October 21, 2020
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Submitted via http://www.regulations.gov

Re: Executive Office for Immigration Review, Department of Justice, Notice of Proposed Rulemaking: *Procedures for Asylum and Withholding of Removal,* (EOIR Docket No. 19–0010, RIN 1125–AA93)

Dear Ms. Reid:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (the Council) submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) proposed rule, EOIR Docket No. 19-0010, *Procedures for Asylum and Withholding of Removal,* 85 FR 59692 (September 23, 2020) ("Proposed Rule").[*]

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

It is the long-settled policy of both Congress and the executive branch to provide asylum seekers a fair and meaningful opportunity to seek and apply for asylum in the United States. For four

[*] These comments were drafted with the assistance of Andrew DeFalco and Greg Haffner of the Georgetown University Law School, Federal Legislation Clinic and the AILA Asylum Committee and joint EOIR/ICE Committee.

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decades, federal law—consistent with the United States' international treaty obligations—has ensured the right for those fleeing persecution to seek protection in the United States. That long-established commitment is undergirded by fundamental principles of the U.S. legal system: that an adjudication of essential rights and liberties must be fair and must comport with basic due process principles. The Proposed Rule would upend those long-standing protections. AILA and the Council urge the agency to reconsider the Proposed Rule and withdraw it.

I. The Proposed Rule's 15-Day Asylum Filing Deadline Should Be Withdrawn

A. The 15-Day Filing Deadline Is an Impossibly Tight Timeframe for Asylum Seekers and Would Deeply Undermine Their Right to Due Process and Right to Counsel

The Proposed Rule would require that asylum seekers in asylum-and-withholding-only proceedings file their applications within 15 days of their initial master calendar proceeding. Obtaining legal counsel is a critical first step to navigating the asylum process, and without legal representation, asylum seekers may not know what to do or when to do it. Individuals have a statutory right to be represented by counsel, and the right to counsel requires "a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel."[1] EOIR guidance specifically provides that immigration judges generally must provide "at least one continuance" for the purposes of obtaining counsel.[2] Where immigration judges have given respondents only a matter of days to obtain counsel, the BIA and Circuit Courts have found a violation of the right to counsel.[3]

Asylum seekers already struggle to secure counsel, with the process often lasting longer than 15 days. Typically, pro se respondents are not provided the list of pro bono service providers until the first hearing, giving them only 15 days to both secure counsel and complete the application. The exceptionally narrow 15-day timeframe makes it far more difficult for them to secure counsel. If the Proposed Rule is implemented, many people and especially those who are detained would have little choice but to represent themselves, pro se, with no guidance to navigate asylum proceedings. As a consequence, asylum seekers would need to navigate the lengthy, complex legal application in a language they most likely will not speak or read.[4] The result would be an alarming curtailment of the due process rights to which asylum seekers are entitled under law.[5]

The Proposed Rule also ignores the impact of the new $50 filing fee.[6] By itself, the imposition of the new $50 filing fee is a hardship for most asylum seekers. It will be extremely difficult for

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[1] *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012).
[2] Chief Immigration Judge MaryBeth Keller, Operating Policies and Procedures Memorandum 17-01, *Continuances*, July 31, 2017, at 4, https://www.justice.gov/eoir/file/oppm17-01/download.
[3] *See, e.g.*, *Biwot v. Gonzales*, 403 F.3d 1094, 1096 (9th Cir. 2005) (single continuance of "five working days" violated right to counsel); *Matter of Gaitan*, 2017 WL 1951549, at *1 (BIA Mar. 31, 2017) (finding that a single two-week continuance did not afford "a reasonable and realistic period of time in which to obtain counsel").
[4] I-589, Application for Asylum and for Withholding of Removal, https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf.
[5] *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015); *see also Rodrigues-Lairz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002) ("Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.").
[6] Proposed Rule, 85 Fed. Reg. at 59698.

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asylum seekers to obtain that fee before filing the application as the Proposed Rule would require. Combined with the unprecedented new fee for which the Proposed Rule does not allow a fee waiver,[7] and which would require proof of receipt being mailed back from U.S. Citizenship and Immigration Services (USCIS), the 15-day filing rule imposes an enormous obstacle for asylum seekers.[8]

The 15-day filing rule will impact an enormous number of asylum seekers, at least 75,000 each year, and likely many more. Under existing policy, only a few thousand people each year are put through asylum-and-withholding-only proceedings, with a combined 3,962 such proceedings begun in fiscal year 2018.[9] However, when the 15-day rule operates in tandem with the proposed June 2020 asylum regulations,[10] everyone arriving at the border who passes a credible fear interview would now be placed in asylum-and-withholding-only proceedings.[11] This would dramatically increase the number of asylum seekers being subjected to the new 15-day filing window. In Fiscal Year 2019, a total of 75,252 people passed a credible fear interview and were referred for full removal proceedings under INA § 240.[12] Under the June proposed regulation, each of those cases would instead be referred to asylum-and-withholding-only proceedings, and the applicants would be required to file an application within 15 days of the first hearing under the Proposed Rule. Moreover, none of these people would be "already subject to removal orders," a justification the Proposed Rule makes for imposing a 15-day deadline.[13]

EOIR barely acknowledges the severe consequences of imposing a 15-day asylum application deadline on asylum seekers. The extent of EOIR's consideration of the rule's impact on asylum seekers is as follows:

> No costs to the Department or to respondents are expected. Respondents are already required to submit complete asylum applications in order to have them adjudicated. … Moreover, this rule does not require that an alien wait until the immigration judge sets a filing deadline before filing an application, and an alien remains free to file his or her asylum application with the immigration court before the first hearing.

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[7] *Ibid*. (explaining that EOIR is not currently authorized to waive fees for applications published by DHS, and that the Proposed Rule "would also not alter that regulatory structure").

[8] The DHS fee rule, which imposes a $50 asylum fee, is currently enjoined, *see Immigrant Leg. Resource Ctr. v. Wolf*, 20-CV-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020). That injunction may be lifted during the time that EOIR is considering this rule. As a result, this comment presumes that a $50 fee may still be imposed.

[9] Executive Office for Immigration Review, *Statistics Yearbook, Fiscal Year 2018* (August 2019), at 12, https://www.justice.gov/eoir/file/1198896/download; *See generally* American Immigration Council, *The Difference Between Asylum and Withholding of Removal*, October 6, 2020, https://www.americanimmigrationcouncil.org/asylum-withholding-of-removal.

[10] *See* Proposed 15-Day Filing Rule for Asylum Seekers Is Designed to Be Impossible, American Immigration Council, https://immigrationimpact.com/2020/09/24/asylum-15-day-filing-deadline/#.X245W2hKhPY.

[11] *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,* 85 Fed. Reg. 36264 (June 15, 2020).

[12] *See U.S. Citizenship and Immigration Services,* Credible Fear Workload Report, Fiscal Year 2019, https://www.uscis.gov/sites/default/files/document/data/Credible_Fear_Stats_FY19.pdf.

[13] Proposed Rule, 85 Fed. Reg. at 59693.

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These cursory sentences fail to capture the impact of this rule that could lead to the denials of thousands of asylum applications and make it far more difficult, if not impossible, for people to seek protection.

The 15-day filing deadline, when considered in light of the Board's recent decision, *Matter of R-C-R-*,[14] will mean that asylum seekers who fail to meet the deadline can be ordered removed immediately without a second hearing. Such an expedited process would provide no opportunity for pro se respondents to request extensions or build a record explaining why they were unable to meet the deadline.

B. The Proposed Rule Fails to Offer Adequate Explanation for Imposing a 15-Day Deadline

The Proposed Rule violates the most basic command of regulatory rulemaking: to explain why the rule is being adopted. "An agency may not … depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy."[15] Similarly, "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[16] The Supreme Court recently affirmed that "The reasoned explanation requirement of administrative law … is meant to ensure that agencies offer genuine justifications for important decisions."[17]

The Proposed Rule provides a perfunctory justification for imposing the 15-day deadline that defies logic:[18]

> Moreover, delaying filing of the claim risks delaying protection or relief for meritorious claims and increases the likelihood that important evidence, including personal recollections, may degrade or be lost over time. Further, without such a deadline for the asylum application, there is a risk that applicants may simply delay proceedings, resulting in inefficiency in what should otherwise be a streamlined proceeding.

This reasoning for choosing 15 days as the limit is wholly inadequate and is belied by the fact that such a short period will have precisely the opposite effect of its putative intent, namely excluding large numbers of people who have meritorious claims but cannot possibly meet the stringent deadline. Moreover, the Proposed Rule offers no data to demonstrate why evidence is more likely to be degraded beyond 15 days or that asylum applicants are more likely to delay proceedings without such a severe restriction.

The Proposed Rule makes brief mention that "such a deadline is consistent with" regulations providing crewmembers 10 days in which to file an asylum application before being referred to

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[14] 28 I&N Dec. 74 (BIA 2020).
[15] *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (citations omitted).
[16] *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).
[17] *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019).
[18] Proposed Rule, 85 Fed. Reg. at 59694. While EOIR does later say that the Proposed Rule would "effectuate congressional intent to resolve cases in an expeditious manner," *see* Proposed Rule, 85 Fed. Reg. at 59698, that reference is to the rule as a whole and does not specifically mention the 15-day filing deadline.

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immigration court.[19] But asylum seekers arriving at the border are not crewmembers, and EOIR does not offer an explanation for why the comparison is apt or provide statistics about crewmember asylum applications that would make comment possible on the comparison.

Similarly, EOIR also says the deadline is "consistent" with a regulatory directive "that asylum applications filed by detained [noncitizens] are to be given expedited consideration."[20] But the regulation that the Proposed Rule references applies only *after* an application for asylum has been filed, and thus is entirely unrelated to a filing deadline. In short, EOIR proposes a 15-day deadline with no logical explanation for why it chose that period, in violation of the Administrative Procedures Act. Given the manifest failure of EOIR to follow the Administrative Procedure Act, the only solution is to withdraw the rule in its entirety.

C. The Proposed 15-Day Deadline Would Severely Impact Attorneys and the Immigration Courts

EOIR declares in the Proposed Rule that establishing a 15-day application submission deadline "would not be expected to increase any burdens on practitioners," and would not impose any costs to respondents.[21] This is in part, according to EOIR, because practitioners "are already subject to professional responsibility rules regarding workload management" and "are already accustomed to preparing and filing documents related to asylum claims according to deadlines established by an immigration judge."[22]

These assertions are contrary to the overwhelming experience of AILA's thousands of members who represent asylum seekers in immigration court. The Proposed Rule would significantly increase the workload of practitioners and make it difficult for many practitioners to represent asylum seekers at all.

In AILA's experience, once an attorney has agreed to represent an asylum seeker, the process of completing and filing an I-589 can take significantly more than 15 days. Practitioners need to build a rapport with their clients, elicit the grounds for the asylum claim, gather evidence, and research potential legal arguments in support of the asylum claim. Many asylum seekers suffer from Post-Traumatic Stress Disorder, which can make this process more difficult as practitioners work to avoid retraumatizing the client. Completing an asylum claim can take a matter of weeks or months for even the most experienced practitioners. In 2019, AILA's National Asylum Liaison Committee estimated that representing an asylum seeker in immigration court requires between 40 to 80 hours of work, including 35 hours of face-to-face communications with the client.[23] DOJ itself has estimated the average length of time to prepare the 12– to 16-page asylum application at 18 business hours.[24] Under the Proposed Rule practitioners would be required to file repeated motions to extend the deadline for good cause, which may or may not be granted.

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[19] Proposed Rule, 85 Fed. Reg. at 59694, citing 8 CFR § 1208.5(b)(1)(ii).
[20] *Id.*, citing 8 CFR § 1208.5(a).
[21] Proposed Rule, 85 Fed. Reg. at 59698.
[22] *Id.*
[23] https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp
[24] *See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear*, 85 Fed. Reg. 36264, 36290 (June 15, 2020).

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Given these extreme deadlines, AILA and the Council believe that the Proposed Rule would force some practitioners to decline to take asylum cases subject to the new deadlines and could force others to significantly increase their representation fees due to the additional time-sensitive work required. AILA and the Council also believe that many nonprofit organizations that provide representation to asylum seekers would be severely impacted by the rule.

AILA and the Council, which jointly operate the Immigration Justice Campaign ("the Campaign"), also wish to highlight the deleterious effect the Proposed Rule would have on pro bono representation. The Campaign coordinates pro bono volunteer attorneys for individuals held in immigration detention, through a network of pilot sites and local organizations that operate inside immigration detention centers. The Campaign operates on a mentor-based model, where pro bono attorneys with little or no immigration– or asylum-related experience take cases under the tutelage of an experienced practitioner.

It will be difficult for the Campaign to learn about cases within the period prior to the initial master calendar hearing, let alone place the case with a pro bono attorney. AILA and the Council believe that pro bono attorneys with limited immigration experience may be unwilling or unable to agree to represent asylum seekers if the 15-day deadline is implemented. By limiting the ability of the Campaign to recruit pro bono attorneys, the Proposed Rule is almost certain to disrupt the Campaign's representation model and would reduce asylum seekers' overall access to counsel. EOIR must take these interests into consideration, along with the interests of similar representation projects.

EOIR claims that these concerns are limited because "[m]ost [noncitizens] filing asylum applications in pending immigration proceedings—87 percent—have representation."[25] But EOIR not only fails to recognize the effect the 15-day deadline would have on representation rates, it also misrepresents its own statistics. That statistic refers only to the percent of individuals who have *already filed* asylum applications and are represented by counsel. The statistic fails to capture individuals who are unable to file an asylum application in the first place, and thus does not support EOIR's contention that most people who want to seek asylum are represented by counsel.

Counsel play a vital role in ensuring respondents understand the asylum process. Research shows that individuals who obtain counsel are more likely than pro se respondents to file an application for relief from removal, including asylum. A 2016 study from the Council found the following:[26]

> Detained immigrants with counsel were nearly 11 times more likely to seek relief such as asylum than those without representation (32 percent with counsel versus 3 percent without). Immigrants who were never detained were five times more likely to seek relief if they had an attorney (78 percent with counsel versus 15 percent without).

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[25] Proposed Rule, 85 Fed. Reg. at 59698.

[26] American Immigration Council, *Access to Counsel in Immigration Court* (September 2016), at 2, https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

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Without counsel, every year, many asylum seekers who fear persecution in their home country are forced to give up their cases and accept removal because they are unable to complete an application.[27] The Proposed Rule would increase that possibility.

In addition to the impact on attorneys, the Proposed Rule would also put more burden on the already overloaded immigration court system. When evaluated in tandem with the June 2020 regulations, the Proposed Rule will require the courts to hear the claims of at least 75,000 more asylum seekers who are unrepresented. With far more asylum applicants who cannot find counsel due to the 15-day deadline, the court system will be faced with, and possibly overwhelmed by, the additional pro se asylum cases. EOIR also seems to have ignored that studies have shown that legal representation improves the courts' efficiency because it alleviates courts of the time required for explaining the legal process and improves the quality of filings.[28]

As a whole, the Proposed Rule would interfere with the effective operations of the courts and the practice of legal counsel. In addition, it would curtail asylum seekers' right to due process and their right to gather and present evidence in support of their application. We strongly oppose the implementation of this rule and urge EOIR withdraw it.

II. Rejecting Asylum Applications That Leave Irrelevant Fields Blank Will Cause Significant Harm to Asylum Seekers for No Articulated Benefit

By requiring asylum applicants to exactly follow the form instructions on the USCIS asylum application, and by deeming an application incomplete if the instructions are not followed to the letter, the Proposed Rule will cause significant hardship on asylum seekers and result in many unfairly rejected applications.

The Proposed Rule would require immigration courts to enforce the recently adopted USCIS practice of rejecting any asylum form that does not provide an explicit answer to each question asked—in other words, for leaving a space blank.[29] This USCIS policy, for which USCIS has not articulated a clear purpose, will impact thousands of asylum applications.

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[27] Samatha Balaban, Sophia Alvarez Boyd, Lulu Garcia-Navarro, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR, Feb. 25, 2018, https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes.

[28] Ingrid Eagly and Steven Shafer, University of Pennsylvania Law Review, "Measuring In Absentia Removal in Immigration Court," Mar. 2020, https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf.

[29] Catherine Rampell, *Washington Post*, "The Trump administration's no-blanks policy is the latest Kafkaesque plan designed to curb immigration," August 6, 2020, https://www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

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Based on a brief survey of its members, AILA has found that the USCIS policy has already resulted in numerous unnecessary rejections of substantively complete asylum applications. AILA found that all 189 of the cases that were reported by AILA members for being rejected due to alleged incompleteness had been rejected for leaving one or more spaces blank.[30] Dozens of these forms were rejected because applicants without middle names left the middle name space blank, because applicants with three or fewer siblings left spaces for additional siblings blank, and because applicants whose native language uses the English alphabet left the "Name in Native Alphabet" space blank.[31] The USCIS practice not only imposes a significant burden but also has had devastating consequences, namely placing applicants at risk of deportation.

The hardship will be even more severe due to the Proposed Rule's imposition of the 15-day filing deadline and a 30-day time limit to correct any errors. The cost of resending an updated form alone is likely to be a significant burden to some applicants; in addition, an applicant who filed their initial form prior to a fee increase, or under a no-longer-applicable fee waiver, may be required to pay additional filing fees.

The Proposed Rule does not take into account that USCIS's delays in processing can stretch months. In fairness, the agency cannot impose such a harsh, exacting rule and then fail to return the applications in a timely manner. Such delays prevent an asylum applicant from obtaining employment authorization and results in further financial burdens. The delay may result in an applicant missing the statutory filing deadline (resulting in possible detention or repatriation), or in a child near the age of 18 losing status as an unaccompanied alien child. Like too many regulations, these burdens will fall disproportionately on pro se asylum seekers, who may struggle to understand this counterintuitive demand issued in a language of which they may have only limited understanding.

When USCIS proposed its practice change in 2019, USCIS justified it on the bare assertion that it is necessary to preserve the integrity of the immigration system. But EOIR does not even do that; the Proposed Rule adds no further detail to suggest that this change would have any meaningful positive impact or acknowledge the harmful consequences of the change. To arbitrarily impose this requirement on asylum seekers without a clearly articulated reason is unjust.

III. The Proposed Rule Imposes a Severe Fee Payment Requirement on Asylum Seekers and Encumbers Immigration Courts with the Duty to Enforce Payment

The proposed requirement that an asylum application be rejected unless it is accompanied by proof of payment of all fees places an unreasonable burden on asylum seekers. Requiring payment of the significant fee will prevent many eligible asylum seekers from filing, especially in light of recent restrictions imposed by USCIS on eligibility for fee waivers.[32] EOIR acknowledges in the Proposed Rule that it is choosing not to amend the regulation to permit fee waivers but offers no

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[30] *See USCIS Accountability: An Examination of "Blank Space" Rejections available at* https://www.aila.org/infonet/an-examination-of-blank-space-rejections-.
[31] *Id.*
[32] 8 CFR § 106.3.

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reason for its decision.[33] In this respect, the agency has failed to meaningfully consider the compelling circumstances of asylum seekers that would justify fee waivers.

Many asylum seekers arrive in this country with few or no assets, often having fled without adequate resources. Although some have familial and social connections that will allow them to raise the required money, others do not. Because asylum seekers cannot immediately seek legal employment they are unable to earn the necessary money. This problem is even more difficult for asylum seekers attempting to file their application while in detention, where they have less access to family or community connections that could assist them. The Proposed Rule, when combined with the 15-day filing deadline discussed above, would require asylum seekers to raise the required funds within a very short period and make it more difficult for them to meet the stringent requirement.

Implementing this policy is also problematic due to the ongoing legal battle over USCIS's authority to impose the proposed fees in the first place.[34] For EOIR to decline to provide authority to waive fees at a moment when USCIS's authority to implement these fees is in question will cause confusion on the part of asylum seekers and immigration officers alike.

IV. The Proposed Changes to Evidentiary Rules Unfairly Tip the Scales Against Asylum Seekers and Further Compromise Immigration Court Impartiality

The Proposed Rule imposes on immigration judges the unjustified presumption that reports produced by U.S. government sources are more credible than other information. Deciding an asylum claim often depends on factual findings about the conditions in the asylum seeker's country of origin, and evidence about those conditions will be critical to a just resolution of the claim. The Proposed Rule seeks to replace a balanced system, in which all evidence is given only as much weight as its credibility will bear, with a two-tier system in which evidence produced by a U.S. government agency will be deemed presumptively credible and probative while information produced by equally credible sources (such as international bodies, nongovernmental organizations, academic institutions, and respected news organizations) will be subjected to a more rigorous scrutiny. The result will be that outdated, cursory, and inaccurate U.S. government reports will be given more weight while more recent and more detailed evidence from other sources will be disfavored. For example, State Department country condition reports are released only on a yearly basis and are typically published three months after the year's end. Evaluating veracity and credibility of these reports is the responsibility of the immigration judge and should not be dictated by regulation.

This bias is further exacerbated by the other proposed change to evidentiary rules: permitting judges to submit evidence on their own authority. By allowing immigration judges to submit evidence, the Proposed Rule further compromises their role as a fair and impartial arbiter. This policy will further degrade the integrity of the immigration courts, which EOIR has significantly undermined in recent years by stripping powers of immigration judges to manage their dockets and giving more authority to EOIR administrators to overturn judge decisions. Moreover, asylum seekers will be at a severe disadvantage in objecting to such information being admitted as

[33] Proposed Rule, 85 Fed. Reg. at 59698 (explaining that EOIR is not currently authorized to waive fees for applications published by DHS, and that the Proposed Rule "would also not alter that regulatory structure").
[34] *See ILRC et al., v. Wolf, et al.,* 9/29/20 (enjoining enforcement of the proposed fee increase.).

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evidence. This departure from traditional court procedure is likely to cause confusion when legal counsel is present, but it is wholly unreasonable to expect a pro se asylum seeker to be prepared to object.

V. A 180-Day Adjudication Clock Would Effectively Bar Continuances and Substantially Interfere with Immigration Judges' Docket Management

The Proposed Rule would require that "in the absence of exceptional circumstances, an immigration judge shall complete administrative adjudication of an asylum application within 180 days after the date an application is filed."[35] While EOIR claims the Proposed Rule would promote efficiency, the actual result will be to severely curtail the authority of immigration judges to manage their dockets and the due process protections for asylum seekers.

Under current law, immigration judges have the discretion to issue continuances for "good cause," which can include procedural reasons such as providing enough time for an asylum seeker to secure counsel.[36] The Proposed Rule would restrict judges' authority to grant a continuance for "good cause" so severely that it would all but ban continuances. The Proposed Rule specifies that, if the continuance would lead to an asylum application being adjudicated more than 180 days after the application was filed, an immigration judge would be required to find both "good cause" *and* that there are "exceptional circumstances" justifying the continuance.[37]

The Proposed Rule states that the "exceptional circumstances" requirement is a higher standard than "good cause" and calls for "circumstances that are 'clearly out of the ordinary, uncommon or rare'" citing an Eighth Circuit case.[38] The Proposed Rule also references the Immigration and Nationality Act definition for exceptional circumstances as including ' ' 'battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances.' '"[39] The Proposed Rule further specifies that lack of work authorization will not qualify.[40] Without question, this is an extremely high standard that will result in immigration judges being blocked from issuing a continuance in nearly every asylum case.

EOIR fails to recognize that as a result of the current backlog in immigration courts, asylum applications filed in non-detained immigration courts routinely take far longer than the proposed 180-day adjudication clock.[41] With the exception of detained cases and some cases placed on the Family Unit Docket, asylum applications are routinely scheduled for individual calendar hearings multiple years after the asylum application is filed. Indeed, the Proposed Rule does not even

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[35] Proposed Rule, 85 Fed. Reg. at 59696.
[36] 8 CFR § 1240.6.
[37] Proposed Rule, 85 Fed. Reg. at 59696. Proposed 8 CFR § 1003.29 ("The immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(A)(iii) of the Act and § 1003.10(b)").
[38] *Id.* at 59697 (quoting United States v. Larue, 478 F. 3d 924, 926 (8th Circ. 2007) (per curiam).
[39] *Id.* (citing INA § 240(e)(1)).
[40] *Id.* at 59696.
[41] *See* https://trac.syr.edu/phptools/immigration/court_backlog/.

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acknowledge or grapple with this basic reality about the current operation of the immigration courts.

By enforcing such a narrow time limit and requiring "exceptional circumstances," the Proposed Rule would effectively make it impossible for immigration judges to grant continuances after an application is filed, even for common sense reasons where "good cause" would typically be established.

Perhaps most important the new restriction would greatly curtail the ability of asylum seekers to obtain the assistance of counsel. Immigration attorneys currently take cases with the understanding that most cases will take years, and the decision to accept a case requires careful planning far into the future. If all asylum cases are placed on an expedited docket, immigration attorneys would be forced to take fewer cases on shorter deadlines. In AILA and the Council's experience, this exact problem is currently occurring with EOIR's similar "Family Unit Docket," where judges are required to complete certain asylum seekers' cases within one year.[42] AILA and the Council have found that the stringent deadlines of the Family Unit Docket—which are *more* flexible than the Proposed Rule—have already discouraged many attorneys from taking cases on that docket. These problems will only get worse under the Proposed Rule.

Moreover, the Proposed Rule would force asylum seekers to bear the negative consequences of a backlogged immigration system, a system over which they have no control. As the Ninth Circuit has emphasized, individual petitioners should not be "punished for the crowded dockets of the immigration courts," or "forced to proceed without counsel because of the scheduling problems of the immigration court."[43]

The Proposed Rule will also hurt the immigration court's ability to manage dockets and could negatively impact other removal cases. If immigration judges are required to prioritize the adjudication of asylum applications within 180 days, they will necessarily have to *deprioritize* the adjudication of other applications, which will lead to significant amounts of "docket reshuffling."

EOIR has previously acknowledged that the first attempt at creating priority dockets for asylum seekers from 2014-2017 "coincided with some of the lowest levels of case completion productivity in EOIR's history and, thus, did not produce significant results."[44] EOIR has not released any public information on the effect of the Family Unit Docket that permits comment on whether that system has produced "significant results." In the experience of AILA's member practitioners, however, the Family Unit Docket has created similar docket reshuffling and due process problems that have interfered with the right to counsel and the ability of asylum seekers to present their case, and it has made it harder for immigrants to attend court hearings. These concerns have been

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[42] James McHenry, Director, Executive Office for Immigration Review, *Tracking and Expedition of 'Family Unit' Cases*, Nov. 16, 2018, https://www.justice.gov/eoir/page/file/1112036/download.
[43] *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1084 (9th Cir. 2007) (finding that the right to counsel was violated when an immigration judge refused to grant a continuance of an individual hearing to obtain counsel, when the respondent's attorney withdrew just weeks before the individual hearing).
[44] *See* McHenry, *Tracking and Expedition of 'Family Unit' Cases, supra* note 42 at 2.

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repeatedly identified by immigrants, attorneys, former immigration judges, and Board of Immigration Appeals members.[45]

EOIR should articulate and examine not only the consequences that the Proposed Rule would have on asylum seekers, but also the consequences it would have on individuals who are not seeking asylum and who will inevitably be subject to increasing backlogs and delays as a result of immigration judges being required to prioritize asylum applicants.[46] The types of non-asylum cases that could be delayed if an immigration judge can no longer issue continuances beyond 180 days include adjustments of status where U.S. citizen family members are petitioning; cancellation of removal for lawful permanent residents; and cancellation of removal in particularly compelling situations, such as for those with sick U.S. citizen or LPR family members or for victims of domestic violence.

The 180-day adjudication clock and limitation on continuances after 180 days remove an essential docket-management tool from the discretion of immigration judges, and in doing so makes it exceedingly difficult for asylum seekers to effectively argue their cases. We strongly oppose the implementation of such a rule in order to preserve the integrity of our immigration courts' proceedings and the due process rights of asylum seekers.

VI. A 30-Day Period Does Not Provide the Public a Meaningful Opportunity to Comment

Executive Order 13563 states that "[t]o the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[47] The sudden change in timeframe from 60 to 30 days does not provide a meaningful opportunity for organizations and advocates to provide feedback on a notice of proposed rulemaking. Instead, a 30-day comment period directly contravenes the guidance provided in the current Executive Order and injects tremendous uncertainty into the existing understanding of policy.

A meaningful opportunity to comment is necessary because it allows for the creation of stable policy and alerts practitioners in the field to potential changes in guidance from the executive branch. However, a shortened 30-day comment period greatly compromises the ability of even

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[45] *See, e.g.* Sarah Pierce, Migration Policy Institute, *As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound*, July 2019, https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants (describing the Family Unit Docket" as "anything but" fair); Former BIA Chairman Jeffrey Chase, *EOIR Creates More Obstacles for Families, Immigration Courtside*, Dec. 13, 2018, https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families (describing the Family Unit Docket as "lessen[ing] the likelihood that families will be able to be represented in their removal proceedings"; Beth Fertig, *Fast-Tracking Families Through Immigration Court*, WNYC, April 2, 2019, https://www.wnyc.org/story/fast-tracking-families-through-immigration-court/ (describing how immigration attorneys have been overwhelmed by expedited Family Unit Docket cases).

[46] *See, e.g.* Stephen Franklin, Rocket Dockets: How an effort to speed immigration cases is causing havoc for countless families, The Chicago Reporter, Sept. 27, 2019, https://www.chicagoreporter.com/rocket-dockets-how-an-effort-to-speed-immigration-cases-is-causing-havoc-for-countless-families/ (describing how the Family Unit Docket has created "two clocks" for immigrants in removal proceedings, where "One clock ticks exceptionally quickly while the other drags on painfully slowly").

[47] Executive Order 13563 of January 18, 2011, https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

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highly sophisticated and well-staffed organizations to provide meaningful feedback to proposed policy changes. The majority of interested parties will be prevented from commenting entirely or will be unable to provide thorough feedback to often complicated revisions that have dramatic implications. Without the public's input, including that of skilled practitioners and interested parties, policy will be put into effect that is poorly understood and, as a result, poorly implemented. The result will be an unstable body of policy that erodes critically important due process rights for affected individuals and the public's trust.

We believe that a meaningful opportunity to comment is intrinsically linked to a 60-day comment period, as shown in current executive guidance. Anything less greatly diminishes the public's opportunity to provide feedback and creates unnecessary confusion for individuals and practitioners. We strongly urge the EOIR to reevaluate this sudden, arbitrary change to the traditional comment period for proposed rulemaking.

Conclusion

AILA and the Council strongly oppose the Proposed Rule because of the unfair burdens it will impose on vulnerable individuals who deserve protection from persecution that may result in grave danger and potential death. These policy changes are choking off access to asylum and are fundamentally undermining the U.S. commitment to protect those fleeing persecution and harm. In addition, the Proposed Rule would make it more difficult for attorneys to represent asylum seekers, interfere with the efficient operation of the immigration courts, and hurt people who have non-asylum removal cases awaiting review before the immigration courts. We urge the agencies to reconsider the Proposed Rule and withdraw it entirely from consideration.

Sincerely,

The American Immigration Lawyers Association

American Immigration Council

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