multiple areas, which prevents it from adequately quantifying the effects of its rule, including benefits and indirect costs. Overall, its analysis does not measure up to the standards outlined in Executive Order 12866. DHS should supplement its NPRM with a revised regulatory impact analysis and reopen its public comment period on the proposal before moving forward with the rule. As crafted, the benefits of DHS's NPRM are not likely to justify its costs.

Summary of Proposals

DHS's proposed rule would modify the process for its regulations governing the affidavit of support requirements under section 213A of the Immigration and Nationality Act. In general, the requirements would make these regulations more stringent on immigrants and their sponsors. The stated intent of the NPRM is to (a) "better ensure" that sponsors have the ability to maintain the requisite income thresholds and meet their support obligations for the sponsored immigrant and to (b) strengthen the enforcement mechanism for recouping means-tested public benefits received by sponsored immigrants.³

DHS's proposal to amend its affidavit of support regulations includes seven distinct planks related to these stated ends:⁴

1. Update and increase evidentiary requirements for sponsors, specifically by requiring the sponsors and household members executing the affidavit "to provide Federal income tax returns for 3 years, credit reports, credit scores, and bank account information;"⁵
2. Stipulate that whether a sponsor has previously received means-tested benefits or has failed to meet support obligations for another affidavit will affect the department's determination on the sponsor's means;
3. Restrict who qualifies as a household member for Form I-864A (Contract Between Sponsor and Household Member) and reduce how many household members may execute the form;

³ 85 FR 62433. Available at: <https://www.federalregister.gov/documents/2020/10/02/2020-21504/affidavit-of-support-on-behalf-of-immigrants>.

⁴ See, 85 FR 62433-4

⁵ 85 FR 62433.

4. Modify how benefit-granting agencies get information from and give information to the U.S. Citizenship and Immigration Services (USCIS) related to the forms covered by the regulations, including eliminating a subpoena requirement;
5. Clarify categories of individuals who are exempt from the affidavit requirements, including “children automatically acquiring citizenship under section 320 of the Act,”⁶ and revise definitions to increase clarity;
6. Clarify that household members executing the contract in addition to sponsors are required to notify the department of a change of address;
7. Clarify that assets used to meet the affidavit’s threshold “must be those that can be readily converted to cash,”⁷ and make other minor revisions, such as updating definitions, eliminating form numbers, and revising outdated terminology.

These seven planks will produce varying effects that I discuss in the next section on the department’s regulatory analysis.

Regulatory Analysis

DHS confirmed that its proposed rule is considered a significant regulatory action under Executive Order 12866 – specifically being designated an economically significant rule that is expected to have an annual economic impact of \$100 million or more.⁸ The regulatory philosophy contained in Executive Order 12866 instructs:

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.⁹

I discuss the department’s proposed rule in light of the requirements of Executive Order 12866 and other executive branch guidance.

Problem Identification

Executive Order 12866 presents 12 principles of regulation to guide agencies in keeping the regulatory philosophy. The first principle relates to identifying the problem the agency intends to solve and determining the significance of that problem.¹⁰ DHS identifies three problems with its

⁶ 85 FR 62450.

⁷ 85 FR 62434.

⁸ 85 FR 62451.

⁹ Executive Order 12866, Sec. 1(a). Available at: https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

¹⁰ Executive Order 12866, Sec. 1(b)(1).

current processes: 1) insufficient information on the financial means of sponsors and household members; 2) too many household members contributing to the sponsor's income; and 3) issues with information sharing between agencies on repayment actions and sponsor determinations.¹¹

Nevertheless, DHS's proposed rule does not provide data or information on the nature and significance of these problems, nor does it adequately connect these problems to the specific solutions contained in the rule. As written, the NPRM only establishes that DHS's rule aligns with its policy priorities, without providing evidence for a systemic problem, such as a market failure, that requires a regulatory response. Further, readers are unable to adequately evaluate whether what "DHS believes" about its chosen approach is, in fact, accurate – e.g., is DHS's belief that collecting more financial information from sponsors would "strengthen the integrity of the immigration process" substantiated by the evidence?¹²

When DHS claims it lacks sufficient information about financial ability of sponsors to meet obligations, it fails to produce relevant information on the significance of these issues. Relevant data would include the number of sponsors who cannot meet financial support obligations annually, or the amount of means-tested benefits that sponsored immigrants have received. If DHS cannot provide such information or obtain it from other agencies, it should at least explain what reasons it has for supposing these are extensive issues to begin with.

When DHS claims that too many household members may contribute to a sponsor's income, the department does not explain why the current provisions to hold those individuals jointly and severally liable provides insufficient accountability.

Lastly, the barriers to repayment actions and reporting problems that DHS lists are most directly related to interagency communication, rather than the requirements imposed on sponsors themselves. DHS should clearly distinguish which of its proposals will actually address this problem. Furthermore, DHS should provide information on the number of subpoenas issued to obtain copies of affidavits, along with reasonable estimates of the associated delays and burdens.

Alternatives

Executive Order 12866 directs agencies to "identify and assess" alternatives to direct regulation and alternative regulatory approaches.¹³ Crucial to this effort is identifying the baseline absent regulatory action and considering how available alternatives compare to the baseline.¹⁴ OMB guidance suggests considering at least three options, including the preferred approach, a more

¹¹ 85 FR 62441.

¹² 85 FR 62441.

¹³ Executive Order 12866, Sec. 1(b)(3), 1(b)(8).

¹⁴ OMB Circular A-4 (2003), p. 2. Available at:

<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

stringent option, and a less stringent one.¹⁵ To adequately portray the tradeoffs associated with different alternatives, agencies should compare each alternative against the baseline and clearly characterize its incremental effects related to other approaches.

DHS does indicate that it considered alternatives to each plank of its proposed rule. However, multiple issues exist with its discussion of alternatives, making its analysis inadequate:

1. The alternative approaches are discussed in isolation so that it is difficult to assess the incremental effects of each alternative relative to the baseline.
2. None of these alternative approaches are thoroughly evaluated in a manner that analyzes their associated costs and benefits.
3. The alternatives do not portray a sufficient variety to support an informed decision. Multiple alternatives that DHS considered are simply current regulatory provisions – i.e., the baseline itself.¹⁶ The rest of the provided alternatives are more stringent than the preferred option – e.g., “permanently barring an individual who had ever received means-tested public benefits from becoming a sponsor.”¹⁷

In short, DHS does not comply with Executive Order 12866 because its regulatory analysis does not meaningfully compare the differences between the preferred approach and alternative options. DHS should also include less stringent options, which are distinct from the baseline, to determine whether other approaches could achieve greater net benefits.

Impacts and Benefit-Cost Analysis

Executive Order 12866 instructs agencies to “assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs”¹⁸ and to tailor regulations to “impose the least burden on society.”¹⁹

DHS’s NPRM would impose large direct net costs in exchange for qualitative benefits. In addition, DHS estimates that its proposed rule would affect more than a million individuals each year – a substantial population.²⁰ The direct net costs include the opportunity cost of time associated with filling out forms, the cost of providing credit reports and scores, and the burden of providing IRS-

¹⁵ Circular A-4, p. 16.

¹⁶ *See*, e.g., the following stated alternatives: keeping the current definition of household size (85 FR 62445); not requesting credit reports for Form I-864A (85 FR 62445); keeping the existing requirement of 1 year of tax returns (85 FR 62446); leaving the subpoena requirements in the regulation (85 FR 62447).

¹⁷ 85 FR 62442. *Also see*, other more stringent alternatives: “permanently barring an individual who had previously defaulted on a support obligation from becoming a sponsor” (85 FR 62443); “eliminating the Contract entirely, and considering only the sponsor’s income for the purposes of the Affidavit” (85 FR 62444).

¹⁸ Executive Order 12866, Sec. 1(b)(6).

¹⁹ Executive Order 12866, Sec. 1(b)(11).

²⁰ *See*, Table 8 at 85 FR 62463.

certified copies of tax returns.²¹ In addition, the department identifies other unquantified costs that would affect the Department of State.²² The unquantified benefits include strengthening enforcement mechanisms, increasing the accountability of sponsors, more effectively judging sponsors' financial means, and increasing the efficiency of information sharing between agencies. DHS does not incorporate a detailed discussion of why it believes the extensive costs of the rule justify the purported benefits. In light of these estimated effects, the benefits of the proposed rule most likely do not justify its costs.

The direct costs of the proposed rule are massive. DHS estimates that the total net costs on applicants would be about \$240.3 million annually. Over 10 years, the total quantified net costs would range from \$1.7 billion to \$2.0 billion, depending on the discount rate.²³

Besides these large quantified costs, DHS assesses that the new requirements could decrease the number of immigrants that obtain a sponsor.²⁴ Although the department does not attempt to quantify the number, the economic effects could be substantial. Immigrants pay taxes that contribute to the government operation of means-tested benefit programs. The overall net effect of these tax contributions is not considered in DHS's analysis. Such an analysis would also factor in the potential decline in costs associated with fewer immigrants using means-tested benefits or more payments being recovered by the government. These indirect effects are notable because they could negatively affect the broader ends of federal policy. Since it is ambiguous whether reducing immigration might negatively affect the solvency of certain government benefit programs, DHS should acknowledge that uncertainty and conduct additional analysis on this potential impact.

DHS does not evaluate the potential distributional effects of its rule, as directed by Executive Orders 12866 and 13563.²⁵ But the department's analysis in its Family Assessment section suggests that the proposal would have disproportionately negative effects on poorer households: "DHS has determined that the proposed rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."²⁶ DHS claims that it showed how "the benefits of the action justify the financial impact on the family" elsewhere in the preamble,²⁷ but that reasoned justification is not discussed anywhere in the preamble – at least not

²¹ The net costs account for cost savings associated with eliminating I-864W.

²² 85 FR 62469-70.

²³ 85 FR 62452. *See*, Table 2.

²⁴ *See*, 85 FR 62468: "While this proposed requirement would better ensure that a sponsor has demonstrated the means to maintain income at the requisite level to support that intending immigrant, the indirect impact of this proposed provision could be a reduction in the number of immigrants granted an immigration benefit in cases where the intending immigrant is unable to submit a sufficient Affidavit."

²⁵ Executive Order 12866, Sec. 1(a), 1(b)(5); Executive Order 13563, Sec. 1(b). Available at: https://www.reginfo.gov/public/jsp/Utilities/EO_13563.pdf.

²⁶ 85 FR 62474.

²⁷ 85 FR 62474.

explicitly. At best, DHS notes in multiple places that it “has identified enforcement of sponsorship obligations as a priority.”²⁸ Because of the distributional consequences of DHS’s rule, the department should thoroughly evaluate the proposal’s distributive impacts and equity effects.²⁹

Although DHS does not discuss how the claimed benefits justify the rule’s costs, it does acknowledge that it lacks sufficient data to quantify the expected benefits.³⁰ In certain places, this lack of data prevents DHS from determining whether the rule actually produces net benefits.³¹

Retrospective Review

The extensive data limitations that DHS identifies underscore the need to plan for retrospective review at the proposed rule stage. With a clear plan for analyzing the effects of its rule down the road, DHS may be able to determine whether the expected benefits do in fact materialize. DHS should establish clear performance goals and identify metrics that could help assess the effectiveness of its rule. Determining what data are required to assess performance would facilitate comparing measured outcomes to original performance goals.³²

Recommendations

As written, DHS’s proposal does not comport with the requirements of executive branch guidance, including Executive Order 12866. DHS should supplement its NPRM with a revised regulatory impact analysis and reopen its public comment period on the proposal before moving forward with the rule. As crafted, the benefits of DHS’s NPRM are not likely to justify its costs. Absent sufficient revisions of the NPRM, DHS should withdraw the proposed rule.

²⁸ 85 FR 62441. *Also see*, 62453, 62455.

²⁹ *See*, Executive Order 12866, Sec. 1(b)(5).

³⁰ *See*, 85 FR 62453: “DHS does not have sufficient data to quantify the expected benefits of the proposed rule. However, the Administration has identified enforcement of sponsorship obligations as a priority and DHS has made a policy determination that the proposed changes in this rule will assist with better ensuring sponsors and household members who execute a Contract are capable of meeting their support obligations under section 213A of the INA, 8 U.S.C. 1183a, and strengthening the enforcement mechanism for the Affidavit and Contract so that sponsors and household members are held accountable for those support obligations.”

³¹ *See*, 85 FR 62455: “However, DHS does not have data on reimbursement efforts or successful recoveries by benefits-granting agencies. USCIS receives limited information from benefit-granting agencies or other parties enforcing the Affidavit or Contract, despite the information sharing provisions in the statute and regulations and thus is unable to determine whether the proposed rule’s benefits are likely to exceed its costs.”

³² 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>.