recognize the opportunity afforded to migrants via the provided lawful pathways, as well as the unique vulnerabilities of asylum applicants, the high stakes involved in the adjudication of applications for asylum, and the fundamental importance of ensuring that noncitizens with a fear of return have access to the U.S. asylum system, subject to certain exceptions. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (explaining that removing a noncitizen to their home country "is all the more replete with danger when the [noncitizen] makes a claim that [the noncitizen] will be subject to death or persecution if forced to return . . . ."); *Quintero*, 998 F.3d at 632 ("[N]eedless to say, these cases per se implicate extremely weighty interests in life and liberty, as they involve [noncitizens] seeking protection from persecution, torture, or even death."); *Matter of O-M-O-*, 28 I&N Dec. 191, 197 (BIA 2021) ("The immigration court system has no more solemn duty than to provide refuge to those facing persecution or torture in their home countries, consistent with the immigration laws."). These concerns are echoed in E.O. 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border. *See, e.g.*, E.O. 14010, 86 FR at 8267 (Feb. 5, 2021) ("Securing our borders does not require us to ignore the humanity of those who seek to cross them."). Accordingly, the Departments believe that when evaluating changes to the asylum system, as well as processing at the POEs, the potential adverse impacts to legitimate asylum seekers should be carefully considered, as they have been in this rule. The Departments believe that this rule is better suited to address current circumstances than the TCT Bar Final Rule's categorical ban on asylum for nearly anyone who traveled through a third country without applying for asylum in that third country.

The Departments recognize that the TCT Bar was in effect for nine months, and although multiple factors influence migration trends over time, the Departments' review does not indicate that the bar had a dramatic effect on the number of noncitizens seeking to cross the SWB

between POEs.[304] Given the success of the CHNV parole processes, which paired lawful pathways with consequences for not pursuing such pathways, in decreasing encounters, the Departments believe that the TCT Bar's lack of such alternative pathways may have contributed to its failure to dramatically decrease encounters between POEs. This informs the Departments' reasoning for adopting the more tailored approach in this rule—that is, pairing safe, orderly, and lawful pathways for entering the United States with negative consequences for forgoing those pathways, along with exceptions and means of rebutting the presumption against asylum eligibility where certain circumstances are present. Additionally, the fact that the TCT Bar has not been in effect for approximately three years undermines any assertion of reliance interests on the bar.

ii. Opposition to Removal of Provisions Implementing the TCT Bar Final Rule

Comment: Some commenters expressed general opposition to the removal of provisions implementing the TCT Bar Final Rule. Commenters stated that "the concepts of limiting eligibility for asylum based on means of entry and criteria surrounding that entry are appropriate methods of controlling migrant flows at the southwest border" and that the TCT Bar achieved this without including "myriad of exceptions to effectively render it meaningless." Some commenters maintained the TCT Bar Final Rule was legally permissible and politically warranted based on factual conditions at the SWB. Commenters similarly urged the Departments to adopt on a permanent basis an amended version of the rule that would mirror the

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[304] The Departments note that apprehensions along the SWB did not dramatically decrease while the TCT Bar IFR was in effect between September 11, 2019, and June 30, 2020. *See* CBP, *Southwest Border Migration FY 2019*, *https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019* (last visited Mar. 22, 2023); CBP, *Southwest Land Border Encounters*, *https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters* (last visited Mar. 22, 2023). Encounters along the SWB increased dramatically starting in January 2019 until early May 2019, when they began to fall significantly. CBP, *Southwest Border Migration FY 2019*, *https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019* (last visited Mar. 22, 2023). The TCT Bar IFR, although issued on July 16, 2019, did not go into full effect until September 11, 2019, after encounters had already dropped from a high of 144,116 in May to 52,546 in September. *Id.* Encounters continued to trend downward more slowly from October 2019 to March 2020 when concerns over COVID-19 led to the suspension of MPP and the Title 42 public health Order and a steep decline of encounters to a low in April 2020. CBP, *Southwest Land Border Encounters*, *https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters* (last visited Mar. 22, 2023). Thereafter, encounters increased steadily for the rest of the FY with no noticeable change after the TCT Bar IFR was enjoined and stopped being applied on June 30, 2020. Given this data, the Departments have no reason to believe that the TCT Bar IFR had any noticeable impact on encounters along the SWB while it was in effect.

TCT Bar Final Rule's provisions, stating that this would better serve the NPRM's stated goal of "distribut[ing] the asylum burden to countries that are able to provide protection against persecution within the Western Hemisphere." Commenters averred that this would limit asylum eligibility to those with the greatest need for protection and that the "maintenance of effective deterrence policies is essential to stemming the flow of illegal immigration into the United States."

Response: The Departments note these commenters' general opposition to rescinding the TCT Bar and their support for enforcing the Nation's immigration laws. The Departments believe that this rule results in the right incentives to avoid a significant further surge in irregular migration after the Title 42 public health Order is lifted, and that the approach taken in this rule is substantially more likely to succeed than the approach taken in the TCT Bar Final Rule. Specifically, the successful implementation of the CHNV parole processes has demonstrated that an increase in lawful pathways, when paired with consequences for migrants who do not avail themselves of such pathways, can positively affect migrant behavior and undermine transnational criminal organizations, such as smuggling operations. This rule, which is fully consistent with domestic and international legal obligations, provides the necessary consequences to maintain this incentive under Title 8 authorities. In short, the rule aims to disincentivize irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in a third country.

As compared to the TCT Bar Final Rule, this rule has been more carefully tailored to mitigate the potential for negative impact of the rule on migrants to the extent feasible while also recognizing the reality of unprecedented migratory flows, the systemic costs that those flows impose on the immigration system, and the ways in which increasingly sophisticated smuggling networks cruelly exploit the system for financial gain. The Departments remain committed to ensuring that those who apply for asylum or seek protection who most urgently need protection from persecution are able to have their claims adjudicated in a fair, impartial, and timely manner

and believe that this rule, including the removal of provisions implementing the TCT Bar Final Rule, will be a more effective and efficient means of doing so.

Comment: Commenters averred that the rule would be too lenient in comparison to the TCT Bar Final Rule and would lead to "open borders." They claimed that the presumption of asylum ineligibility is not sufficiently stringent and therefore would be far less effective at disincentivizing unlawful migration.

Response: The Departments believe that the rule strikes the right balance in terms of incentivizing the use of lawful, safe, and orderly pathways to enter the United States while imposing negative consequences on a failure to do so. As has been shown with the CHNV parole processes, pairing such policies together can lead to meaningful decreases in the flow of irregular migration to the SWB.

10. Declining to Permanently Adopt the Proclamation Bar IFR

In addition to the 51,952 comments on this NPRM, the Departments received a total of 3,032 comments on the Proclamation Bar IFR and posted 3,000 of those comments. Of the 32 comments not posted, 30 were commenters' duplicates, one was untimely and did not address substantive or novel issues not already covered by other timely comments, and one was an internal test comment. Most of the comments came from one of three mass-mail campaigns, containing the same or closely related variations of the same standard language. While 18 comments supported the IFR specifically or the prior Administration's efforts generally, the vast majority of the comments opposed the IFR. Below, the Departments address these comments in addition to the comments relating to removal of provisions implementing the Proclamation Bar IFR received in response to the NPRM.

i. Support for not Permanently Adopting the Proclamation Bar

Comment: Many commenters expressed general opposition to the Proclamation Bar IFR or support for removing provisions implementing that rule without providing any reasoning. Some commenters simply stated that their comments "express [their] strong opposition to the

new Interim Final Rule." Some commenters, in stating their general opposition to the Proclamation Bar IFR, also made unrelated, general criticisms regarding the prior administration's immigration policies. Commenters supporting the removal of provisions implementing the Proclamation Bar IFR also faulted the Departments for not including proposed regulatory text removing that rule from the CFR. Many commenters who urged the Departments to withdraw the proposed rule did so while requesting that the Departments rescind the Proclamation Bar IFR.

Commenters expressed concern that the Proclamation Bar IFR violates multiple laws. Specifically, commenters stated that the Proclamation Bar IFR violates multiple sections of the Act: INA 208(a), 8 U.S.C. 1158(a) (eligibility to apply for asylum); INA 235(b)(1), 8 U.S.C. 1225(b)(1) (inspection of noncitizens arriving in the United States and certain other noncitizens who have not been admitted or paroled); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C) (additional limitations on granting asylum); INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C) (previous asylum exception to authority to apply for asylum); INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (codifying the TVPRA). Some commenters asserted that only Congress may act to amend the law and that the prior administration circumvented the legislative process by issuing the Proclamation Bar IFR. Commenters also argued that the Proclamation Bar IFR violates 5 U.S.C. 706(2)(A) in that it was promulgated in a manner inconsistent with the APA, and that it violates multiple provisions of the U.S. Constitution. In particular, commenters argued that the Proclamation Bar IFR violates due process rights, equal protection, and separation of powers; exceeds Executive authority; was promulgated with discriminatory intent; is similar to deterrence-focused policies that have been held unconstitutional; and is unlawful on the basis that the appointment of the then-Acting Attorney General violated the Appointments Clause. Commenters contended that the Proclamation Bar IFR also violates the APA by being arbitrary and capricious, in that it conditions asylum on a factor unrelated to persecution. Numerous commenters claimed that the Proclamation Bar IFR violates the APA's notice-and-comment

requirements and that the good cause and foreign affairs exceptions do not apply. One commenter claimed that the Proclamation Bar IFR would, in fact, have federalism impacts, contrary to the Departments' federalism impact assessment, and some commenters disagreed with the Departments' position that it is not subject to the Congressional Review Act because its effect is less than $100 million. Commenters also expressed concern that the Proclamation Bar IFR violates international law, customary international law, and the Refugee Act.

Commenters noted that the court in *East Bay III* held that the Proclamation Bar directly conflicts with section 208(a) of the INA, 8 U.S.C. 1158(a), because "[i]t is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress." Commenters further noted the Ninth Circuit's holding in *East Bay III* that the fact "[t]hat a refugee crosses a land border instead of a port-of-entry says little about the ultimate merits of her asylum application." They further cited *East Bay I* as holding that there is "no basis to support 'categorically disbelieving' non-citizens, or declaring them 'not credible,' simply because of their manner of entry" when applying the "reasonable possibility" standard to those who are determined ineligible for asylum.

Commenters voiced numerous policy concerns about the Proclamation Bar IFR. Specifically, commenters criticized the Proclamation Bar IFR as they believe that it relies on insufficient data or improperly interpreted data; exacerbates trauma by forcing migrants to remain indefinitely outside of the U.S. border in inhumane conditions; punishes those who lack the means to access designated POEs and the luxury to choose how and when they enter the United States; potentially increases risk of harm to children by narrowing safe options; forecloses legitimate asylum claims by imposing an initial higher standard of proof on individuals who enter between POEs; fails to address the root causes of migration, for which some commenters believe the United States is at least in part responsible; violates religious and moral obligations; and is a "shameful abdication of the United States' obligation to serve as a haven for those individuals who meet the internationally agreed upon definition of a refugee."

Further, commenters stated that, contrary to its purpose, the Proclamation Bar IFR would not encourage admission at POEs due to safety and procedural concerns at the SWB and would impede state and local services and non-governmental organizations by undermining policies and programs, imposing substantial additional costs, and discouraging engagement. Commenters also voiced concern that the Proclamation Bar IFR would harm U.S. diplomatic efforts and undermine the United States' international credibility by inflaming tensions and hindering diplomatic relations with Mexico and other nations, as well as encouraging other nations to abandon their humanitarian protection practices. Commenters expressed their belief that the Proclamation Bar IFR is cruel, unnecessary, and overly harsh and was issued "under the guise of streamlining the asylum process" but was actually intended to intimidate asylum seekers from entering the United States "out of fear that their presence in the United States guarantees inadmissibility." Additionally, commenters indicated that statutory withholding of removal and CAT protection are insufficient forms of relief.

Response: The Departments appreciate the commenters' submissions and agree that removal of provisions implementing the Proclamation Bar IFR is sound policy and accords with this Administration's priorities. Although the Departments did not include proposed regulatory text in the NPRM, the Departments have included amendatory text in this final rule, which will result in the Proclamation Bar's removal from 8 CFR 208 and 1208.

Since the Proclamation Bar IFR was promulgated, the Departments have reconsidered their approach and have determined that they prefer the tailored approach of the rebuttable presumption enacted by this rule to the categorical bar that the Proclamation Bar IFR adopted. Even if the rebuttable presumption were not paired with the decision not to adopt the Proclamation Bar permanently, the Departments would decline to permanently adopt the Proclamation Bar IFR and would remove the bar's language from the regulatory text as the Departments no longer view it as their preferred policy choice and are not inclined to continue defending the Proclamation Bar IFR in court in order to be able to implement it at some

indeterminate point in the future. Thus, the Departments consider the decision not to adopt the Proclamation Bar on a permanent basis and to remove the bar's language from the CFR to be severable from the provisions of 8 CFR 208.13(f), 208.33, 1208.13(f), and 1208.33.

The Proclamation Bar IFR was promulgated to address circumstances along the SWB. In the Proclamation Bar IFR, the Departments stated that "[i]n recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border." 83 FR at 55935. They further noted "large caravans" of noncitizens, primarily from Central America, attempting to make their way to the United States, "with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation." *Id.* The Departments noted that nationals of Central American countries were more likely to enter between POEs rather than present at a POE. *Id.* The Departments enacted the Proclamation Bar IFR to "channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner." *Id.* The Departments also stated that the Proclamation Bar IFR would "facilitate the likelihood of success in future negotiations" with Mexico. *Id.* at 55951.

Rather than barring entry on its own, the Proclamation Bar IFR only barred entry between POEs when a presidential proclamation or other presidential order under section 212(f) or 215(a)(1) of the INA, 8 U.S.C. 1182(f) or 1185(a)(1), suspended entry along the SWB. 83 FR at 55952–53. Any exceptions to the operation of the bar would be set out in the presidential proclamation or order and were not within the Departments' control. *Id.* at 5934 ("It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum, nor would it apply to aliens subject to a waiver or exception provided by the proclamation.").

The Proclamation Bar IFR was preliminarily enjoined soon after it became effective and was eventually vacated. *See generally O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019) (recounting the history of the litigation over the Proclamation Bar IFR and vacating it). The Departments appealed the vacatur, and that case has been stayed since February 24, 2021, to

allow for rulemaking by the agencies. *O.A. v. Biden*, No. 19-5272 (D.C. Cir. filed Oct. 11, 2019).

As stated in the NPRM, the Departments have reconsidered the Proclamation Bar IFR and decline to adopt it permanently. *See* 88 FR at 11728. As an initial matter, the Proclamation Bar IFR conflicts with the tailored approach taken in this rule because, in combination with the proclamation the President issued, the Proclamation Bar IFR barred from asylum all individuals who entered the United States along the SWB unless they presented themselves at a POE. *See* 83 FR at 55935 ("The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner."). The Departments do not believe barring all noncitizens who enter between POEs along the SWB is the proper approach in the current circumstances and have instead decided to pair safe, orderly, and lawful pathways for entry into the United States with negative consequences for not taking those pathways, with exceptions and means of rebutting the presumption against asylum eligibility.

Even if the rule's rebuttable presumption were not finalized and given effect, the Departments would nevertheless remove provisions implementing the Proclamation Bar IFR. The bar's categorical nature did not allow for case-by-case judgments to determine whether it should apply, which the Departments consider important to ensure that such bars are applied fairly. The Departments believe that this consideration further supports removing the regulatory language implementing the Proclamation Bar IFR. Finally, U.S. negotiations with Mexico have changed, and the Departments no longer believe that the Proclamation Bar IFR is necessary for those negotiations.

ii. Opposition to not Adopting the Proclamation Bar IFR Permanently

Comment: Some commenters expressed general support for the Proclamation Bar IFR. Commenters stated that the prior Administration had not done enough to deter irregular

migration, resulting in the undermining of compliance with U.S. laws, the rule of law, and national security and safety.

Response: The Departments acknowledge commenters' concerns regarding national security and safety and note the commenters' support for the Proclamation bar IFR. Nevertheless, the Departments, after due consideration, believe this rule to be more appropriate as a matter of policy and law. This rule serves to encourage the safe and orderly processing of migrants at the SWB and is consistent with the United States' legal obligations under the INA, international treaties, and all relevant legal sources. Because these particular comments failed to articulate specific reasoning underlying expressions of general support for the Proclamation Bar IFR, the Departments are unable to provide a more detailed response.

F. Statutory and Regulatory Requirements

1. Administrative Procedure Act

i. Length of Comment Period

Comment: Commenters raised concerns that this rule violated the APA's requirements, as set forth in 5 U.S.C. 553(b) through (d). Commentors stated that the 30-day comment period was not sufficient, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Numerous commenters requested additional time to comment, citing the complex nature of the NPRM, its length, and the impact of the rule on asylum-seekers and commenters. Other commenters, such as legal services organizations, noted that they have a busy workload and that 30 days was not a sufficient period to prepare the fulsome comment they would have prepared had the comment period provided more time. For example, a legal services organization indicated that it would have provided additional information about asylum seekers the organization has assisted in the past and data about the population the organization serves but that it did not have time to do so. Other organizations stated they also would have included information on issues such as their clients' experiences with the CBP One app and experiences in third countries en route to the

United States and would have consulted with experts. Another organization stated that it had to choose between providing comments on the rule and helping migrants prepare for the rule's implementation, and another organization stated that it was unable to provide fulsome comments because the comment period coincided with the implementation of the CBP One app as a means by which its clients could seek exceptions to the Title 42 public health Order. Commenters argued that the Departments selected a 30-day comment period to reduce the volume of negative comments that will be filed in order to justify disregarding national sentiment against the rule.

Commenters asserted that the 30-day comment period is "risking that public comments will not be seriously considered before the rule is implemented," and additional time is needed to meet APA requirements that agencies provide the public with a "meaningful opportunity" to comment. These comments referenced Executive Orders 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993) and 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011), which recommend a comment period of not less than 60 days "in most cases," and case law, such as *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d. Cir. 2011), and *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021).

Commenters disagreed with the Departments' reliance on the impending termination of the Title 42 public health Order in May 2023 and the expected potential surge in migration that would result as justification for the 30-day comment period. These commenters emphasized that the Administration itself sought to formally end the Title 42 public health Order nearly a year ago and stated that the Departments have had sufficient time to prepare for the policy's end. For example, commenters cited to the December 13, 2022, statement issued by Secretary Mayorkas regarding the planning for the end of the Title 42 public health Order.[305]

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[305] DHS, *Statement by Secretary Mayorkas on Planning for End of Title 42* (Dec. 13, 2022), *https://www.dhs.gov/news/2022/12/13/statement-secretary-mayorkas-planning-end-title-42#:~:text=%E2%80%9CNonetheless%2C%20we%20know%20that%20smugglers,United%20States%20will%20be%20removed.*

Some commenters requested extension of the comment period due to reported technical difficulties with submitting comments and stated that technical problems had effectively shortened the comment period to less than 30 days or reduced the public's ability to fully participate in the rulemaking process. For example, one commenter stated that they had learned that there was a technical outage or other error in the application programming interface ("API") technology used to allow third-party organizations to submit comments through regulations.gov. This commenter expressed a belief that an unknown number of comments had been "discarded" without the commenters' knowledge. Another commenter referenced an individual who had technical errors when trying to submit a comment online.[306] This commenter also noted that there was an alert banner on regulations.gov at 9:30 a.m. eastern time on March 27, 2023, that stated "Regulations.gov is experiencing delays in website loading. We apologize for the inconvenience. While we are working on a fix, please try to refresh when you encounter slow responses or error messages." Overall, these commenters referenced possible technical errors with the submission of comments from as early as March 20, 2023, through the close of the comment period on March 27, 2023.

Finally, commenters further stated that the comment period for the USCIS fee schedule NPRM[307] (from January 4, 2023, through March 13, 2023) overlapped with the comment period for the NPRM in this rulemaking, which caused challenges for commenting on this rule in the 30-day comment period. In addition, commenters stated that the 30-day comment period did not provide commenters who do not regularly work in immigration law with sufficient time to fully analyze the effects of the rule, and that the Departments should extend the 30-day comment

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[306] This commenter also referenced a second individual who was able to eventually submit a timely comment but who posted a photo on twitter that the commenter described as a screenshot of an error screen from regulations.gov. *https://twitter.com/argrenier/status/1639989637413490689/photo/1*. The Departments note that this photo is actually a screenshot from a different website (federalregister.gov) and not regulations.gov, which is the website the instructions in the NPRM told the public to use to submit a comment. *Id.*

[307] *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 FR 402 (Jan. 4, 2023); U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Extension of Comment Period, 88 FR 11825 (Feb. 24, 2023) (extending the comment period until March 13, 2023).

period to provide sufficient time for respectful observance of Ramadan, which began during the comment period.[308]

Response: The Departments believe the comment period was sufficient to allow for meaningful public input, as evidenced by the almost 52,000 public comments received, including numerous detailed comments from interested organizations.

The comment period spanned 33 days, from February 23, 2023, through March 27, 2023. The January 5, 2023, announcement of the impending issuance of the proposed rule[309] also provided an opportunity for public discussion of the general contours of the policy.[310] In addition, commenters could begin to familiarize themselves with the rule before the rule was published during the period before the comment period opened when the rule was on public inspection.

The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866 and 13563 recommend a comment period of at least 60 days, a 60-day period is not required. Much of the litigation on this issue has focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (concluding 15 days for comments was sufficient); *NW. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (finding 7-day comment period sufficient).

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[308] This commenter also stated the Departments should extend the comment period due to the holidays of Passover and Easter, but both Passover (April 5 through April 13, 2023) and Easter (April 9, 2023 or later) do not occur in whole or in part during the rule's comment period.

[309] DHS, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), *https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.*

[310] *See, e.g.*, Al Jazeera, *US Rights Groups Slam Bidens 'Unacceptable' Asylum Restrictions*, Jan. 6, 2023, *https://www.aljazeera.com/news/2023/1/6/us-rights-groups-slam-bidens-unacceptable-asylum-restrictions*; UN, *New US Border Measures 'Not in Line with International Standards', Warns UNHCR*, Jan. 6, 2023, *https://news.un.org/en/story/2023/01/1132247.*

The Departments are not aware of any case law holding that a 30-day comment period is categorically insufficient. Indeed, some courts have found 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the "shortest" period that will satisfy the APA, such a period is generally "sufficient for interested persons to meaningfully review a proposed rule and provide informed comment," even when "substantial rule changes are proposed." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)). The Departments recognize, however, that some courts have held that a 30-day comment period was likely insufficient in certain circumstances. *See, e.g.*, *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021) (holding that DOJ's 30-day notice-and-comment period was likely insufficient for a rule that implemented extensive changes to the immigration court system and noting, inter alia, the arguments by commenters that they could not fully respond during the comment period, the effect of the COVID-19 pandemic, and allegations of "staggered rulemaking"); *Pangea Legal Servs. v. DHS*, 501 F. Supp. 3d 792, 818–22 (N.D. Cal. 2020) (holding that the plaintiffs had at a minimum shown "serious questions going to the merits" of whether the 30-day comment period for a different asylum-related rulemaking was insufficient and noting, inter alia, the "magnitude" of the rule, that the comment period "spanned the year-end holidays," the comment periods of other rules by DHS, the number of comments received, and allegations of "staggered rulemaking").

Here, even assuming these cases were correctly decided, the Departments have concluded that the concerns raised in those circumstances are not borne out. First, the significant number of detailed and thorough public comments is evidence that the comment period here was sufficient for the public to meaningfully review and provide informed comment. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367, 2385 (2020) ("The object [of notice and comment], in short, is one of fair notice." (citation and quotation marks omitted)). Second, the 30-day comment period did not span any Federal holidays, and while

commenters noted that the Muslim month of Ramadan began during the comment period, the Departments find that there is no evidence that the occurrence of the month of Ramadan during the comment period would substantively impact the ability of Ramadan observants to submit a timely comment. Third, because the Departments had not recently published other related rules on this topic or that affect the same portions of the CFR that would affect commenters' ability to comment, this rule does not present staggered rulemaking concerns. The last asylum-related rulemaking, the Asylum Processing IFR, was published on March 27, 2022, and was effective on May 31, 2022. 87 FR 18078.[311] Accordingly, commenters did not have to contend with the interplay of intersecting rules and related policy changes when drafting their comments. And though the Departments recognize that the USCIS fee rule's comment period partially overlapped with this rule's comment period, this overlap does not render this rule's comment period unreasonable. The comment period for that rule—which addresses different subjects and portions of the CFR than this rule—opened on January 4, 2023, 50 days before opening of this rule's comment period, and ended on March 13, 2023, 14 days prior to the close of this comment period.

Finally, the Departments also believe that the 30-day comment period was preferable to a longer comment period since this rule involves concerns about the Departments' ability to safely, effectively, and humanely enforce and administer the asylum system and immigration laws given the surge of migrants that is expected to occur upon the lifting of the Title 42 public health Order if this rule were not in place. *Cf., e.g.*, *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (noting that the agency had good cause to not engage in notice and comment rulemaking at all because the rule was needed to protect public safety as demonstrated by numerous then-recent helicopter crashes). By proceeding with a comment period shorter than 60 days, the Departments were able to receive comments, review comments, and prepare a final rule

[311] In addition, the Departments published a final rule extending the U.S.-Canada STCA on March 28, 2023, but that rule did not have any impact on the subject of this rule as it applies to the U.S.-Canada land border. 88 FR 18227.

to be promulgated in time for the May 11, 2023, expiration of the public health emergency and the corresponding expiration of the Title 42 public health Order. A 60-day comment period, on the other hand, would have run until April 24, 2023, and a final rule would have been impossible to prepare in the 17 days from April 24 to May 11, 2023. Having this rule in place for the expiration of the Title 42 public health Order will disincentivize the expected surge of irregular migration and instead incentivize migrants to take safe, orderly, and lawful pathways to the United States or to seek protection in third countries in the region. The rule will thus prevent a severe strain on the immigration system, as well as protect migrants from the dangerous journey to the SWB and the human smugglers that profit on their vulnerability. Contrary to some commenters' allegations, the Departments did not select a 30-day comment period to limit public involvement on the rule.

The Departments disagree with commenters' statements that the Departments' reliance on the end of the Title 42 public health Order is inapt because ending Title 42 was a government choice, and the Departments should have had time to prepare without a 30-day comment period. First, the Departments note that the Title 42 public health Order is ending based on factual developments, and the Departments do not control either those factual developments or the decision to recognize those factual developments by terminating the public health Order. Second, litigation and the resulting injunctions over ending the Title 42 public health Order have made it difficult for the Departments to predict an exact end date. *See, e.g.*, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (granting States' application for stay pending certiorari and preventing the District Court for the District of Columbia from giving effect to its order setting aside and vacating the Title 42 public health Order); *Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022) (granting States' motion for a preliminary injunction prohibiting enforcement of the CDC's order terminating Title 42). Accordingly, it was not until the Administration

announced[312] its plan to have the public health emergency that underpins the Title 42 public health Order extend until May 11, 2023, and then expire that the end of the Title 42 public health Order changed from speculative to more concrete. The Departments then published the NPRM in short order, 24 days after the Administration's statement of intent. Finally, as discussed in the NPRM and elsewhere in this preamble, the CHNV parole processes that the Departments developed in October 2022 (Venezuela) and January 2023 (Cuba, Haiti, and Nicaragua) have shown significant success in reducing encounters and encouraging noncitizens to seek lawful pathways to enter the United States. This rule adopts a similar design as these programs—coupling the incentives of lawful pathways with disincentives for failing to pursue those pathways—based, in part, on the successes of those programs in decreasing irregular migration. Because those successes were not seen until as late as January 2023, commenters are incorrect that the Departments could have published it long before February 2023. Once the NPRM was published, it was reasonable to include a 30-day comment period in light of the impending end of Title 42 public health Order.

Finally, the Departments have investigated commenters' allegations of technical errors that led to comments being "discarded" or not submitted with the eRulemaking Program at the GSA. A GSA representative explained the following:

- The API, which allows the electronic submission of comments to regulations.gov by third-party software, was operating normally from March 20, 2023, to March 28, 2023.
- Commenters are incorrect that any submitted comments were "discarded" as comments that are received are not discarded.
- While some users reported errors on the submission of API comments, all unsuccessful transactions were successfully resubmitted within a maximum of 30 minutes.
- In addition, the eRulemaking Program accommodated one commenting organization with a temporary increase to the API posting rate limit so that the organization could submit approximately 26,000 comments by the close of the comment period.

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[312] Office of Mgmt. & Budget, Exec. Office of the President, *Statement of Administration Policy* (Jan. 30, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf*.

- None of the help desk call logs reflect a call related to this rule nor a discussion indicating an unresolved error when posting comments.

Accordingly, the Departments do not believe that any technical errors prevented commenters from submitting comments within the 30-day comment period.

Overall, the Departments find that the time afforded by a 30-day comment period to prepare a final rule prior to the expiration of the Title 42 public health Order, which would not have been possible with a longer comment period, outweighs the arguments raised in support of a longer comment period by commenters. Commenters have provided numerous and detailed comments regarding the NPRM, and the Departments appreciate their effort to provide thorough commentary for the Departments' consideration during the preparation of this final rule.

ii. Insufficient Consideration of Public Comments

Comments: Commenters stated that the timeline for the rule risks that the Departments will not seriously consider public comments before implementing a final rule and gives the appearance that the Departments have predetermined the outcome of the NPRM. Many commenters stated that the short time span between the scheduled close of the comment period (at the end of March 27, 2023) and the anticipated issuance of the final rule (no later than May 12, 2023) suggested that the Departments would not meaningfully consider public comments. Commenters stated that the Departments should have issued a proposed rule earlier than February 2023 to give the Departments more time to carefully consider comments received and revise policy plans prior to the issuance of a final rule.

Response: The Departments have included an extensive discussion of comments received as part of this preamble. The Departments strongly disagree with the commenters' assertions that the Departments failed to meaningfully consider public comments in issuing this final rule. The Departments' receptivity to public comments is demonstrated by, for instance:

- The extensive and substantive discussion of public comments in this preamble;
- Multiple revisions made by the Departments to the policy contained in the NPRM, including clarifications of policy requested by commenters, a reorganization of the

regulatory text for clarity, and other policy changes that are responsive to public comments; and

- The Departments' choice to seek public comment in the first instance, notwithstanding that this rulemaking involves a foreign affairs function of the United States and addresses an emergency situation for which the Departments would have good cause to bypass notice and comment.[313]

iii. Delayed Effective Date

Comments: Commenters stated that they anticipated that the Departments would issue the final rule in violation of the APA's requirement of a 30-day delayed effective date for substantive rules.[314] Commenters stated that by delaying so long in issuing the NPRM, the Departments had forfeited any argument for "good cause" to make the final rule effective immediately. Commenters noted that there has been litigation for years over the ongoing viability of Title 42 public health Order—itself an inherently temporary measure—and the April 2022 Title 42 termination Order. Commenters stated that the Departments could have conducted a notice-and-comment rulemaking with a 30-day delayed effective date had they begun this rulemaking sooner.

Response: As discussed in Section V.A. of this preamble, the Departments are invoking the foreign affairs and good cause exceptions for bypassing a 30-day delayed effective date. *See* 5 U.S.C. 553(a)(1) and (d). The Departments have determined that immediate implementation of this rule is necessary to fortify bilateral relationships and avoid exacerbating a projected surge in migration across the region following the lifting of the Title 42 public health Order.

Case law suggesting that an agency's delay can effectively forfeit the agency's "good cause" relates primarily to the separate good cause exception applicable to notice-and-comment rulemaking requirements under 5 U.S.C. 553(b)(B).[315] Such case law has no bearing on the

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[313] *See* 5 U.S.C. 553(a)(1), (b)(B); *see also* Section VI.A. of this preamble.

[314] *See* 5 U.S.C. 553(d).

[315] *See, e.g., Envt'l. Def. Fund v. EPA*, 716 F.2d 915, 921–22 (D.C. Cir. 1983) (holding that because the agency "failed to demonstrate that outside time pressures forced the agency to dispense with APA notice and comment procedures . . . the agency's action . . . [fell] outside the scope of the good cause exception"); *Nat'l Ass'n of Farmworkers Org. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) (rejecting a good cause argument for bypassing notice and comment because the time pressure cited by the agency "was due in large part to the [agency's] own delays").

foreign affairs exemption under 5 U.S.C. 553(a)(1). In addition, it is not dispositive as to the good cause exception at 5 U.S.C. 553(d), which serves "different policies" and "can be invoked for different reasons."[316] Specifically, the 30-day delayed-effective-date requirement "is intended to give affected parties time to adjust their behavior before the final rule takes effect,"[317] but in this context, affected parties have been subject to the Title 42 public health Order for years, and cannot reasonably argue that they require an additional 30 days to adjust their behavior to the new approach taken in this rule.

Even if the forfeiture doctrine is applied in this context, however, the Departments have pursued this rulemaking without delay, and in fact have proceeded as rapidly as possible under the circumstances. As discussed at length in the NPRM, this rulemaking addresses a range of dynamic circumstances, including major recent shifts in migration patterns across the hemisphere, altered incentives at the SWB created by the application of the Title 42 public health Order (which has carried no immigration consequences and resulted in many migrants trying repeatedly to enter the United States), and ongoing litigation regarding the Title 42 public health Order.[318] The Departments have sought to address these circumstances in a variety of ways, including the six-pillar strategy outlined in the April 2022 DHS Plan for Southwest Border Security and Preparedness; the issuance of the Asylum Processing IFR, 87 FR 18078; the expansion of lawful pathways throughout the region and via the CHNV processes; and the introduction of the CBP One app, among other measures. The Departments' issuance of the proposed rule while the litigation over the Title 42 public health Order was ongoing, and within weeks of the Administration's announcement regarding the impending termination of that Order, reflects the high priority that the Departments have placed on issuing this rulemaking promptly via a notice and comment process.

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[316] *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (The "30-day waiting period in no way relates to the notice and comment requirement, but the federal courts have not always been careful to maintain the distinction" (internal citation and quotation omitted)).

[317] *Id.*

[318] *See* 88 FR at 11708–14.

2. Paperwork Reduction Act ("PRA")

Comment: A commenter stated that the Departments had not posted to the public docket any proposed revisions to the collection of information under Office of Management and Budget ("OMB") Control Number 1651-0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border*. The commenter stated that such revision appeared particularly important given the NPRM's proposed codification of the required use of the CBP One app to access regular Title 8 asylum processing. The commenter stated that, as a consequence of the failure to post the proposed revisions, they were unable to comment on the proposed changes to the collection of information. A commenter expressed concern that CBP sought emergency approval to collect advance information on undocumented noncitizens and bypassed the standard notice and comment process.

Response: With respect to commenters' stated concerns about the public docket, the Departments note that like all proposed revisions to collections of information, the proposed revisions described in the NPRM were available for review throughout the comment period on OMB's website at *https://www.reginfo.gov*, under the Information Collection Review tab.[319] The Departments did not also post these comments to the public docket, but are unaware of any attempt by the commenter to request a copy of the proposed changes by using the contact information listed in the NPRM.

The Departments maintain that the nature of the proposed change to the collection of information was clear to commenters, as the proposed change was described at length in the NPRM and was the subject of many comments. The Supporting Statement that was available on OMB's website (and was the only document related to the information collection for which the Departments had proposed revisions) described an NPRM that, if finalized, "would change the consequences, for some noncitizens and for a temporary period of time, of not using CBP One to

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[319] *See* OMB, *ICR Documents: CLEAN Supporting Statement 1651-0140 Advance Information Collection NPRM Changes*, *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202302-1651-001* (last visited Mar. 29, 2023).

schedule an appointment to present themselves at a POE."[320] The Supporting Statement explained that such noncitizens would "be subject to a rebuttable presumption of asylum ineligibility, unless the noncitizen demonstrates by a preponderance of the evidence that it was not possible to access or use CBP One due to a language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or that the noncitizen is otherwise not subject to the rebuttable presumption."[321] The Supporting Statement further clarified that "[t]here is no change to the information being collected under this collection or the use of the information by CBP, but this change would alter the consequences of not using the collection, and thus increases the estimated annual number of responses in the collection."[322]

Regarding the concern with using the emergency PRA approval process for the collection of information via the CBP One app, CBP notes that, although the initial collection was approved on an emergency basis,[323] the relevant PRA approval for the collection that is being used for this rule (OMB Control Number 1651-0140) was subsequently done using the normal PRA process, which included two *Federal Register* notices and an opportunity for public comment.[324] Further, this collection is being revised again through this rule, and the public was given additional opportunity to comment on the information collection in this rulemaking. *See* 88 FR at 11749–50.

Members of the public are welcome to submit comments to OMB on the collection of information via *https://www.reginfo.gov* for a period of 30 days following issuance of this final rule.

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[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *See* OIRA, *OIRA Conclusion, OMB Control No. 1651-0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (May 3, 2021), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202104-1651-001.
[324] *See* 86 FR 73304 (Dec. 27, 2021); 87 FR 53667 (Sept. 28, 2021). *See also* OIRA, *OIRA Conclusion, OMB Control No. 1651-0140, Collection of Advance Information from Certain Undocumented Individuals on the Land Border* (Dec. 18, 2022), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202112-1651-001. The OIRA *Conclusion* includes citations and links to the notices published in the Federal Register, as well as the comments received in response.

Comment: A commenter expressed that the NPRM is not in compliance with the APA because the CBP One app has not gone through the normal notice-and-comment period required by the APA. The commenter stated that the Departments had not clearly described the app in a way that would provide the public with the necessary information to understand how the app works and that a noncitizen's failure to use the app when presenting themselves at a port of entry has serious implications on immigration relief.

Response: The Departments disagree with the contention that the use of the CBP One app, whether separate from or as described in this rule, fails to comply with the APA. The CBP One app serves as a single portal to a variety of CBP services.[325] Because there is not an overarching CBP One information collection, CBP has sought OMB approval under the PRA of each information collection contained in the CBP One app, pursuant to standard procedures. Regarding the particular use of the CBP One app that is described in this rulemaking—i.e., the use of the app as the current "DHS scheduling system" described in 8 CFR 208.33(a)(2)(ii)(B), 1208.33(a)(2)(ii)(B), to collect information from certain undocumented individuals on the land border—the PRA information referenced above, and available to the public, provided information sufficient to understand how the app works, and how it would work in connection with this rulemaking. Similarly, the Departments provided a description of the presumption and its application, including to those who do not utilize CBP One, in the NPRM and invited comment thereon.

3. Impacts, Costs, and Benefits (Executive Orders 12866 and 13563)

Comment: A few commenters expressed that the Departments have not met their obligations under Executive Order 12866 and Executive Order 13563. A commenter requested that the Departments investigate and develop quantitative estimates regarding a range of potential regulatory effects, such as estimates of the rule's potential impact on family unity, the

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[325] *See* CBP, *CBP One™ Mobile Application*, https://www.cbp.gov/about/mobile-apps-directory/cbpone (last visited Apr. 26, 2023).

lifetime cost of work permit renewals for those who are granted withholding of removal instead of asylum under the rule; the impact of life-long inability to travel internationally for those granted withholding of removal rather than asylum; and the potential costs on States and localities of vastly increasing the class of individuals ineligible for public benefits, services, and healthcare. Another commenter requested that the Departments consider the downstream impacts of the rule on other noncitizens and their U.S. citizen family members who might be affected by additional backlogs in immigration court. A legal services provider expressed concern with the Departments' "evident implication" that the rebuttable presumption will not impact asylum seekers beyond their loss of a path to citizenship and inability to petition for family members to join them in the United States; the commenter cited challenges with retaining counsel and lost opportunities to collect evidence or consult family before an asylum decision is made. Some commenters stated that the rule's analysis of its costs and benefits is deficient because the rule lacked detailed estimates or further specifics with respect to costs for the Departments, the States, and other parties. Commenters stated that for this reason, the regulatory analysis in Section VI.A. of the NPRM's preamble failed to satisfy the requirements of Executive Order 12866.

Response: The Departments respectfully maintain that the regulatory analysis accompanying the NPRM adequately described the costs and benefits associated with this rulemaking. The concerns raised by the commenters have been addressed qualitatively in the preambles to the NPRM and this final rule. The Departments recognize that the rule will result in costs and benefits for the individual noncitizens who are subject to it, as well as a range of potential indirect effects on other persons and entities.[326] The Departments have further described these costs and benefits throughout this preamble. The Departments have also further revised the Executive Order 12866 discussion in Section VI.B. of this preamble to address some

[326] *See* Section VI.B of this preamble for a further discussion of the rule's costs and benefits.

of the concerns described by the commenters, including concerns related to work permit renewal.[327]

Although the Departments have discussed the relevant policy considerations associated with this rulemaking at length, the Departments note that neither Executive Order 12866, nor any other executive order or law, requires more detailed quantitative analysis in these circumstances. The fact that preparation of a regulatory impact analysis under Executive Order 12866 is a matter of Executive Branch discretion is underscored by the terms of Executive Order 12866, section 10:

> Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Courts have recognized the internal, managerial nature of this and other similarly worded executive orders, and have concluded that actions taken by an agency to comply with such executive orders are not subject to judicial review. *See Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 445 (9th Cir. 1993) (citing *State of Mich. v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986)).

i. Quantitative Impacts on Federal and State Governments

Comment: A group of State Attorneys General stated that the proposed rule "completely ignores the increased costs to the States of higher levels of unlawful aliens precipitated by" the NPRM. Quoting the proposed rule, the commenters stated that the Departments "falsely claim[ed] that '[t]he costs of the proposed rule primarily are borne by migrants and the Departments.'" *See* 88 FR at 11748. Commenters further stated that States have significant reliance interests in the Federal Government's enforcement of the immigration laws and that the Departments should withdraw the rule because the Departments did not consider this reliance in

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[327] The Departments note that some, but not all, of the commenters that pressed for additional quantitative analysis expressed strong support for the TCT Bar IFR and Final Rule, which did not contain an Executive Order 12866 analysis due to their nexus to a foreign affairs function of the United States. *See* 84 FR at 33843 (IFR); 85 FR at 82289 (final rule).

the proposed rule. Commenters stated that the rule would cause additional noncitizens to enter the United States where they would cause the States to expend additional funds on law enforcement, education, and healthcare than the States otherwise would have spent.

In support of this assertion, commenters stated that irregular migration imposes significant costs on States. Commenters cited a study that stated "the net cost of illegal immigration to U.S. taxpayers is now $150.7 billion." Commenters provided specific examples of costs that the State of Indiana has incurred or could incur to provide services to noncitizens, including costs to provide English Language Learner Services and other education services. Commenters stated that as many as 5,000 family units that had been encountered and granted parole pursuant to the parole + ATD policy settled in Indiana between July 2021 and February 2022. On the other hand, a state administrative agency wrote that immigrants and refugees are integral to that State's economy and generate $2.8 billion of business income and contribute over $21.4 billion in Federal, State, and local taxes, annually. The commenter wrote that immigrants and refugees have successfully rebuilt their lives and made positive social and economic contributions to the State by revitalizing neighborhoods and adding to the cultural vitality of the State and its communities.

Response: The Departments respectfully disagree with the characterization of the rule as precipitating higher levels of irregular migration. As discussed in the preamble to the proposed rule, *see, e.g.*, 88 FR at 11705–06, and in Section I of this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule is expected to reduce irregular migration, not increase it.

This rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. This rule excepts from its rebuttable presumption noncitizens who enter the United States pursuant to a lawful pathway, but

the rule does not newly introduce or authorize any lawful pathways to enter the United States. While it is true that the rule excepts from the rebuttable presumption those who use some lawful pathways, such pathways would exist irrespective of this rule. Indeed, as stated in the NPRM, the term "lawful pathways" refers to the "range of pathways and processes by which migrants are able to enter the United States or other countries in a lawful, safe, and orderly manner and seek asylum and other forms of protection." 88 FR at 11706 n.15. One such lawful pathway is entry pursuant to the CHNV parole processes; such processes were established prior to and separate from the publication of the NPRM. In other words, the commenters have conflated the lawful pathways accounted for in this rule with the rule itself.

The Departments further note the evidence that the introduction of lawful pathways, particularly when coupled with a consequence for failing to use such processes, has significantly reduced levels of irregular migration. For instance, as noted in the proposed rule, in the week prior to the announcement of the Venezuela parole process on October 12, 2022, encounters of Venezuelan nationals between POEs at the SWB averaged over 1,100 a day from October 5–11. About two weeks after the announcement, encounters of Venezuelan nationals averaged under 200 per day between October 18 and 24.[328] The low trend continued with a daily average of 106 in March 2023.[329] Similarly, the number of CHN nationals encountered dropped significantly in the wake of the January 2023 announcement of new processes for those countries. Between the announcement of the new processes on January 5, 2023, and January 21, the number of daily encounters between POEs of CHN nationals dropped from 928 to 73, a 92 percent decline.[330] Encounters between POEs of CHN nationals continued to decline to a daily average of fewer than 17 per day in March 2023.[331] These reductions in encounters have been sustained for months while the Title 42 public health Order has remained in effect.

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[328] USBP encountered an average of 225 Venezuelans per day in November 2022 and 199 per day in December 2022. OIS analysis of OIS Persist Dataset based on data through March 31, 2023. Data are limited to USBP encounters to exclude those being paroled in through POEs.
[329] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.
[330] *Id.*
[331] *Id.*

With respect to commenters' statement that States have significant reliance interests in the Federal Government's enforcement of the immigration laws, this rule does not set any policy against enforcement of the immigrations laws. Commenters' objections to other enforcement policies, or any lack thereof, have little relationship to this rule, which, as previously stated, creates a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The Departments are unaware of any existing policies altered by this rule in which States have a substantial reliance interest. For example, States cannot have substantial reliance interests in the Proclamation Bar IFR or TCT Bar Final Rule because neither rule is being enforced.

Ultimately, the commenters' objections are not to the proposed rule, but to the lawful pathways themselves, as well as to other aspects of the immigration system. The Departments believe that withdrawing the proposed rule would not achieve the Departments' or the commenters' goals.

Comment: Another group of State Attorneys General stated that if, as a consequence of the rule, noncitizens endure additional trauma seeking asylum in a third country or waiting at the SWB in potentially dangerous conditions for a CBP One appointment, such noncitizens will require more State-funded services, such as services related to healthcare, education, and legal assistance.

Response: The Departments acknowledge that various levels of government provide services to noncitizens for a range of purposes. The Departments have further revised the Executive Order 12866 discussion in Section VI.B of this preamble to note the potential effects on such entities.

Comment: Commenters stated that while the Departments acknowledge the cost and other impact that irregular migration has had on DHS operations, States and border communities, and NGOs, the Departments did not adequately consider the costs borne by other Federal

agencies not directly associated with immigration enforcement. For example, commenters stated that some health programs (Medicaid; the Children's Health Insurance Program; the Supplemental Nutrition Assistance Program; and the Women, Infants, and Children program) and tax credits are available to noncitizens without employment authorization. Commenters also stated that UCs are eligible for a large number of Federal benefits immediately upon their entry. Commenters also stated that the expanded usage of humanitarian parole results in costs associated with providing parolees Federal benefits.

Response: The Departments agree that a high volume of irregular migration can have significant implications for other Federal agencies that provide services or assistance to migrants. For the reasons stated in the first comment response in Section IV.F.3.i of this preamble, however, the Departments do not believe it is reasonable to expect that the rule would result in an increase in irregular migration. This rule is designed to reduce levels of irregular migration, and to channel migrants into lawful, safe, and orderly pathways. In the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted. This rule will reduce irregular migration and any costs associated with such migration, rather than increasing such migration and costs.

Comment: Some commenters also stated that the rule fails to adequately consider and address the administrative costs that the Departments would incur in order to implement the rule. Regarding USCIS, these commenters stated that the Departments failed to consider, for instance, the following costs: new trainings, possible future hiring needs that could result from the rule, and possible collateral costs to petitioners before USCIS who could have adjudications delayed due to downstream delays. Some commenters expressed concern that USCIS, as a fee-funded agency, might have insufficient resources to implement the rule, and hypothesized that USCIS might seek to ask Congress for an appropriation to cover implementation costs, which would shift the burden of the cost to U.S. taxpayers. These commenters cited the requirements of the

Anti-Deficiency Act and past reductions in USCIS fee revenues in support of the commenters' prediction of an appropriations request.

Regarding CBP, commenters stated that the Departments failed to consider, for instance, costs for training staff on the CBP One app and for app maintenance and updates.

Regarding ICE, commenters stated that if, as a result of the rule, more noncitizens receive negative credible fear determinations and request IJ review, there is a risk of overcrowding and other operational complications as bed space runs out for new arrivals. The commenters stated that this could increase the money paid by the U.S. taxpayer unnecessarily.

Regarding EOIR, these commenters stated that the Departments failed to consider, for instance, the following costs: training of IJs and staff; form updates; and an increase to the court backlog if adjudications take longer.

Response: The Departments agree that various agencies will expend resources to implement this rule. The discussion in Section VI.B of this preamble explains that the rule will require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed in the proposed rule and elsewhere in this preamble, in the absence of this rule, the Departments would anticipate a significant further surge in irregular migration after the Title 42 public health Order is lifted, which would require the expenditure of significant resources. This rule is therefore anticipated to substantially reduce net burdens on the Departments, including at the agencies referenced by the commenters.

4. Regulatory Flexibility Act ("RFA")

Comment: At least one commenter disagreed with the certification in the NPRM that the proposed rule would not have a significant economic impact on a substantial number of small entities. *See* 88 FR at 11748. Some legal services providers gave examples of how the rule would impact their organization and workloads, without objecting to the RFA certification. But

at least one commenter disputed the certification and wrote that as a nonprofit organization that helps asylum seekers prepare for credible fear interviews, IJ reviews, and merits hearings, the commenter would experience a significant time and cost burden associated with the new rule, such as the additional time spent gathering evidence from foreign countries, appearing at interviews and hearings, and explaining the law and outcome to clients and pro se respondents. The commenter stated that, as a consequence of the rule, the commenter would therefore be forced to serve fewer individuals, significantly reducing the number of people who would have access to legal services. The commenter further stated that due to the increased time burden, individuals would have to pay the commenter increased fees or donors would have to chip in more for each person.

Response: Consistent with longstanding case law, a regulatory flexibility analysis is not required when a rule has only indirect effects on small entities, rather than directly regulating those entities. *See, e.g.*, *Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) ("[A]n agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.").[332] This rule does not directly regulate any organizations; the rule imposes a rebuttable presumption of asylum ineligibility for certain migrants who enter the United States at the southwest land border or adjacent coastal borders after traveling through a third country during a designated period. The RFA does not

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[332] *See also Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply'. . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected." (citing *Mid-Tex*, 773 F.2d at 343)); *White Eagle Co-op. Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) ("[S]mall entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.").

require the Departments to estimate the rule's potential indirect effects on legal service organizations, law firms, and other service providers whose clients may be subject to the rule. Because this rule does not regulate small entities themselves, the Departments reaffirm their conclusion that no regulatory flexibility analysis is necessary.

5. Other Regulatory Requirements

Comment: A group of State Attorneys General disputed the statement in the proposed rule, made pursuant to Executive Order 13132, Federalism, 64 FR 43255 (Aug. 4, 1999), that the proposed rule would not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. *See* 88 FR at 11749.

Response: The Departments maintain that this rule will not have a substantial direct effect on the States, the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule's only direct effects relate to asylum applicants and those being processed at the SWB. For the same reason, this final rule will not impose substantial direct compliance costs (indeed, any direct compliance costs) on State and local governments, or preempt State law. Accordingly, in accordance with section 6 of Executive Order 13132, this rule requires no further agency action or analysis.

Comment: A group of State Attorneys General stated that the Departments should withdraw the rule because it would impose significant unfunded mandates on the States but the Departments did not assess the impact on the States or their constituent local governments under the Unfunded Mandates Reform Act of 1995 ("UMRA"). Commenters disagreed with the Department's statement in the proposed rule that the rule would not impose an unfunded mandate because "[a]ny downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed" by the rule. 88 FR 11748. Commenters cited cases regarding

standing to sue in Federal court, such as *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) and *City & County of San Francisco v. USCIS*, 944 F.3d 773, 787 (9th Cir. 2019), arguing that if the fact patterns in those cases were sufficient to establish standing, they are sufficient to trigger the UMRA's requirements. Quoting 2 U.S.C. 1534(a), commenters stated that UMRA also requires that "[e]ach agency . . . develop an effective process to permit elected officers of State, local, and tribal governments . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." The comments stated that the Departments never allowed elected leaders in their States to provide any such input.

Response: Case law on standing does not dictate UMRA's scope. The Departments maintain that the NPRM preamble's discussion of UMRA was correct. This rule does not contain a Federal mandate, or a significant Federal intergovernmental mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by the rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate contained in this rule, as that term is defined under UMRA.

G. Out of Scope

Comment: Commenters submitted a number of comments that were outside the scope of the rulemaking. For instance, some commenters stated that the United States should create a path to citizenship for undocumented immigrants; that the Government should otherwise engage in legislative immigration reform; that all noncitizens with disabilities should be eligible for asylum; that minors should not be released to individuals without lawful status; that the Government should focus on disparities among IJs in asylum grant rates; that the United States should expand resources focused on the development of civil society and governments in the Northern Triangle; that countries from which asylum applicants flee should help fund

humanitarian aid for their citizens who resettle in the United States; that POEs are already overwhelmed so asylum-seekers should be allowed to enter in other places; that the Government needs to focus on granting "Dreamers" citizenship; that the Government should call on the military to forcibly repel migrants from the border; that the United States should end birthright citizenship; that the American workforce is becoming automated, putting American citizens out of work; that the United States should subsidize the implementation of machinery that would fill the jobs that normally "attract" migrants (e.g., agricultural work); that migrant children are being forced into child labor; that the U.S. birthrate is low and we need more workers to maintain Social Security and Medicare; that the United States is selling land to China, and India is buying oil from Russia; that the United States should systematically fund research that evaluates the racial disparities that exist in the efficiency with which Ukrainian humanitarian parole applications have been reviewed and evaluated versus those of Afghan applicants; that American taxpayers are suffering the effects of the border crisis, particularly in schools; that the United States should expand legal immigration; that asylum seekers will receive in absentia removal orders due to difficulties in contacting asylum seekers for court hearings; that they objected to the number of noncitizens present in the United States without lawful status.

Response: Such comments address matters well beyond the scope of the proposed rule and do not require further response.

Comment: Several commenters made statements related to CBP custody conditions, noting for instance that they are overcrowded, lack adequate access to hygiene, lack adequate space so that families are separated by gender, are cold, lack adequate bedding, have lights on at night, and do not have adequate showers. At least one commentor noted that CBP facilities should have more child friendly reception areas.

Response: The Department acknowledges the commenters' concerns. However, this rule does not have any impact on whether or how individuals are in custody or detained, and these comments are outside the scope of the rulemaking.

V. Request for Comments on Proposed Extension of Applicability to All Maritime Arrivals

In addition to the changes made in this final rule described in Section IV.B.8.i of this preamble, the Departments are considering and request comment on whether to apply the rebuttable presumption to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at a maritime border,[333] whether or not they traveled through a third country. Such a modification would expand the scope of the rule's rebuttable presumption in two ways: both geographically (covering all entries by sea, not just those entering the United States from Mexico at coastal borders adjacent to the SWB) and with regard to the class of persons potentially subject to the rebuttable presumption (by covering persons who enter the United States by sea even if they did not travel through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees). In addition, the Departments are also considering and request comment on whether to expand the scope of the rule's rebuttable presumption geographically to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, while continuing to limit the presumption's applicability to those who traveled through another country before reaching the United States. Finally, the Departments are considering and request comment on whether to expand the scope of the presumption to noncitizens who enter the United States by sea, but to limit the scope of that expansion to noncitizens who departed from the Caribbean or other regions that present a heightened risk of maritime crossings.

The Departments are considering extending the rule's rebuttable presumption to maritime arrivals to encourage any migrants intending to reach the United States by sea to instead avail

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[333] The STCA and Additional Protocol controls and applies as to individuals who cross the U.S.-Canada land border between POEs, including certain bodies of water along or across the U.S.-Canada land border, as described in 88 FR 18227, 18234. The Departments' use of "at a maritime border" includes individuals who enter the United States by sea, as in the Atlantic and Pacific coasts of the United States.

themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in another country. As discussed in more detail below, DHS has recently experienced high levels of maritime interdictions, primarily of Cuban and Haitian nationals in the Caribbean, and is concerned that rates of attempted entries to the United States by sea may soon increase to levels that would greatly stress DHS's available resources and may lead to devastating loss of life and other consequences. The Departments expect that extending the strategy of coupling an expansion of lawful, safe, and orderly pathways into the United States with this rule's consequence for noncitizens who do not avail themselves of one of those options would lead to a reduction in the numbers of migrants who would otherwise undertake a dangerous sea journey to the United States.

A. Maritime Migration Continues to Increase, With Devastating Consequences for Migrants

Total migrants interdicted at sea by the U.S. Coast Guard ("USCG") increased by 502 percent between FY 2020 (2,079) and FY 2022 (12,521).[334] Interdictions continued to rise in FY 2023 with 8,822 migrants interdicted at sea through March, almost 70 percent of the total in FY 2022 within six months.[335] Interdictions occurred primarily in the South Florida Straits and the Caribbean Sea.[336]

Individuals departing from Cuba and Haiti make up the vast majority of maritime interdictions. Maritime migration from Cuba increased by nearly 600 percent in FY 2022, with 5,740 Cuban nationals interdicted at sea, compared to 827 in FY 2021.[337] Similarly, maritime migration from Haiti more than tripled in FY 2022, with 4,025 Haitian nationals interdicted at sea, compared to 1,205 in FY 2021 and 398 in FY 2020.[338] In the first six months of FY 2023, Cuban interdictions were nearly equal to the Cuban FY 2022 total, comprising 62 percent of all

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[334] OIS analysis of USCG data through March 31, 2023.
[335] *Id.*
[336] Testimony of Jonathan Miller, "Securing America's Maritime Border: Challenges and Solutions for U.S. National Security" at 4 (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/3.23.23-TMS-Testimony.pdf.*
[337] OIS analysis of USCG data through March 31, 2023.
[338] *Id.*

FY 2023 interdictions at sea; Haitian interdictions were over 60 percent of the Haitian FY 2022 total, comprising around 30 percent of all FY 2023 interdictions at sea.[339]

Meanwhile, USBP apprehensions of noncitizens who made landfall in southeast coastal sectors have also been increasing rapidly.[340] There were 5,978 such apprehensions in FY 2022, nearly triple the number of apprehensions in FY 2021 (2,045). And in FY 2023 to date, there have already been 6,364 USBP apprehensions of noncitizens who made landfall in southeast coastal sectors, more than the total for all of FY 2022.[341] Cuban and Haitian nationals made up 76 percent of these apprehensions in FY 2022 and 84 percent of apprehensions so far in FY 2023.

Several large group interdictions of Cubans and Haitians have caused challenges for the USCG in recent months. On January 22, 2023, the USCG interdicted a sail freighter suspected of illegally transporting migrants with nearly 400 Haitians aboard, necessitating repatriations of eligible individuals back to the Bahamas.[342] Days later, on January 25, the USCG interdicted and repatriated another 309 Haitians to Haiti.[343] USCG interdicted yet another large group of Haitians on February 15, resulting in the repatriation of all 311 Haitian migrants in that group,[344] and another group of 206 Haitians were repatriated on March 2 following two successive, separate interdictions on February 22 and 28.[345] On January 12, 2023, USCG repatriated 177

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[339] *Id.*
[340] Includes Miami, Florida; New Orleans, Louisiana; and Ramey, Puerto Rico sectors.
[341] OIS analysis of OIS Persist Dataset based on data through March 31, 2023.
[342] David Goodhue and Jacqueline Charles, *Coast Guard stops boat with 400 Haitians off the Bahamas and likely headed to Florida*, Miami Herald, Jan. 23, 2023, *https://www.miamiherald.com/news/nation-world/world/americas/haiti/article271514157.html.*
[343] USCG, *Coast Guard Repatriates 309 People to Haiti* (Jan. 31, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3281802/coast-guard-repatriates-309-people-to-haiti.*
[344] USCG, *Coast Guard Repatriates 311 People to Haiti (*February 20, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3302743/coast-guard-repatriates-311-people-to-haiti/.*
[345] USCG, *Coast Guard Repatriates 206 People to Haiti* (March 2, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3314530/coast-guard-repatriates-206-people-to-haiti/.*

Cubans from 7 separate interdictions.[346] USCG repatriated an additional 67 Cubans between February 23–24 following prior interdictions.[347]

Interdictions in the maritime environment can pose unique hazards to life and safety. On March 23, 2023, Rear Admiral Jo-Ann Burdian, Assistant Commandant for Response Policy, testified before a Congressional panel, stating: "Over the last year and a half, the Coast Guard observed an increase in irregular maritime migration, above historical norms, across our southern maritime border. This is a difficult mission for our crews.... For example, patrolling the waters of the South Florida Straits can be compared to patrolling a land area the size of Maryland with seven police cars limited to traveling at 15 miles per hour. It requires exceptional tactical coordination between aircraft, ships, boats, and supporting partners ashore."[348] Rear Admiral Burdian further stated that it is not uncommon for migrants encountered at sea to be non-compliant, threatening their own lives and those of other migrants on board to deter a Coast Guard rescue.[349] Additional challenges of maritime migration operations include ensuring adequate sanitation, security, and providing for food, medical, and shelter needs of migrants.[350]

Interdicting Haitian sail freighters poses unique challenges to DHS crews and migrants. *See* 88 FR at 26328. These types of vessels are often overloaded with more than 150 migrants onboard, including small children. *Id.* Because these vessels do not have sufficient safety equipment, including life jackets, emergency locator beacons, or life rafts in the event of an emergency, there is a great risk to human life if these vessels overturn or sink because such an overturning or sinking would create a situation where there could be hundreds of noncitizens in

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[346] USCG, *Coast Guard Repatriates 177 People to Cuba* (Jan. 12, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3265898/coast-guard-repatriates-177-people-to-cuba/.*
[347] USCG, *Coast Guard Repatriates 29 People to Cuba* (Feb. 23, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3306722/coast-guard-repatriates-29-people-to-cuba/*; USCG, *Coast Guard Repatriates 38 People to Cuba* (Feb. 24, 2023), *https://www.news.uscg.mil/Press-Releases/Article/3306850/coast-guard-repatriates-38-people-to-cuba/.*
[348] Testimony of Rear Admiral Jo-Ann F. Burdian, Assistant Commandant for Response Policy, "Securing America's Maritime Border: Challenges and Solutions for U.S. National Security" (Mar. 23, 2023), *https://homeland.house.gov/media/2023/03/2023-03-23-TMS-Testimony.pdf.*
[349] *Id.*
[350] *Id.*

the water, many of whom may not know how to swim. *Id.* Often, noncitizens interdicted on these vessels have been at sea for several days, are dehydrated, need medical attention, or are otherwise experiencing elevated levels of stress. *Id.* These factors increase the risk to DHS personnel who rescue these migrants from these vessels because the number of migrants outnumber DHS crews. *Id.* DHS encounters with sail freighters are not uncommon, and because of sail freighter capacity to carry several hundred migrants, they can exceed the holding capacity of USCG cutters patrolling southeastern maritime smuggling vectors, increasing the risk not only to the migrants, but to cutter crews as well. *Id.* While maritime interdictions declined somewhat in February 2023, DHS assesses that the weather played a significant role in this reduced maritime movement in the Caribbean. *Id.* Through much of February, weather conditions were unfavorable for maritime ventures, particularly on smaller vessels. *Id.* However, DHS assesses that this was only temporary. Increasing levels of maritime interdictions put lives at risk and stress DHS's resources, and the increase in migrants taking to sea, under dangerous conditions, has led to devastating consequences.

Human smugglers and irregular migrant populations continue to use unseaworthy, overly crowded vessels, piloted by inexperienced mariners, without any safety equipment—including, but not limited to, personal flotation devices, radios, maritime global positioning systems, or vessel locator beacons. In FY 2022, the USCG recorded 107 noncitizen deaths, including those presumed dead, as a result of irregular maritime migration. In January 2022, the USCG located a capsized vessel with a survivor clinging to the hull.[351] USCG crews interviewed the survivor, who indicated there were 34 others on the vessel who were not in the vicinity of the capsized vessel and the survivor.[352] The USCG conducted a multi-day air and surface search for the missing migrants, eventually recovering five deceased migrants, while the others were presumed

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[351] Adriana Gomez Licon, Situation 'dire' as Coast Guard seeks 38 missing off Florida, Associated Press, Jan. 26, 2022, *https://apnews.com/article/florida-capsized-boat-live-updates-f251d7d279b6c1fe064304740c3a3019.*
[352] *Id.*

lost at sea.[353] In November 2022, USCG and CBP rescued over 180 people from an overloaded boat that became disabled off of the Florida Keys.[354] They pulled 18 Haitian migrants out of the sea after they became trapped in ocean currents while trying to swim to shore.[355]

IOM's Missing Migrants Project reported at least 321 documented deaths and disappearances of migrants throughout the Caribbean in 2022, signaling the highest recorded number since they began tracking such events in 2014.[356] Most of those who perished or went missing in the Caribbean were from Haiti and Cuba.[357] This data represents a tragic 78 percent overall increase over the 180 deaths in the Caribbean documented in 2021, underscoring the perils of the journey.[358]

B. A Further Increase in Maritime Migration is Reasonably Foreseeable

The Departments assess that maritime migration is likely to increase absent policy changes such as those being considered. For instance, Haiti continues to experience security and humanitarian crises caused by rampant gang violence, food and fuel shortages, a resurgence of cholera, and an August 2021 earthquake that killed 2,000 people.[359] And Cuba is undergoing its worst economic crisis since the 1990s[360] due to the lingering impact of the COVID-19 pandemic, reduced foreign aid from Venezuela because of that country's own economic crisis, high food prices, and U.S. economic sanctions.[361] These crises will likely continue to fuel irregular maritime migration.

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[353] Adriana Gomez Licon, Coast Guard suspends search for migrants off Florida, Associated Press, Jan. 27, 2022, *https://apnews.com/article/florida-lost-at-sea-79253e1c65cf5708f19a97b6875ae239.*
[354] Ashley Cox, More than 180 people rescued from overloaded vessel in Florida Keys, CBS News CW44 Tampa, Nov. 22, 2022, *https://www.cbsnews.com/tampa/news/more-than-180-people-rescued-from-overloaded-vessel-in-florida-keys/.*
[355] *Id.*
[356] IOM, Missing Migrants in the Caribbean Reached a Record High in 2022 (Jan. 24, 2023), *https://www.iom.int/news/missing-migrants-caribbean-reached-record-high-2022.*
[357] *Id.*
[358] *Id.*
[359] *See, e.g.*, CRS, Haiti: Recent Developments and U.S. Policy, R47394 (Jan. 23, 2023), *https://crsreports.congress.gov/product/pdf/R/R47394.*
[360] The Economist, Cuba is Facing Its Worst Shortage of Food Since 1990s (July 1, 2021), *https://www.economist.com/the-americas/2021/07/01/cuba-is-facing-its-worst-shortage-of-food-since-the-1990s.*
[361] CRS, Cuba: U.S. Policy in the 117th Congress (Sept. 22, 2022), *https://crsreports.congress.gov/product/pdf/R/R47246.*

Although the establishment of the CHNV parole processes has significantly reduced SWB encounters with Cuban and Haitian nationals as described above in Section II.A, maritime interdictions of Cuban and Haitian nationals in the Caribbean have increased in recent years and persist at high levels, as just described. Unlike noncitizens encountered at the SWB, noncitizens who reach the United States directly by sea without traveling from Mexico or Canada have not been subject to the CDC's Title 42 public health Order.[362] Instead, they are (and will continue to be) processed under Title 8, which as described above may entail years spent in the United States before a final order of removal is issued. DHS recently announced that in response to the increase in maritime migration and interdictions, and to disincentivize migrants from attempting the dangerous journey to the United States by sea, individuals who have been interdicted at sea after April 27, 2023, are ineligible for the parole processes for Cubans and Haitians. 88 FR 26327; 88 FR 26329. The Departments expect that this step will help but that, in light of the complicated mix of factors driving maritime migration, more is needed to discourage maritime migration and encourage the use of safe, lawful, orderly processes.

C. Effects on Resources and Operations

USCG and its partners have surged assets to address the recent increase in maritime migration, but the increased flow of migrants overall led to a lower interdiction effectiveness rate (that is, the percentage of detected undocumented migrants of all nationalities who were interdicted by USCG and partners via maritime routes).[363] Between FY 2018 and FY 2020, USCG approached or exceeded its 75 percent effectiveness target.[364] In FY 2021 and FY 2022, effectiveness dropped to 47.2 percent and 56.6 percent, respectively, despite a surge response that resulted in 17 percent more interdictions in FY 2022 than in FY 2021.[365] That is, even though the USCG interdicted more migrants overall, those interdictions were a smaller

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[362] *See* 86 FR at 42841 (Order applies only to certain persons "traveling from Canada or Mexico").
[363] DHS, U.S. Coast Guard Budge Overview, Fiscal Year 2024 Congressional Justification, at USCG-3.
[364] *Id.*
[365] *Id.*

percentage of total detected migrants on maritime routes than the USCG had interdicted between FY 2018 and 2019. A further surge in maritime migration risks further decreasing effectiveness (and thereby reducing deterrence of dangerous journeys by sea) and, as described below, would exacerbate USCG's overall capacity challenges and increase the risk to other key mission areas, such as counter-drug operations.

The United States Government's response to maritime migration in the Caribbean region is governed by executive orders, presidential directives, and resulting framework and plans that outline interagency roles and responsibilities. Homeland Security Task Force-Southeast ("HSTF-SE") is primarily responsible for DHS's response to maritime migration in the Caribbean Sea and the Straits of Florida. Operation Vigilant Sentry is the DHS interagency operational plan for responding to maritime migration in the Caribbean Sea and the Straits of Florida.[366] The primary objectives of HSTF-SE are to protect the safety and security of the United States, deter and dissuade noncitizens from attempting the dangerous journey to the United States by sea, achieve U.S. humanitarian objectives, maintain the integrity of the U.S. immigration system, and prevent loss of life at sea through mobilizing DHS resources, reinforced by other Federal, State, and local assets and capabilities.

The USCG supports HSTF-SE and views its migrant interdiction mission as a humanitarian effort to rescue those taking to the sea and to encourage noncitizens to pursue lawful pathways to enter the United States. By allocating additional assets to migrant interdiction operations and to prevent conditions that could lead to maritime mass migration, the USCG assumes certain operational risk to other statutory missions. Some USCG assets were diverted from other key mission areas, including counter-drug operations, protection of living

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[366] Homeland Security Task Force–Southeast, published through the U.S. Embassy in Cuba, *Homeland Security Task Force Southeast partners increase illegal migration enforcement patrols in Florida Straits, Caribbean* (Sept. 6, 2022), *https://cu.usembassy.gov/homeland-security-task-force-southeast-partners-increase-illegal-migration-enforcement-patrols-in-florida-straits-caribbean/.*

marine resources, and support for shipping navigation. *See* 88 FR at 26329. A reduction in maritime migration would reduce the operational risk to USCG's other statutory missions.

Maritime encounters also strain other DHS resources. For instance, during times of increased encounters in the maritime environment, the U.S. Border Patrol executes lateral decompression flights for processing. Once the Title 42 public health Order is lifted, based on DHS encounter projections and throughput models, southwest border sectors will likely lose the ability to accept decompression flights from coastal border sectors. This in turn would result in overcrowding in coastal border sectors' short-term holding facilities and impact local communities not prepared to receive migrants.

D. Lawful, Safe, and Orderly Pathways

As discussed in detail earlier in this preamble, the United States has taken significant steps to expand safe and orderly options for migrants, including migrants from the Caribbean region, to lawfully enter the United States. The United States has, for example, increased and will continue to increase refugee processing in the Western Hemisphere; country-specific and other available processes for individuals seeking parole for urgent humanitarian reasons or significant public benefit, including the Cuba, Haiti, Nicaragua, and Venezuela parole processes; and opportunities to lawfully enter the United States for the purpose of seasonal employment. In addition, the United States has resumed the Cuban Family Reunification Program and resumed and increased participation in the Haitian Family Reunification Program.

The Departments are also aware that many individuals migrating out of island nations, such as Cuba and Haiti, do so via air travel.[367] For many individuals, travel by air to a third

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[367] *See, e.g.*, Reuters, *Nicaragua eliminates visa requirement for Cubans*, Nov. 23, 2021, *https://www.reuters.com/world/americas/nicaragua-eliminates-visa-requirement-cubans-2021-11-23/*; Ed Augustin, *Stars align for Cuban migrants as record numbers seek better life in US*, Guardian, June 12, 2022, *https://www.theguardian.com/world/2022/jun/12/cuban-migrants-us-record-numbers-migration* ("The US Coast Guard has intercepted nearly 2,000 Cubans since October [2021]. But far more are flying to the Latin American mainland before journeying up to the US-Mexico border: 114,000 have crossed into the US since October [2021], according to US Customs and Border Protection – 1% of the island's entire population."); Julie Watson et al., *Charter business thrives as US-expelled Haitians flee Haiti*, AP, June 14, 2022, *https://apnews.com/article/covid-health-travel-caribbean-2e5f32f8781a06e74ef7ea7ec639785f*; Julie Watson et al., *Haitian trip to Texas border often*

country may be an additional option for obtaining asylum or other protection. The Departments acknowledge, however, that there may be individuals for whom air travel is not an option. The Departments welcome data, other information, or comments on access to air travel and whether any aspect of this rule's presumption should be adjusted to account for differences among individuals in access to air travel.

E. Alternatives Under Consideration

The Departments are considering whether the rebuttable presumption should apply to noncitizens who enter the United States without documents sufficient for lawful admission during the same temporary time period at any maritime border, whether or not they traveled through a third country. Under this approach, the presumption would apply to any covered noncitizen who reached the United States by sea, including Cuban or Haitian nationals traveling directly to the United States from Cuba or Haiti. The Departments acknowledge, however, that eliminating the third-country travel component for those arriving by sea would be a departure from the rest of the rule. The Departments are therefore considering whether this departure may be independently justified. The Departments believe that this additional measure could be warranted in light of the extreme hazard to both migrants and DHS personnel associated with maritime migration; the deterrence it would afford migrants who might undertake this dangerous journey to enter the United States irregularly and thus supplement interdiction efforts; the availability of lawful, safe, and orderly pathways for the primary populations at issue; and the safeguards incorporated into the rule. Applying the rule's rebuttable presumption of asylum ineligibility to persons who reach the United States by sea would not impose a categorical bar to asylum. To the contrary, the rule would still exempt noncitizens from the presumption if, instead of making a dangerous journey by sea, they arrived at the United States through a lawful pathway. It would also exempt certain noncitizens who arrive by sea, including unaccompanied

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starts in South America, AP, Sept. 21, 2021, *https://apnews.com/article/technology-mexico-texas-caribbean-united-states-ac7f598bafd44b3f95b786d2d800f3ce* ("Nearly all Haitians reach the U.S. on a well-worn route: Fly to Brazil, Chile or elsewhere in South America [then] move through Central America and Mexico.").

children, and provide multiple ways for noncitizens to rebut the presumption, including in circumstances where—at the time the noncitizen entered the United States—the noncitizen or a member of their family with whom they were traveling faced an imminent and extreme threat to life or safety. The Departments request comment on how the various means of rebutting the presumption—including facing an "acute medical emergency," "imminent and extreme threat to life and safety," and "especially compelling circumstances"—should apply to noncitizens who reach the United States by sea. *See* 8 CFR 208.33(a)(3)(i); 8 CFR 1208.33(a)(3)(i).

The Departments are also considering whether to extend the geographic scope of the rule to certain noncitizens who enter the United States by sea, without regard to whether they departed from Mexico, while retaining the requirement that a noncitizen have traveled through another country on their way to the United States. This narrower application of the rule would limit covered noncitizens to those who, by and large, could have sought asylum or other protection in that other country. However, this alternative would mean that Cuban and Haitian nationals who reach the United States by sea directly from their country of origin would not fall within the rule's compass.

As another alternative, the Departments are considering whether to extend the scope of the presumption to certain noncitizens who enter the United States by sea, but only if they departed from the Caribbean or another region that presents a heightened risk of maritime crossings. This alternative may be more tailored to the specific geographic regions that have caused the increase in maritime interdictions in recent months, but it would not expand the rule to other regions that could be a source of maritime crossings in the future.

Finally, if rates of maritime migration rise substantially prior to the end of this comment period or prior to the issuance of a final rule that responds to these comments, the Departments intend to take appropriate action, consistent with the APA, which may include issuance of a temporary or interim final rule that implements one of the proposed modifications.

VI. Regulatory Requirements

A. Administrative Procedure Act

This final rule is consistent with the notice-and-comment rulemaking requirements described at 5 U.S.C. 553(b) and (c). For the reasons explained below, the Departments have determined that this rule is exempt from the 30-day delayed-effective-date requirement at 5 U.S.C. 553(d).

1. Foreign Affairs Exemption

This rule is exempt from the APA's delayed-effective-date requirement because it involves a "foreign affairs function of the United States."[368] 5 U.S.C. 553(a)(1). Courts have held that this exemption applies when the rule in question "is clearly and directly involved in a foreign affairs function."[369] In addition, although the text of the APA does not require an agency invoking this exemption to show that such procedures may result in "definitely undesirable international consequences," some courts have required such a showing.[370] This rule satisfies both standards.

The United States must work with foreign partners to address migration in the Western Hemisphere region, and this rule is clearly and directly related to, and responsive to, ongoing discussions with and requests by key foreign partners in the Western Hemisphere region in two ways. First, such partners have encouraged the United States to take action to address unlawful migration to the SWB, which is particularly necessary now in light of the anticipated lifting of the Title 42 public health Order.[371] And by responding to these requests, the rule facilitates a key foreign policy goal—fostering a hemisphere-wide approach of addressing migration on a regionwide basis. Though the specific details of these discussions are not appropriate for extensive elaboration here due to the sensitive nature of government-to-government discussions,

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[368] Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the foreign affairs exception as well, for the same reasons that are described in this section.

[369] *See, e.g., Mast Indus. v. Regan*, 596 F. Supp. 1567, 1582 (C.I.T. 1984) (cleaned up).

[370] *See, e.g., Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

[371] *See, e.g., Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (exemption applies where a rule is "linked intimately with the Government's overall political agenda concerning relations with another country").

such partners have expressed concern that the lifting of the Title 42 public health Order—which provided an immediate consequence for many of those attempting to cross the SWB irregularly—may be misperceived by migrants as an indication that the U.S. border is open, which, in turn, could spur a surge of irregular migrant flows through their countries as migrants seek to enter the United States. One foreign partner opined that the formation of caravans in the spring of 2022 were spurred by rumors of the United States Government terminating the Title 42 public health Order and then the officially announced plans to do so. Such increases in irregular migration would further strain limited governmental and nongovernmental resources in partner nations. Already, partner nations have expressed significant concerns about the ways in which recent flows are challenging their own local communities and immigration infrastructure; they have expressed serious concerns that a dramatic increase in migrant flows could be overwhelming.

Some partner countries also have emphasized the possibility that criminal human smuggling organizations may seek to intentionally misrepresent the end of the Title 42 public health Order as leading to the opening of the U.S.-Mexico border in order to persuade would-be migrants to participate in expensive and dangerous human smuggling schemes. Such activity would put migrants' lives in danger and also contribute to the above-referenced adverse consequences associated with increased irregular migratory flows.

In connection with such discussions, a number of countries have lauded the sharp reductions in irregular migration associated with the aforementioned CHNV processes—which, like this rule, imposed consequences for irregular migration alongside the availability of a lawful, safe, and orderly process for migrants to travel directly to the United States. Following the implementation of the Venezuela process in October 2022, some countries requested that the United States implement similar policies for other nationalities, which DHS did in January 2023. At the same time, however, partner nations have raised concerns that any changes to these processes or the circumstances in which they operate—including the perception that there will be

no consequences for irregular entry once the Title 42 public health Order is no longer in place—will undermine their success.[372]

Implementation of this rule will therefore advance top foreign policy priorities of the United States, by responding to the aforementioned discussions with and feedback from foreign partners and demonstrating U.S. partnership and commitment to the shared goals of stabilizing migratory populations and addressing migration collectively as a region, both of which are essential to maintaining strong bilateral and multilateral relationships.[373] As noted earlier in this preamble and in the proposed rule, recent surges in irregular migration, including overland migration through the Darién Gap, have affected a range of regional neighbors, including Mexico, Colombia, Costa Rica, Peru, Ecuador, and Panama. *See, e.g.*, 88 FR 11710–11. A further spike in migration following the lifting of the Title 42 public health Order risks severely straining relations with the countries in the region, as each would be compelled to turn away from more sustainable policy goals, and employ its limited resources to address the humanitarian needs of a significant influx of irregular migrants.

Further, as described above, the United States faces constraints in removing nationals of certain countries—including Venezuela, Nicaragua, Cuba, and Haiti—to their home countries. With limited exceptions, such nationals can only be removed to a third country as a result. International partners have conveyed that their willingness to receive increased returns of migrants was contingent on expanding the model provided by the Venezuela process, which decreased irregular migration throughout the hemisphere by increasing options for lawful pathways and adding consequences for noncitizens who bypass those opportunities to travel irregularly to the United States.[374]

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[372] *See, e.g.*, Alfredo Corchado, *Ahead of Title 42's end, U.S.-Mexico Negotiations called 'intense,' 'round-the-clock,'* Dallas Morning News, Dec. 13, 2022, *https://www.dallasnews.com/news/2022/12/13/ahead-of-title-42s-end-us-mexico-negotations-called-intense-round-the-clock/.*

[373] *See* L.A. Declaration Fact Sheet.

[374] *See* The White House, *Mexico and United States Strengthen Joint Humanitarian Plan on Migration* (May 2, 2023) (committing to increase joint actions to counter human smugglers and traffickers, address root causes of migration, and continue to combine expanded lawful pathways with consequences for irregular migration).

In short, delaying issuance and implementation of this rule, including for purposes of incorporating a 30-day delayed effective date, would be inconsistent with the foreign policy imperative to act now. Such delay would not only forfeit an opportunity to fortify bilateral relationships, but would fail to address, and potentially exacerbate, DHS's projections of a surge in migration across the region following the lifting of the Title 42 public health Order. From a U.S. foreign policy perspective, such outcomes would have undesirable international consequences.

The Departments' invocation of the foreign affairs exemption here is consistent with recent precedent. For example, in 2017, DHS published a notice eliminating an exception to expedited removal for certain Cuban nationals, which explained that the change in policy was consistent with the foreign affairs exemption because the change was central to ongoing negotiations between the two countries.[375] DHS similarly invoked the foreign affairs exemption more recently, in connection with the CHNV parole processes.[376]

2. Good Cause

This rule is also exempt from the APA's delayed-effective-date requirement because the Departments have for good cause found that a delay associated with that requirement would be impracticable and contrary to the public interest.[377] The Title 42 public health Order is ending due to developments over which the Departments do not exercise any direct control. It would be impossible to incorporate a 30-day delayed effective date and issue a rule prior to the expiration of the Title 42 public health Order in that abbreviated time frame. As described above, such a delay would greatly exacerbate an urgent border and national security challenge that DHS has already taken multiple additional measures to address, and would miss a critical opportunity to

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[375] *See* DHS, Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902 (Jan. 17, 2017).

[376] *See* 88 FR 1266 (Jan. 9, 2023); 88 FR 1243 (Jan. 9, 2023); 88 FR 1255 (Jan. 9, 2023); DHS, Implementation of Changes to the Parole Process for Venezuelans, 188 FR 1282 (Jan. 9, 2023); 87 FR 63507 (Oct. 19, 2022).

[377] 5 U.S.C. 553(d)(3). Although the Departments have voluntarily complied with the APA's notice and comment requirements, this rule is exempt from such requirements pursuant to the good cause exception at 5 U.S.C. 553(b)(B) as well, for reasons that are described in this section.

reduce and divert the additional flow of irregular migration that is expected following lifting of the Title 42 public health Order.[378]

First, a 30-day delay of the effective date would be impracticable and contrary to the public interest because it would likely result in a significant further increase in irregular migration. As noted above, in recent years, the Departments, in coordination with other Executive Branch agencies and regional neighbors, have undertaken numerous measures to address such increases, which have been implemented via rulemakings,[379] voluntary processes paired with incentives against irregular migration,[380] and a wide range of significant resource surges and operational changes. A significant further increase in irregular migration, exacerbated by an influx of migrants from countries such as Venezuela, Nicaragua, and Cuba, with limited removal options, and coupled with DHS's limited options for processing, detaining, or quickly removing such migrants, would unduly impede DHS's ability to fulfill its critical and varied missions.

Such challenges were evident in the days following the November 15, 2022, court decision vacating the Title 42 public health Order.[381] Within two days of the court's decision, total encounters at the SWB reached 9,583 in a single day on November 17, 2022, a 17 percent

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[378] The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for forgoing notice and comment rulemaking. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (noting "good cause [is] more easily found as to [the] 30–day waiting period" than the exception to notice and comment procedures)); *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates either urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977).

[379] *See, e.g.*, 87 FR 18078 (Mar. 29, 2022) (amending regulations to allow U.S. immigration officials to more promptly consider the asylum claims of individuals encountered at or near the SWB while ensuring the fundamental fairness of the asylum process); 87 FR 30334 (May 18, 2022) (authorizing an additional 35,000 supplemental H-2B visas for the second half of FY 2022, of which 11,500 were reserved for nationals of Central American countries and Haiti); 87 FR 4722 (Jan. 28, 2022) (authorizing an additional 20,000 H-2B visas for FY 2022, of which 6,500 were reserved for nationals of Central American countries, with the addition of Haiti); 87 FR 76818 (Dec. 15, 2022) (authorizing nearly 65,000 additional visas, of which 20,000 are reserved for nationals of Central American countries and Haiti).

[380] *See, e.g.*, DHS, Implementation of a Parole Process for Venezuelans, 87 FR 63507 (Oct. 19, 2022) (parole process for certain Venezuelan nationals and their immediate family members); DHS, Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 27, 2022) (parole process for certain Ukrainian nationals and their immediate family members).

[381] *See Huisha-Huisha v. Mayorkas*, --- F. Supp. 3d ----, 2022 WL 16948610 (D.D.C. Nov. 15, 2022).

increase from the day before.[382] The baseline number of encounters decreased in March 2023, from April 2022, and also consisted of a much lower share of nationals from countries that have stopped or limited returns of their own nationals.[383] A delayed effective date could result in a substantial increase in irregular migration across multiple national borders, including our own.[384] As detailed above, these levels of irregular migration risk overwhelming DHS's ability to effectively process, detain, and remove, as appropriate, the migrants encountered. This, in turn, would result in potentially dangerous overcrowding at CBP facilities. The attendant risks to public safety, health, and welfare provide good cause to issue this rule without delay.[385]

The Departments expect that this effect would be particularly pronounced if noncitizens know that there is a specific 30-day period between the termination of the Title 42 public health Order and the effective date of this rule. That gap would incentivize even more irregular migration by those seeking to enter the United States before the process would take effect. It has long been recognized that agencies may use the good cause exception where significant public harm would result from using standard APA procedures.[386] If, for example, advance notice of a coming price increase would immediately produce market dislocations and lead to serious

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[382] OIS analysis of Persist Dataset based on data through March 31, 2023.

[383] *Id.*

[384] DHS SWB Encounter Planning Model generated April 18, 2023.

[385] *See, e.g., Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (concluding agency's "concern about the threat to public safety" justified notice and comment waiver).

[386] *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94–95 (D.C. Cir. 2012) (noting that the "good cause" exception "is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent [or] in order to prevent the amended rule from being evaded" (cleaned up)); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1975) ("[W]e are satisfied that there was in fact 'good cause' to find that advance notice of the freeze was 'impracticable, unnecessary, or contrary to the public interest' within the meaning of § 553(b)(B). . . . Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct 'actual transactions'—or avoid them—before the freeze deadline." (cleaned up)).

shortages, advance notice (and comment) need not be given.[387] A number of cases follow this logic in the context of economic regulation.[388]

The same logic applies here, where the Departments are responding to exceedingly serious challenges at the border, and a gap between the termination of the Title 42 public health Order and the implementation of this rule would significantly increase the incentive, on the part of migrants and others (such as smugglers), to engage in actions that would compound those very challenges. The Departments' experience has been that in some circumstances when public announcements have been made regarding changes in our immigration laws and procedures that would restrict access to immigration benefits to those attempting to enter the United States along the U.S.-Mexico land border, there have been dramatic increases in the numbers of noncitizens who enter or attempt to enter the United States. Smugglers routinely prey on migrants using perceived changes in domestic immigration law.[389] And those sudden influxes overload scarce government resources dedicated to border security.[390]

For instance, on February 28, 2020, the Ninth Circuit lifted a stay of a nationwide injunction of MPP, a program implementing the Secretary's contiguous return authority under 8 U.S.C. 1225(b)(2)(C).[391] Almost immediately, hundreds of migrants began massing at POEs

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[387] *See, e.g., Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) ("[W]e think good cause was present in this case based upon [the agency's] concern that the announcement of a price increase at a future date could have resulted in producers withholding crude oil from the market until such time as they could take advantage of the price increase.").

[388] *See, e.g., Chamber of Commerce of U.S. v. S.E.C.*, 443 F.3d 890, 908 (D.C. Cir. 2006) ("The ['good cause'] exception excuses notice and comment in emergency situations, where delay could result in serious harm, or when the very announcement of a proposed rule itself could be expected to precipitate activity by affected parties that would harm the public welfare." (citations omitted)); *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) ("On a number of occasions . . . this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.").

[389] *See* Nick Miroff and Carolyn Van Houten, *The Border is Tougher to Cross Than Ever. But There's Still One Way into America*, Wash. Post (Oct. 24, 2018); *See* Tech Transparency Project, *Inside the World of Misinformation Targeting Migrants on Social Media* (July 26, 2022), *https://www.techtransparencyproject.org/articles/inside-world-misinformation-targeting-migrants-social-media* ("A review of social media groups and pages identified by migrants showed . . . dubious offers of coyote or legal services, false claims about conditions along the route, misinformation about points of entry at which officials waive the rules, and baseless rumors about changes to immigration law.").

[390] Declaration of Enrique Lucero ¶¶ 6–8, Dkt. 95-3, *Innovation Law Lab v. Wolf*, No. 19-15716 (9th Cir. Mar. 3, 2020); Declaration of Robert E. Perez, ¶ 15, Dkt. 95-2, *Innovation Law Lab*, No. 19-15716.

[391] *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020), *vacated as moot sub nom. Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021).

across the SWB attempting to immediately enter the United States, creating a severe safety hazard that forced CBP to temporarily close POEs in whole or in part.[392] Many others requested immediate entry into the country through their counsel, while others overwhelmed Border Patrol agents by attempting to illegally cross the SWB, with only some being apprehended successfully.[393] Absent the immediate and resource-intensive action taken by CBP, the number of migrants gathered at the border, whether at or between the POEs, could have increased dramatically, especially considering there were approximately 25,000 noncitizens who were in removal proceedings pursuant to MPP without scheduled court appearances, as well as others in Mexico that could have become aware of CBP's operational limitations and sought to exploit them.[394] And while CBP officers took action to resolve the sudden influx of migrants at multiple ports and prevent further deterioration of the situation at the border, they were diverted away from other critical missions, including detecting and confiscating illicit materials, and guarding efficient trade and travel.[395]

By contrast, as detailed above, immediate implementation of the parole process for Venezuelans was associated with a drastic reduction in irregular migration by Venezuelans. Had the parole process, and the consequence that accompanied it (*i.e.*, the return to Mexico of Venezuelan nationals encountered irregularly entering the United States without authorization between POEs) been announced weeks prior to its implementation, it likely would have had the opposite effect, resulting in many hundreds and thousands of Venezuelan nationals attempting to cross the border between the POEs before the process went into effect. *See* 87 FR at 63516.

The Departments' determination here is consistent with past practice. For example, in addition to the parole process for Venezuelans described above, DHS concluded in January 2017 that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by

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[392] *See* Declaration of Robert E. Perez, ¶¶ 4–15, Dkt. 95-2, *Innovation Law Lab*, No. 19-15716.
[393] *Id.* ¶¶ 4, 8.
[394] *Id.* ¶ 14.
[395] *Id.* ¶ 15.

air as eligible for expedited removal because "[p]re-promulgation notice and comment would . . . endanger[ ] human life and hav[e] a potential destabilizing effect in the region."[396] DHS cited the prospect that "publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule."[397] DHS found that "[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations."[398] DHS concluded that "a surge could result in significant loss of human life."[399] Here, the Departments announced the proposed rule while a prior restrictive policy remained in place, but given the impending termination of the Title 42 public health Order, there is insufficient time for a delayed effective date.

Second, a delayed effective date is contrary to the public interest given that the anticipated termination of the Title 42 public health Order has drastically altered the framework governing processing of migrants. Courts find good cause satisfied where the immediate issuance of a rule is necessary to prevent public harm where a previously existing regulatory structure has been set aside by the courts.[400] A similar circumstance exists here: the Title 42 public health Order is ending based on factual developments, and the Departments do not control either those factual developments or the decision to recognize those factual developments by

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[396] DHS, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017).
[397] *Id.*
[398] *Id.*
[399] *Id.*; *accord, e.g.*, Department of State, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (finding the good cause exception applicable because of similar short-run incentive concerns).
[400] *See, e.g.*, *United States v. Dean*, 604 F.3d 1275, 1277–80 (11th Cir. 2010); *Mid–Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1124 (D.C. Cir. 1987), *Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 608 (D.C. Cir. 1982), *Block*, 655 F.2d at 1154; *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1284 (N.D. Fla. 2016) (collecting cases).

terminating the public health Order. Until May 11, 2023, the Title 42 public health Order requires DHS to expel hundreds of thousands of migrants without processing them under Title 8. Once the Title 42 public health Order is lifted, however, the Government must pivot, quickly, to process all migrants under its Title 8 authorities, at a time when the number of migrants seeking to cross the SWB without lawful authorization to do so is expected to surge significantly. The Departments therefore find good cause to forgo a delayed effective date in order to prevent the adverse consequences resulting from the termination of the Title 42 public health Order.

The Departments reiterate that they have only invoked the foreign affairs and good cause exceptions for the delayed-effective-date requirement. The Departments have solicited public comments and have given careful attention to comments that were received during the comment period, as reflected in Section III of this preamble.

B. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)

Executive Order 12866, Executive Order 13563, and Executive Order 14094, Modernizing Regulatory Review, 88 FR 21879 (Apr. 6, 2023) direct agencies to assess the costs, benefits, and transfers of available alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Information and Regulatory Affairs of OMB reviewed the rule as a significant regulatory action under section 3(f)(4) of Executive Order 12866, as amended.

The expected effects of this rule are discussed above. The rule is expected to result in significantly reduced incentives for irregular migration and illegal smuggling activity, and will help avert a significant further surge in irregular migration after the Title 42 public health Order

is lifted. The rule will likely decrease the number of asylum grants and likely reduce the amount of time that noncitizens who are ineligible for asylum and who lack a reasonable fear of persecution or torture would be present in the United States. Noncitizens who establish a reasonable fear of persecution or torture would still be able to seek protection in proceedings before IJs.

The benefits of the rule are expected to include large-scale reductions in strains on limited national resources; preservation of the Departments' continued ability to safely, humanely, and effectively enforce and administer the immigration laws; a reduction in the role of exploitative transnational criminal organizations and smugglers; and improved relationships with, and enhanced opportunities to coordinate with and benefit from the migration policies of, regional neighbors. Some of these benefits accrue to migrants who wish to pursue safe, orderly, lawful pathways and processes, such as the ability to schedule a time to apply for admission at a POE. These migrants' ability to present their claims might otherwise be hampered by the severe strain that a further surge in irregular migration would impose on the Departments.

The direct costs of the rule are borne by migrants and the Departments. To the extent that any migrants are made ineligible for asylum under the presumptive condition established by the rule but would have received asylum in the absence of this rule, such an outcome would entail the denial of asylum and its attendant benefits, although such persons may continue to be eligible for statutory withholding of removal and withholding under the CAT. Unlike asylees, noncitizens granted these more limited forms of protection do not have a path to citizenship and cannot petition for certain family members to join them in the United States.[401] Such migrants may also be required to apply for work authorization more frequently than an asylee would. Migrants who choose to wait in Mexico for a CBP One appointment, rather than migrating

[401] As discussed previously in Section IV.E.7.ii of this preamble, the rule includes a specific provision to ensure that applicants who in section 240 removal proceedings who have a spouse or child who would be eligible to follow to join them under section 208(b)(3)(A), 8 U.S.C. 1158(b)(3)(A), will be able to rebut the presumption if the presumption is the only reason for denying their asylum application.

irregularly across the southwest land border or adjacent coastal borders, also may incur some costs that are discussed earlier in this preamble, including potential safety risks for some migrants. The Departments note, in this regard, that noncitizens who establish "exceptionally compelling circumstances," including an imminent and extreme threat to life or safety or an acute medical emergency, can rebut the presumption against asylum eligibility. 8 CFR 208.33(a)(3)(i)(B), 1208.33(a)(3)(i)(B). The Departments further note that there are also potential benefits for migrants who choose to wait in Mexico for a CBP One appointment (for instance, avoiding a dangerous cross-border journey and interactions with smugglers).

The rule will also require additional time for AOs and IJs, during fear screenings and reviews, respectively, to inquire into the applicability of the presumption and whether the presumption has been rebutted. Similarly, the rule will require additional time for IJs during section 240 removal proceedings. However, as discussed throughout this preamble, the rule is expected to result in significantly reduced irregular migration. Accordingly, the Departments expect the additional time spent by AOs and IJs on the rebuttable presumption to be mitigated by a comparatively smaller number of credible fear cases than AOs and IJs would otherwise have been required to handle in the absence of the rule.

Other entities, such as legal service organizations and private attorneys, will also incur some indirect costs as a result of the rule, such as familiarization costs and costs associated with assisting noncitizens who may be subject to the rule. There are other potential downstream effects of the rule, including effects on NGOs and state and local entities that interact with noncitizens, such as by providing services to such persons or receiving tax revenues from them. The nature and scale of such effects will vary by entity and should be considered relative to the baseline condition that would exist in the absence of this rule. As compared to the baseline condition, this rule is expected to reduce irregular migration.

The lawful, safe, and orderly pathways described earlier in this preamble are authorized separately from this rule but are expected to yield significant benefits for noncitizens who might

otherwise seek to migrate irregularly to the United States. For instance, the ability to schedule a time to arrive to apply for admission at POEs is expected to significantly improve CBP's ability to process noncitizens at POEs, and available parole processes allow prospective irregular migrants to avoid a dangerous and expensive overland journey in favor of an arrival by air to the United States. To the extent that such pathways and this rule result in a substantial reduction in irregular migration, the benefits of such pathways may also accrue to the various entities that incur costs as a consequence of irregular migration.

C. Regulatory Flexibility Act

The RFA requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. *See* 5 U.S.C. 601 et seq. "Small entities" are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. *Id.* 601(6). This rule does not directly regulate small entities and is not expected to have a direct effect on small entities. Rather, the rule regulates individuals, and individuals are not defined as "small entities" by the RFA. *Id.* While some employers could experience costs or transfer effects, these impacts would be indirect. In the proposed rule, the Departments certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Departments nonetheless welcomed comments regarding potential impacts on small entities. The Departments discuss comments from small entities earlier in the preamble, including in connection with the RFA. No such comments identified small entities that are subject to the rule within the meaning of the RFA. Accordingly, and for the same reasons stated in the proposed rule, the Departments certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

UMRA is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each

Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a). The inflation-adjusted value of $100 million in 1995 was approximately $177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI-U).[402]

The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6). A "Federal intergovernmental mandate" in turn is a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(5). And the term "Federal private sector mandate" refers to a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). *See id.* 658(7).

This rule does not contain a Federal mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to the entity's voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this proposed rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. The requirements of title II of UMRA, therefore, do not apply, and the Departments have not prepared a statement under UMRA.

E. Congressional Review Act

OMB has determined that this rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the

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[402] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items by Month* (Dec. 2021), *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf.*

economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The rule will be submitted to Congress and GAO consistent with the Congressional Review Act's requirements no later than its effective date.

F. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Departments believe that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996).

H. Family Assessment

The Departments have reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. The Departments have reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local governments or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the

norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

The Departments have determined that the implementation of this rule will not impose a negative impact on family well-being or the autonomy or integrity of the family as an institution. Under the rule, adjudicators would consider the circumstances of family members traveling together when determining whether noncitizens are not subject to the presumption in §§ 208.33(a)(1) and 1208.33(a). The presumption will not apply to a noncitizen if the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen establishes one of the conditions in § 208.33(a)(1)(i) through (iii). Similarly, the presumption in paragraph (a)(1) of those sections would be rebutted if the noncitizen demonstrates that, at the time of entry, the noncitizen or a member of the noncitizen's family who is traveling with the noncitizen was subject to one of the circumstances enumerated in paragraph (a)(3).

Additionally, to protect against family separation, the Departments have determined that a principal applicant establishes an exceptionally compelling circumstance that rebuts the presumption of ineligibility for asylum where the principal asylum applicant is eligible for statutory withholding of removal or CAT withholding and would be granted asylum but for the lawful pathways rebuttable presumption, and where denial of asylum on that ground alone would lead to the applicant's family being or remaining separated because an accompanying spouse or child would not qualify for asylum or other protection from removal on their own, or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant if the applicant were not subject to the presumption. *See* E.O. 14011, Establishment of Interagency Task Force on the Reunification of Families, 86 FR 8273, 8273 (Feb. 5, 2021) ("It is the policy of my Administration to respect and value the integrity of families seeking to enter the United States.").

I. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This rule does not have "tribal implications" because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000). Accordingly, Executive Order 13175 requires no further agency action or analysis.

J. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. the Departments must submit to OMB, for review and approval, any collection of information contained in a rule, unless otherwise exempt. *See* Pub. L. 104–13, 109 Stat. 163 (May 22, 1995). The proposed rule proposed a revision to a collection of information under OMB Control Number 1651–0140, *Collection of Advance Information from Certain Undocumented Individuals on the Land Border*. Comments pertinent to the collection of information are discussed earlier in this preamble.

As discussed in Section IV.E.3.ii.b of this preamble, CBP will transition CBP One scheduling to a daily appointment allocation process to allow noncitizens additional time to complete the process. CBP has revised the burden estimate for this collection consistent with this change. CBP continues to make improvements to the app based on stakeholder feedback.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Collection of Advance Information from Certain Undocumented Individuals on the Land Border.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* CBP.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individual undocumented noncitizens. Under this collection, CBP collects certain biographic and biometric information from undocumented noncitizens prior to their arrival at a

POE, to streamline their processing at the POE. The requested information is that which CBP would otherwise collect from these individuals during primary and/or secondary processing. This information is provided by undocumented noncitizens, directly or through NGOs and International Organizations. Providing this information reduces the amount of data entered by CBP officers and the corresponding time required to process an undocumented noncitizen.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* This information collection is divided into three parts. The estimated annual number of respondents for the registration in the CBP One app is 500,000 and the estimated time burden per response is 12 minutes. The estimated annual number of respondents for the daily opt-in for appointments is 500,000 and the estimated time burden per response is 1 minutes. The estimated annual number of respondents for the confirmation of appointment in the app is 456,250 and the estimated time burden per response is 3 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 372,813 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,605,385.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Amend § 208.13 by removing and reserving paragraphs (c)(3), (4), and (5); adding and reserving paragraph (e); and adding paragraph (f), to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) – (5) [Reserved]

* * * * *

(e) [Reserved]

(f) *Lawful pathways condition*. For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 208.33.

§ 208.30 [Amended]

3. Amend § 208.30(e)(5) by:

a. Amending paragraph (e)(5)(i) by removing the phrase "paragraphs (e)(5)(ii) through (iv), or" from the first sentence;

b. Removing paragraphs (e)(5)(ii) and (iii); and

c. Redesignating paragraph (e)(5)(i) as (e)(5).

4. Add subpart C, consisting of § 208.33, to read as follows:

Subpart C – Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025

§ 208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 208.2, 208.13, and 208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption*. (i) An alien subject to the presumption described in paragraph (a)(1) of this section can rebut the presumption by demonstrating by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in § 214.11(a) of this chapter.

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations*—(1) *Initial determination.* The asylum officer shall first determine whether the alien is covered by the presumption in paragraph (a)(1) of this section and, if so, whether the alien has rebutted the presumption in accordance with paragraph (a)(3) of this section.

(i) If the alien is covered by the presumption in paragraph (a)(1) of this section and fails to rebut the presumption in accordance with paragraph (a)(3) of this section, then the asylum officer shall enter a negative credible fear determination with respect to the alien's asylum claim and continue to consider the alien's claim under paragraph (b)(2) of this section.

(ii) If the alien is not covered by the presumption in paragraph (a)(1) of this section or has rebutted the presumption in accordance with paragraph (a)(3) of this section, the asylum officer shall follow the procedures in § 208.30.

(2) *Additional procedures.* (i) In cases in which the asylum officer enters a negative credible fear determination under paragraph (b)(1)(i) of this section, the asylum officer will assess whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion) or torture, with respect to the identified country or countries of removal identified pursuant to section 241(b) of the Act.

(ii) In cases described in paragraph (b)(2)(i) of this section, if the alien establishes a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the Department will issue a Form I-862, Notice to Appear.

(iii) In cases described in paragraph (b)(2)(i) of this section, if an alien fails to establish a reasonable possibility of persecution or torture with respect to the identified country or countries of removal, the asylum officer will provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative credible fear determinations.

(iv) The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge.

(v) Only if the alien requests such review by so indicating on the Record of Negative Fear shall the asylum officer serve the alien with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. Immigration judges will evaluate the case as provided in 8 CFR 1208.33(b). The case shall then proceed as set forth in paragraphs (b)(2)(v)(A) through (C) of this section.

(A) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(i), the case shall proceed under 8 CFR 1208.30(g)(2)(iv)(B).

(B) Where the immigration judge issues a positive credible fear determination under 8 CFR 1208.33(b)(2)(ii), DHS shall issue a Form I-862, Notice to Appear, to commence removal proceedings under section 240 of the Act.

(C) Where the immigration judge issues a negative credible fear determination, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision and no request for reconsideration may be submitted to USCIS. Nevertheless, USCIS may, in its sole discretion, reconsider a negative determination.

(c) *Continuing applicability of condition on eligibility.* (1) Subject to paragraph (c)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (c)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (c)(1) of this section, and the alien is applying for asylum as a principal applicant.

(d) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003 and 1208 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

5. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

§ 1003.42 [Amended]

6. Amend § 1003.42 by removing paragraphs (d)(2) and (3) and redesignating paragraph (d)(1) as paragraph (d).

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

7. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; Pub. L. 115-218.

8. Amend § 1208.13 by removing and reserving paragraphs (c)(3), (4), and (5), and by adding paragraph (f), to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) – (5) [Reserved]

* * * * *

(f) *Lawful pathways condition*. For applications filed by aliens who entered the United States between May 11, 2023, and May 11, 2025, also refer to the provisions on asylum eligibility described in § 1208.33.

§ 1208.30 [Amended]

9. Amend § 1208.30 by removing and reserving paragraph (g)(1).

10. Add subpart C, consisting of § 1208.33, to read as follows:

Subpart C – Lawful Pathways and Asylum Eligibility for Certain Aliens Who Entered Between May 11, 2023, and May 11, 2025

§ 1208.33 Lawful pathways condition on asylum eligibility.

Notwithstanding any contrary section of this part, including §§ 1208.2, 1208.13, and 1208.30—

(a) *Condition on eligibility.* (1) *Applicability.* A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) Between May 11, 2023, and May 11, 2025,

(ii) Subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021, and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, and

(iii) After the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.

(2) *Exceptions to applicability of the rebuttable presumption.* The rebuttable presumption described in paragraph (a)(1) of this section does not apply if:

(i) The alien was, at the time of entry, an unaccompanied alien child as defined in 6 U.S.C. 279(g)(2); or

(ii) The alien, or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Was provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process;

(B) Presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry without a pre-scheduled time and place, if the alien demonstrates by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle; or

(C) Sought asylum or other protection in a country through which the alien traveled and received a final decision denying that application. A final decision includes any denial by a foreign government of the applicant's claim for asylum or other protection through one or more of that government's pathways for that claim. A final decision does not include a determination by a foreign government that the alien abandoned the claim.

(3) *Rebuttal of the presumption.* (i) The presumption in paragraph (a)(1) of this section can be rebutted if an alien demonstrates by a preponderance of the evidence that exceptionally compelling circumstances exist, including if the alien demonstrates that, at the time of entry, the alien or a member of the alien's family as described in § 208.30(c) with whom the alien is traveling:

(A) Faced an acute medical emergency;

(B) Faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or

(C) Satisfied the definition of "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11(a).

(ii) An alien who demonstrates by a preponderance of the evidence any of the circumstances in paragraph (a)(3)(i) of this section shall necessarily rebut the presumption in paragraph (a)(1) of this section.

(b) *Application in credible fear determinations.* (1) Where an asylum officer has issued a negative credible fear determination pursuant to 8 CFR 208.33(b), and the alien has requested immigration judge review of that credible fear determination, the immigration judge shall evaluate the case de novo, as specified in paragraph (b)(2) of this section. In doing so, the

immigration judge shall take into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge.

(2) The immigration judge shall first determine whether the alien is covered by the presumption at 8 CFR 208.33(a)(1) and 1208.33(a)(1) and, if so, whether the alien has rebutted the presumption in accordance with 8 CFR 208.33(a)(3) and 1208.33(a)(3).

(i) Where the immigration judge determines that the alien is not covered by the presumption, or that the presumption has been rebutted, the immigration judge shall further determine, consistent with § 1208.30, whether the alien has established a significant possibility of eligibility for asylum under section 208 of the Act, withholding of removal under section 241(b)(3) of the Act, or withholding of removal under the Convention Against Torture. Where the immigration judge determines that the alien has established a significant possibility of eligibility for one of those forms of relief or protection, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a significant possibility of eligibility for any of those forms of relief or protection, the immigration judge shall issue a negative credible fear finding.

(ii) Where the immigration judge determines that the alien is covered by the presumption and that the presumption has not been rebutted, the immigration judge shall further determine whether the alien has established a reasonable possibility of persecution (meaning a reasonable possibility of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group) or torture. Where the immigration judge determines that the alien has established a reasonable possibility of persecution or torture, the immigration judge shall issue a positive credible fear finding. Where the immigration judge determines that the alien has not established a reasonable possibility of persecution or torture, the immigration judge shall issue a negative credible fear finding.

(3) Following the immigration judge's determination, the case will proceed as indicated in 8 CFR 208.33(b)(2)(v)(A) through (C).

(4) If, under 8 CFR 208.33(b)(2), DHS issues a Form I-862, Notice to Appear, to commence removal proceedings under section 240 of the Act, the alien may apply for asylum, withholding of removal under section 241(b)(3) of the Act, withholding of removal under the Convention Against Torture, or any other form of relief or protection for which the alien is eligible during those removal proceedings.

(c) *Family unity and removal proceedings.* In removal proceedings under section 240 of the Act, where a principal asylum applicant is eligible for withholding of removal under section 241(b)(3) of the Act or withholding of removal under § 1208.16(c)(2) and would be granted asylum but for the presumption in paragraph (a)(1) of this section, and where an accompanying spouse or child as defined in section 208(b)(3)(A) of the Act does not independently qualify for asylum or other protection from removal or the principal asylum applicant has a spouse or child who would be eligible to follow to join that applicant as described in section 208(b)(3)(A) of the Act, the presumption shall be deemed rebutted as an exceptionally compelling circumstance in accordance with paragraph (a)(3) of this section.

(d) *Continuing applicability of condition on eligibility.* (1) Subject to paragraph (d)(2) of this section, the condition on asylum eligibility in paragraph (a)(1) of this section shall apply to any asylum application filed by an alien who entered the United States during the time and in the manner specified in paragraph (a)(1) of this section and who is not covered by an exception in paragraph (a)(2) of this section, regardless of when the application is filed and adjudicated.

(2) The conditions on asylum eligibility in paragraph (a)(1) of this section shall not apply to an asylum application filed by an alien described in paragraph (d)(1) of this section if the asylum application is filed after May 11, 2025, the alien was under the age of 18 at the time of the entry referenced in paragraph (d)(1) of this section, and the alien is applying for asylum as a principal applicant.

(e) *Severability.* The Department intends that any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, should be construed so

as to continue to give the maximum effect to the provision permitted by law, unless such holding is that the provision is wholly invalid and unenforceable, in which event the provision should be severed from the remainder of this section and the holding should not affect the remainder of this section or the application of the provision to persons not similarly situated or to dissimilar circumstances.

Alejandro N. Mayorkas,

Secretary,

U.S. Department of Homeland Security

Dated: May 8, 2023.

Merrick B. Garland,
Attorney General,
U.S. Department of Justice.

[FR Doc. 2023-10146 Filed: 5/10/2023 8:45 am; Publication Date: 5/16/2023]

Message

From: DAVIES, MATTHEW S (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Sent: 5/10/2023 1:59:13 PM
To: (b)(6), (b)(7)(C)
CC: (b)(6), (b)(7)(C)
Subject: FW: [FR] Public Inspection Documents matching '"cross-border" | "border patrol" | immigration | "border crossing"' and from Homeland Security Department, State Department, Justice Department, Immigration and Naturalization Service, Labor Department, and R
Attachments: 2023-10146.pdf; DHS and DOJ Finalize Rule to Incentivize Use of Lawful Immigration Pathways

I did not realize the final rule was going to be 447 pages – I think that is more than double the last draft we saw.

(b)(5), (b)(7)(E)

I will be looking through it as well.

Thanks,

Matthew S. Davies
Executive Director
Admissibility and Passenger Programs
Office of Field Operations
U.S. Customs and Border Protection
(b)(6), (b)(7)(C)
RRB Office (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C) (office)
(b)(6), (b)(7)(C) (cell)

From: Federal Register Subscriptions (b)(7)(E)
Sent: Wednesday, May 10, 2023 8:53 AM
To: DAVIES, MATTHEW S (b)(6), (b)(7)(C)
Subject: [FR] Public Inspection Documents matching '"cross-border" | "border patrol" | immigration | "border crossing"' and from Homeland Security Department, State Department, Justice Department, Immigration and Naturalization Service, Labor Department, and Re...

subscription results for Wednesday, May 10th, 2023 1 matching public inspection document

Public Inspection Documents matching '"cross-border" | "border patrol" | immigration | "border crossing"' and from Homeland Security Department, State Department, Justice Department, Immigration and Naturalization Service, Labor Department, and Refugee Resettlement Office

MATCHING SPECIAL FILINGS

Special Filing updated at 8:45 AM on Wednesday, May 10, 2023

Executive Office for Immigration Review

Rules

Circumvention of Lawful Pathways

Filed on: 05/10/2023 at 8:45 am
Scheduled Pub. Date: 05/16/2023
FR Document: 2023-10146

PDF 447 Pages *(1.09 MB)*
Permalink

Homeland Security Department

Rules

Circumvention of Lawful Pathways

Filed on: 05/10/2023 at 8:45 am
Scheduled Pub. Date: 05/16/2023
FR Document: 2023-10146

PDF 447 Pages *(1.09 MB)*
Permalink

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Message

From: U.S. Department of Homeland Security (b)(6)
Sent: 5/10/2023 1:17:04 PM
To: DAVIES, MATTHEW S (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Subject: DHS and DOJ Finalize Rule to Incentivize Use of Lawful Immigration Pathways

U.S. DEPARTMENT OF HOMELAND SECURITY

Office of Public Affairs

DHS and DOJ Finalize Rule to Incentivize Use of Lawful Immigration Pathways

Rule places a condition on asylum eligibility for those who circumvent lawful pathways

WASHINGTON – Today, after receiving and considering over 50,000 public comments in response to a Notice of Proposed Rulemaking issued earlier this year, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) finalized a new rule to further incentivize individuals to use lawful, safe, and orderly pathways to enter the United States. The rule builds upon efforts to combine lawful pathways with consequences for failure to use them, by placing certain limiting conditions on asylum eligibility for those who fail to use those pathways. This rule goes into effect once the Title 42 public health Order terminates, on Thursday at 11:59pm ET.

"This Administration has led the largest expansion of legal pathways for protection in decades, and this regulation will encourage migrants to seek access to those pathways instead of arriving unlawfully in the grip of smugglers at the southern border," **said Secretary of Homeland Security Alejandro N. Mayorkas.** "At the same time, we continue to urge Congress to act on President Biden's immigration reform proposal, bipartisan legislation to protect Dreamers and farm workers, and repeated requests for additional resources to hire more asylum officers and immigration judges so we can finally fix our long-broken immigration system."

The rule presumes those who do not use lawful pathways to enter the United States are ineligible for asylum and allows the United States to remove individuals who do not establish a reasonable fear of persecution or torture in the country of removal. Noncitizens can rebut this presumption based only on exceptionally compelling circumstances.

The presumption will not apply to a noncitizen if they, or a family member traveling with them, received appropriate authorization to travel to the United States to seek parole; presented at a port of entry, pursuant to a pre-scheduled time and place using the CBP One app; established that it was not possible to access or use the CBP One app due to a language barrier, illiteracy, significant technical failure, or other applicable exception; or sought and were denied asylum or other protection in at least one other country. Individuals may also rebut the presumption by demonstrating exceptionally compelling circumstances. Unaccompanied children are exempted from this presumption.

Last week, the Government of Mexico announced that they will continue to accept returns, on humanitarian grounds, of migrants from Cuba, Haiti, Nicaragua, and Venezuela who are processed under Title 8 authorities at the U.S. border. Individuals removed under Title 8 are subject to a five-year bar on admission and potential criminal prosecution should they seek to reenter unlawfully.

In January, DHS announced new border enforcement measures to improve border security, limit irregular migration, and create additional safe and orderly processes for people fleeing humanitarian crises to lawfully come to the United States. This included a new parole process for Cubans, Haitians, and Nicaraguans,

scheduling an appointment to present at a port of entry through the CBP One app, and efforts to surge personnel and other resources to the southwest border.

DHS has been preparing for the end of the Title 42 public health Order for nearly two years. In February 2022, DHS formally stood up the Southwest Border Coordination Center, which leads the planning and coordinating of a whole-of-government response to the anticipated increase in border encounters. In April 2022, Secretary Mayorkas issued the DHS Plan for Southwest Border Security and Preparedness, laying out a six-pillar plan to manage an increase in encounters once the Title 42 public health Order is no longer in effect. DHS updated the plan this past December and shared additional details regarding preparations last week.

###

Message

From: (b)(6), (b)(7)(C) (HIDPD) (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Sent: 7/11/2023 10:52:34 PM
To: (b)(6), (b)(7)(C)
Subject: Re: INM Meeting AAR
Attachments: AAR CBPINM 732023.docx

Hola (b)(6), (b)(7)(C), I did not attend the July 3 meeting .

(b)(6), (b)(7)(C)
Port Director
U.S.Customs and Border Protection
Office of Field Operations
Hidalgo/Pharr/Anzalduas
Mobile (b)(6), (b)(7)(C)
Office (b)(6), (b)(7)(C)

Sent from my iPhone

On Jul 11, 2023, at 4:34 PM, (b)(6), (b)(7)(C) wrote:

(b)(6), (b)(7)(C)

If you have time and want to, send me feedback on the attached. I'll work on the other AARs and send them your way. I sent the below message to the others:

From: (b)(6), (b)(7)(C)
Sent: Tuesday, July 11, 2023 3:27 PM
To: (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Cc: (b)(6), (b)(7)(C)
Subject: INM Meeting AAR

Gents,

The attached is a rough draft of the notes I took at the INM meeting on the 3rd of July. If there is anything you'd like to add that I have missed or send pictures you took, let me know. I'll give it a once over tomorrow and submit to FOD. I will be working on the AAR for the other meetings too and will send it to those that attended the meeting for their input/review.

Thanks,

(b)(6), (b)(7)(C)

Asst. Chief/CBP Advisor
U.S. Consulate
Monterrey, Nuevo Leon, MX
(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)

Customs and Border Protection/
Instituto Nacional de Migracion Meeting
Mexico City

Date: July 3, 2023
Time: 12:00 pm to 2:00 pm
Location: INM Headquarters

Participants:

- US Delegation:
  - CBP EAC Manuel Padilla
  - RGV Chief Gloria Chavez
  - DFO Sidney Aki
  - AD (b)(6), (b)(7)(C)
  - FOD HQ Division Chief (b)(6), (b)(7)(C)
  - CBP Representative – Monterrey (b)(6), (b)(7)(C)
  - (A) CBP Attaché (b)(6), (b)(7)(C)
  - RGV ACTT (b)(6), (b)(7)(C)
  - RGV ACPA FOB (b)(6), (b)(7)(C)
  - LRT ACPA FOB (b)(6), (b)(7)(C)
  - CBP MX Representative (b)(6), (b)(7)(C)
- Mexican Delegation:
  - INM Commissioner (b)(6)
  - INM (b)(6)
  - (b)(6)
  - Lic. (b)(6)
  - Lic. (b)(6)
  - (b)(6)

Synopsis:

On July 3, 2023, CBP delegation met with INM Headquarters personnel to discuss current migration surge and statistics, process for CBP One application, "Se Busca" and Missing Migrant Programs, CBP Trade partnerships and best practices for current CBP efforts at the southwest border.

Summary/Issues Briefed:

INM (b)(6) provided a PowerPoint to highlight INM's successes and accomplishments and presented INMs strategic plan to continue funneling the increased migrant flows.

- INM briefed the following:
  - Statistics on current population of (b)(7)(E) bed spaces with (b)(7)(E) of availability
  - Migrants are not being held for more than 36 hours; some are taken south away from the border and released
  - There have been less apprehensions after the end of Title 42.
  - (b)(7)(E)

- CBP briefed the following:
  - CBP One Application has brought order to the arrival of migrants to the border
  - (b)(7)(E)
  - CBP One appointments are currently scheduled at 8 Ports of Entries; Laredo POE has restarted appointments.
  - (b)(7)(E)
  - CBP continues to see migrants on the southside without CBP One appointments.
  - (b)(7)(E)

INM Asks:

- INM asked CBP to share their thoughts (b)(5), (b)(7)(E)
- INM (b)(6) asked that (b)(5), (b)(7)(E)

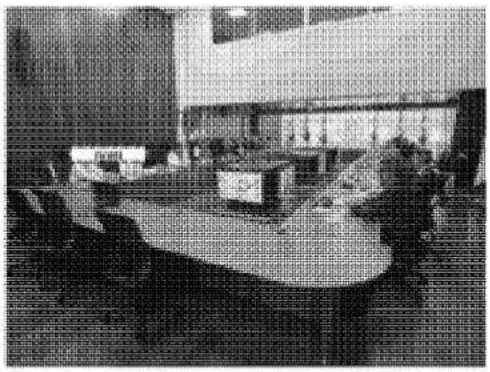
(b)(5), (b)(6)

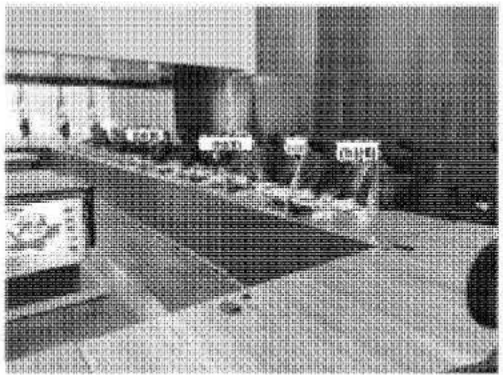
- INM requested new statistics for CBP One App (b)(5) (b)(5). EAC Padilla advised he would share them with INM. (b)(5)
- Commissioner (b)(6) requested more information regarding (b)(5) (b)(5)
- Commissioner (b)(6) requested that (b)(5) (b)(5)
- (b)(6) asked that (b)(5)
- (b)(5)
- Can migrants without CBP One appointments not be processed nor offered shelter?

CBP Asks:

- Reminded INM (b)(6) that during the last meeting in El Paso, TX, it was agreed that there was a need to establish a working group.
- (b)(5)
- EAC Padilla requested INM (b)(5) (b)(5)
- Request that INM send names of INM personnel that will be part of the migration working group.
- (b)(5)

Photos:





Message

From: (b)(6), (b)(7)(C)
Sent: 6/14/2023 3:33:18 PM
To: (b)(6), (b)(7)(C)

How is Mexican immigration validating CBP one appts?

Message

From: (b)(6), (b)(7)(C)

Sent: 5/16/2023 3:02:46 PM

To: (b)(6), (b)(7)(C) HIDALGO APDS-CHIEFS (b)(7)(E)
(b)(7)(E)

Subject: RE: Non CBP One

Thank you!

PD was advised that Guardia Nacional eventual let them through!

From: (b)(6), (b)(7)(C)
Sent: Tuesday, May 16, 2023 10:02 AM
To: HIDALGO APDS-CHIEFS (b)(7)(E)
Subject: Non CBP One

[redacted] non cbp one were escorted to case processing area.

[redacted] males and [redacted] pregnant females.

No medical attention required at this time.

Thank You
(b)(6), (b)(7)(C)
Chief CBP Officer
Hidalgo/Pharr/Anzalduas
(b)(6), (b)(7)(C)