



CENTER FOR IMMIGRATION STUDIES

November 7, 2023

Immigration Law Division, Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

**RE: Appellate Procedures and Decision Finality in Immigration Proceedings;
Administrative Closure (Department of Justice, RIN 1125-AB18, EOIR Docket No. 021-
0410).**

Dear Chief Horowitz:

The Center for Immigration Studies (CIS) submits the following comment to the U.S. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), in response to DOJ's proposed rule, titled *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, as published in the Federal Register on September 8, 2023.¹

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration's far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

I. Background

Under authority delegated by the U.S. Attorney General, EOIR operates the U.S. immigration court system by conducting immigration court proceedings, appellate reviews, and administrative hearings for the purpose of adjudicating immigration cases. EOIR, which includes the Board of Immigration Appeals (BIA), an administrative tribunal that, *inter alia*, hears appeals of immigration judge decisions, was created in 1983² to be independent of the former Immigration and Naturalization Service (INA) (duties of which are now performed by various agencies within

¹ 88 Fed. Reg. 25313 (Apr. 26, 2023).

² See U.S. Department of Justice, Executive Office for Immigration Review, *About the Office* (updated Apr. 25, 2023) (“The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security).”).

the Department of Homeland Security (DHS))³, the agency charged with the enforcement of the federal immigration laws. EOIR's primary mission is to "adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administration the Nation's immigration laws."⁴ Among its goals, the agency has identified increasing "productivity and timeliness of case processing by setting appropriate standards, streamlining procedures, and implementing staff-generated recommendations,"⁵ as essential to supporting its primary mission.

The agency, however, has experienced historic backlogs resulting from the Covid-19 pandemic that was bookended by two border crises. The latter (and on-going) border surge has been so severe that nearly every month of the Biden administration has set historic records for the number of illegal entries, got-aways, and releases of inadmissible aliens into the United States through the Southwest Land Border Region. This has been true despite the Biden administration maintaining use of the public health order under Title 42 to expel recent-border crossers into the United States as late as May 2023. This has also remained true despite the Biden administration's unprecedented abuse of parole to allow inadmissible aliens from countries with high rates of illegal border crossers, who have no lawful basis to enter the United States, to nevertheless apply for parole from home, fly to the United States, and be released with work authorization eligibility – directly contravening the limitations set by Congress.⁶

The impact of the Biden administration's nonenforcement policies have severely impacted processing times and backlogs across the immigration system,⁷ but most notably within the immigration courts. According to EOIR data from July 2023, the immigration courts' overall backlog stands at more than 2.2 million cases.⁸ This is a 1060% increase since 2008, at which time EOIR reported a backlog of over 186,000 cases, and more than double 2019's backlog of over 1,088,000 cases.⁹

These extreme backlogs not only are eroding the credibility of our immigration system, but the backlogs, themselves, will also encourage additional illegal immigration to the United States by ensuring that even those aliens who meet the Biden administration's narrow enforcement

³ See U.S. Citizenship and Immigration Services, *Overview of INS History* (2012) ("The Homeland Security Act of 2002 disbanded INS on March 1, 2003. Its constituent parts contributed to 3 new federal agencies serving under the newly formed Department of Homeland Security (DHS): 1. Customs and Border Protection (CBP), 2. Immigration and Customs Enforcement (ICE), and 3. U.S. Citizenship and Immigration Services (USCIS).").

⁴ U.S. Department of Justice, Executive Office for Immigration Review, *About the Office* (updated Apr. 25, 2023) ("The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals (BIA or Board) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security).").

⁵ *Id.*

⁶ See e.g., White House, *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions* (Jan. 5, 2023); U.S. Department of Homeland Security, *DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras* (Jul. 7, 2023); U.S. Department of Homeland Security, *DHS Announces Family Reunification Parole Process for Ecuador* (Oct. 18, 2023).

⁷ U.S. Citizenship and Immigration Services Office of the Ombudsman, *Annual Report 2023* (Jun. 30, 2023).

⁸ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Pending Cases, New Cases, and Total Completions* (data generated Jul. 13, 2023).

⁹ *Id.*

priorities and are ultimately placed in removal proceedings will nevertheless be provided the opportunity to live in the United States for numerous years – in excess of nearly all nonimmigrant visa categories’ periods of validity. Those who are paroled out of detention or who file asylum applications will likewise be eligible to receive employment authorization documents (EADs) and work in the United States legally immediately or within six months, respectively.

As civil rights champion and chairwoman of President Clinton administration’s Commission on Immigration Reform explained in testimony before Congress:

Deportation is crucial. Credibility in immigration policy can be summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave. The top priorities for detention and removal, of course, are criminal aliens. But for the system to be credible, people actually have to be deported at the end of the process.¹⁰

The removal of an alien subject to removal proceedings from the United States, however, is not possible without DHS first obtaining an order of removal from an immigration judge.¹¹

In December 2020, DOJ issued a final rule (referred to hereafter as the “AA96 Final Rule”) to establish limits on the authority of immigration judges and the BIA in order to ensure efficient processing of the immigration courts’ dockets.¹² The AA96 Final Rule made numerous changes, but most importantly, it:

- Limited EOIR adjudicators’ authority to administratively close cases to only cases in which adjudicators have received express grants of such authority by statute or regulation or in cases of judicially approved settlement agreements;
- Limited the BIA’s authority to remand matters to immigration judges;
- Expedited briefing schedules and limit the number of extensions parties could receive; and
- Addressed incomplete identity, law enforcement, or security investigations by standardizing the authority of adjudicators to deem an application abandoned if an applicant failed to comply with pertinent requirements regarding such investigations.

DOJ explained that it proposed this rule in 2020 to ensure that immigration court cases were adjudicated in a consistent and timely manner – and it further emphasized that the drastic increase in the agency’s backlog also resulted in a corresponding increase in the number of appeals of immigration judge decisions, noting that EOIR that in fiscal year 2018, the number of such appeals increased 70 percent over the previous high in the preceding five fiscal years.¹³

¹⁰ Jordan, Barbara, Testimony before House of Representatives, Committee on the Judiciary, Subcommittee on Immigration and Claims (Feb. 24, 1995).

¹¹ See INA § 241.

¹² See 85 Fed. Reg. 52491 (Aug. 26, 2020).

¹³ *Id.* at 52492.

As of the third quarter of 2023, BIA currently has 114,006 appeals pending – the highest number of pending appeals ever reported by the agency.¹⁴ Accordingly, the AA96 Final Rule was promulgated to reduce unwarranted delays in the appeals process and to ensure that efficient use of BIA and EOIR resources while guaranteeing that cases were completed in a timely manner consistent with due process.¹⁵

The AA96 Final Rule was enjoined on March 10, 2021, by the U.S. District Court for the Northern District of California in *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (2021). The Biden administration refused to appeal that decision, and instead on September 8, 2023, published this Notice of Proposed Rulemaking (NPRM) to repeal the provisions created by the AA96 Final Rule. Notably, the proposal broadens immigration judges’ authority to administratively close, terminate, or dismiss cases; restores longer briefing schedules and calendar flexibility; and restores the BIA’s authority to remand cases, among other changes.

II. DOJ Must Delay Issuance of this Proposed Rule.

CIS requests that DOJ delay the issuance of the proposed rule and any other regulation proposing changes in the immigration court system. The issuance of a new rule is inappropriate when the Department has failed to make the data it has considered available to the public and while the agency, in coordination with DHS and the Department of Health and Human Services (HHS), is in the process of implementing changes to both the credible-fear process and protections afforded to unaccompanied alien children (UACs), respectively.

As a general matter, the Administrative Procedure Act (APA) “requires agencies to engage in ‘reasoned decision making,’”¹⁶ and directs that agency actions be “set aside” if they are “arbitrary” or “capricious.”¹⁷ An agency commits a serious procedural error, however, when it fails to reveal portions of technical bases for a proposed rule in time to allow for meaningful commentary.¹⁸ Further, where public notice is inadequate, an agency’s consideration of comments received in response thereto, no matter how careful, cannot cure such defects.¹⁹

By issuing this NPRM while simultaneously amending related processes, the U.S. government has not fulfilled its obligation under the APA to provide the public with adequate notice regarding the basis for its proposal. Issuing this rulemaking before such necessary information is published prohibits the public from adequately analyzing the proposal’s potential impact.²⁰

¹⁴ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, All Appeals Filed, Completed, and Pending* (generated Jul. 13, 2023).

¹⁵ See 85 Fed. Reg. 52491, 52493 (Aug. 26, 2020).

¹⁶ *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

¹⁷ 5 U.S.C. § 706(2)(A); *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. ___ (2020), slip op. at 9.

¹⁸ *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 218 U.S. App. D.C. 134, 1982 U.S. App. LEXIS 20990 (D.C. Cir.), cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76, 1982 U.S. LEXIS 205 (1982).

¹⁹ *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 267 U.S. App. D.C. 367, 27 Env’t Rep. Cas. (BNA) 1288, 18 Env’t. L. Rep. 20473, 1988 U.S. App. LEXIS 1626 (D.C. Cir. 1988).

²⁰ See 5 U.S.C. § 706.

Currently, DHS is piloting implementation of the interim final rule (IFR) it issued on March 29, 2022, to allow USCIS asylum officers to make final asylum decisions in credible fear cases – a function that has historically been conducted exclusively by immigration judges.²¹ Credible fear cases are fear claims submitted by inadmissible aliens subject to expedited removal proceedings,²² and such cases currently constitute a large portion of EOIR’s docket.²³

Likewise, in recent years, a historically significant number²⁴ of removal proceedings involving UACs have been added to EOIR’s docket.²⁵ On November 4, 2023, however, HHS published a NPRM to alter the procedures and protections the agency must provide to UACs who are transferred to their custody after being encountered by U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE) officers.²⁶

Without understanding the affect that the asylum processing IFR will have upon immigration court dockets and the procedures and protections that will be afforded to UACs in removal proceedings if that rule were finalized, the public is not equipped to adequately analyze the changes posed by DOJ’s proposed rule. Accordingly, DOJ must reissue this NPRM after these details are finalized and made public in order to provide the public with adequate notice and to comply with the APA.

Finally, CIS requests that DOJ make updated data regarding the number of inactive pending cases; the average length of time a case has been administratively closed; the number of terminated or dismissed cases; the number of UACs that have been placed into removal proceedings in recent years (by year); and the grounds for administratively closing, terminating, or dismissing cases available to the public. Without such information, the public lacks the information necessary to properly analyze the impact this regulation will have on the immigration system or to understand how these authorities have been used by EOIR adjudicators.

III. The Proposed Rule’s Administrative Closure Authority is Overbroad.

The proposed rule’s expansion of EOIR adjudicators’ administrative closure authority is both *ultra vires* and bad policy.

²¹ U.S. Citizenship and Immigration Services, *FACT SHEET: Implementation of the Credible Fear and Asylum Processing Interim Final Rule* (Oct. 17, 2023); 87 Fed. Reg. 18078 (Mar. 29, 2022).

²² INA § 235(b)(1)(b).

²³ See U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Pending I-862 Proceedings Originating With a Credible Fear Claim and All Pending I-862s* (generated July 13, 2023) (216,468 pending I-862 claims originating with a credible fear claim).

²⁴ See U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Pending Unaccompanied Noncitizen Child (UAC) Cases* (generated July 13, 2023) (62,183 pending UAC cases as of the end of the third quarter of FY 2023).

²⁵ While the INA gives USCIS initial jurisdiction over asylum claims submitted by UACs, see INA § 208(a)(2)(E), UACs are placed into removal proceedings because UACs are not amenable to expedited removal under INA § 235(b)(1) or processing under INA § 235(b)(2)(C).

²⁶ 88 Fed. Reg. 68908 (Oct. 4, 2023).

Administrative closure is defined as “an order by an Immigration Judge removing a case from the Immigration Court’s calendar.”²⁷ An administrative closure does not result in a final order or disposition in an immigration case. Sometimes, administrative closure has been used to allow an alien to pursue an immigration benefit or form of relief they are eligible to apply for or to await an event that is outside of the immigration courts’ jurisdiction to occur.

The proposal explicitly grants immigration judges and the Board broad authority to administratively close cases which EOIR has a duty to adjudicate.²⁸ CIS strongly recommends that DOJ amend proposed 8 C.F.R. §§ 1003.1(l), 1003.1(d)(1)(ii), 1003.10(b), 1003.18(c), and 1003.18(d) to restrict immigration judges’ and the BIA’s authority to administratively close cases.

Consistent with the Immigration and Nationality Act (INA), regulations should only permit EOIR adjudicators to administratively close cases when such closure allows a separate agency to adjudicate an immigration benefit or other form of relief that the alien is eligible to apply for and, if granted, would render the alien not deportable or inadmissible under the immigration laws.

A. EOIR Adjudicators Do Not Have Broad Authority to Use Administrative Closure.

Broad administrative closure authority created by this NPRM is unsupported by law. No statute authorizes EOIR adjudicators to use administrative closure in the manner or circumstances that would be permitted under this NPRM.

Rather, Congress has, under INA § 240, mandated a specific process for conducting removal proceedings that, as it has stated, “shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”

While the INA permits EOIR adjudicators to take certain actions, such as to reopen or reconsider a case in removal proceedings under conditions laid out in INA § 240(c)(6) and INA § 240(c)(7), respectively, it has not authorized administrative closure as a method to “temporarily” or permanently remove cases from a court’s calendar on the basis of a “totality of the circumstances” analysis of the parties’ interests.

Immigration judges and the BIA have a duty to render final decisions in immigration cases in a timely manner.²⁹ The INA sets out mandatory, not permissive, criteria for adjudicators to apply in determining which aliens are eligible to enter and remain in the United States and which aliens must exit or be removed from the United States.³⁰

²⁷ U.S. Department of Justice, *Immigration Court Practice Manual* (Aug. 2018), page 237.

²⁸ See 88 Fed. Reg. 62242, 62255-62 (Sept. 8, 2023).

²⁹ 8 C.F.R. § 1003.1(d)(1) (“The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations.”); 8 C.F.R. § 1003.10(b) (“In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.”).

³⁰ See INA § 212; INA § 237.

Moreover, as DOJ explained, longstanding precedent has likewise clarified that immigration judges are required to both complete a case and to complete it through only one of three options: an order of termination; an order of removal; or an order of relief or protection consistent with the INA.³¹ As explained above, however, administrative closure does not result in the issuance of a final order or any other final disposition of a case. Rather, administrative closure—by its essence-- delays disposition of a case until an unknown and unpredictable date.

Throughout this NPRM, DOJ repeatedly emphasized that administrative closure results in a “temporary” pause of removal proceedings.³² EOIR data, however, shows that administrative closure is anything but temporary – and has been used as a tool to enable immigration judges and the BIA to allow removable aliens to remain in the United States without any lawful immigration status.

The most recent figures reveal that cases are administratively closed for an average of 17 years, confirming that administrative closure has not been primarily used by EOIR adjudicators to allow aliens time to seek a benefit from DHS – or the completion of another temporary purpose that may justify delaying their proceedings.³³

That average is also expected to rise considerably given that the number of cases administratively closed by EOIR spiked between 2012 and 2016 during the Obama administration, just seven to ten years ago.³⁴ Aliens who entered the United States prior to November 2020—absent exceptional aggravating circumstances – are not considered to be priorities for removal under current Biden administration policies and ICE prosecutors are generally prohibited from pursuing enforcement actions against such “non-priority” cases.³⁵

In other words, the expansion of EOIR adjudicators’ administrative closure authority has allowed those adjudicators to improperly seize equitable powers that are not authorized by the INA or any other relevant statute. That is improper because, as the Ninth Circuit has noted,

*Immigration Judges, or special inquiry officers, are creatures of statute, receiving some of their powers and duties directly from Congress ... and some of them by subdelegation from the Attorney General.... Rather, these decisions plainly hold that the immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INA choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion. **The immigration judge is not empowered to review the wisdom of the INA in instituting the proceedings. His powers***

³¹ See *Matter of Chamizo*, 13 I&N Dec. 435, 437 (BIA 1969)

³² 88 Fed. Reg. 62242, 62259-60 (Sept. 8, 2023); proposed 8 C.F.R. § 1003.1(l).

³³ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Administratively Closed Cases* (Jan. 19, 2022).

³⁴ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Asylum Decision Rates* (generated Jul. 2023).

³⁵ See Memorandum to All OPLA Attorneys, from Kerry Doyle, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, “Re: Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion”, Apr. 3, 2022; see also Memorandum to Tae D. Johnson, acting director, U.S. Immigration and Customs Enforcement, et al., from Alejandro Mayorkas, secretary, U.S. Department of Homeland Security, “Re: Guidelines for the Enforcement of Civil Immigration Law”, September 30, 2021.

are sharply limited, usually to the determination of whether grounds for deportation charges are sustained by the required evidence or whether there has been abuse by the INA in its exercise of particular discretionary powers. [Emphasis added.]

Consequently, EOIR's abuse of administrative closure in the past decade is contrary to law.

Additionally, as DOJ explained at length in its AA94 rulemaking, longstanding precedent and administrative law separation-of-function principals dictate that neither immigration judges nor the BIA should take on prosecutorial discretion functions by determining which cases should be adjudicated and which should not. An immigration judge "may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation ... [and] [o]nce deportation proceedings have been initiated ... the immigration judge may not review the [discretion] of the ... action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner."³⁶ That same principle applies to the BIA, as well. Any alternative would allow EOIR adjudicators to create a parallel immigration system that is unmoored from the INA and not governed by any standards set by Congress.

DOJ, however, should continue to allow EOIR adjudicators to administratively close cases where the alien is eligible to apply for an immigration benefit or form of relief that would render the alien not deportable or inadmissible under the immigration laws. Such authority, unlike the exercise of administrative closure in other scenarios (*i.e.*, administrative closure that is issued because an immigration judge determines removal is not consistent with the interests of the U.S. government) is consistent with the INA because Congress expressly allows aliens in removal proceedings to apply for such benefits and because administrative closure, in such instances, would enable the alien to obtain a final disposition on their case.

³⁶ *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982), *aff'd sub nom. Quintero-Martinez v. INS*, 745 F.2d 67 (9th Cir. 1984); *see also Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982) ("It has long been held that when enforcement officials of the [Immigration and Naturalization Service ("INS"), now DHS] choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged."); *cf. Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) ("Rather, these decisions plainly hold that the immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INA choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion. The immigration judge is not empowered to review the wisdom of the INA in instituting the proceedings. His powers are sharply limited, usually to the determination of whether grounds for deportation charges are sustained by the required evidence or whether there has been abuse by the INA in its exercise of particular discretionary powers. This division between the functions of the immigration judge and those of INS enforcement officials is quite plausible and has been undeviatingly adhered to by the INS."); *Matter of Silva-Rodriguez*, 20 I&N Dec. 448, 449-50 (BIA 1992) (undue delay by an immigration judge may frustrate or circumvent statutory purpose of prompt immigration proceedings); *Matter of Yazdani*, 17 I&N Dec. 626, 630 (BIA 1991) ("However, so long as the enforcement officials of the [INS] choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge and the Board must order deportation if the evidence supports a finding of deportability on the ground charged.").

B. Expanding EOIR Adjudicators' Administrative Closure Authority Will Weaken the Immigration System as a Whole.

The abuse of administrative closure authority permitted by the provisions of this NPRM would further strain the immigration courts, weaken the credibility of the immigration system, and eliminate predictability in immigration proceedings. For these reasons, , CIS recommends that DOJ withdraw this rulemaking or amend its provisions to ensure that administrative closure is only permitted in cases that are consistent with the INA (i.e., when required by law or regulation to allow an alien to apply for an immigration benefit or form of relief in which they are eligible, as explained above).

The administrative closure authority has been significantly abused since the BIA departed from longstanding precedent governing the use of that authority in its 2012 decision in *Matter of Avetisyan*.³⁷ Thereafter, the administrative closure rate for asylum cases skyrocketed, from 4.55 percent in 2011, to 14.25 percent in 2012, to 25.31 percent in 2013, 25.42 percent in 2014, 35.61 percent in 2015, and 39.4 percent in 2016.³⁸ While DOJ has refused to provide (if it is not actively concealing) updated statistics to the public on how many cases in total are currently administratively closed, in its last such disclosure (for the first quarter of FY 2022), EOIR revealed that there were more than 309,000 inactive pending cases subject to administrative closure.³⁹

The agency also reported that the average length of time a case had then been administratively closed was 6,199 days or approximately 17 years – dispelling any notion that EOIR was using administrative closure to “temporarily” remove cases from the component’s calendars for the purpose of completing specific tasks, such as apply for benefits with USCIS. Rather, these figures signal that EOIR adjudicators use administrative closure as method to issue a *de facto* administrative amnesty in direct conflict with Congress’ mandates in the INA.

As DOJ explained in 2020, administrative closure lengthens and delays proceedings because it defers disposition of a case until an unknown and unpredictable date. Notably, an administratively closed case is not removed from EOIR’s docket – it is simply removed from the immigration court’s active calendar.

As the BIA explained in *Matter of Amico*⁴⁰: “When a case is administratively closed, the [alien] is allowed ... to avoid an order regarding his deportability, and the consequences an order of deportation could bring.” In other words, the practice allows aliens with no lawful immigration status who are removable from the United States to remain here indefinitely, both leaving them

³⁷ See *Matter of Avetisyan*, 25 I&N Dec. 688 (Dec. 2012).

³⁸ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Asylum Decision Rates* (generated Jul. 13, 2023).

³⁹ U.S. Department of Justice, Executive Office for Immigration Review, *Adjudication Statistics, Administrative Closure Statistics* (generated Jan. 19, 2022).

⁴⁰ *Matter of Amico*, 19 I&N Dec. 652, 654 (BIA 1988).

in “legal limbo” and signaling to prospective migrants around the world that the U.S. government is not serious about enforcing its own immigration laws.

CIS also strongly warns DOJ against permitting administrative closure in UAC proceedings where the UAC indicates an intent to apply for asylum and USCIS has initial jurisdiction over the asylum application. UACs are not subject to the one-year filing deadline for asylum applications⁴¹ and are especially vulnerable to exploitation and abuse.⁴²

Recent reports have also demonstrated that HHS’s Office of Refugee Resettlement (ORR) is currently unable or unwilling to take necessary measures to keep track of the location and ensure the welfare of UACs after it transfers custody to sponsors, many of whom received inadequate background checks, if any at all.⁴³ Consequently, reports have confirmed that the U.S. government’s failure to safeguard UACs after their arrival in the United States has exposed countless children to horrifying health conditions, criminal threats, unlawful labor, and sex trafficking.⁴⁴ Many UACs who are placed in removal proceedings fail to file asylum applications and age out of UAC protections.

Maintaining UACs in removal proceedings on the immigration courts’ docket will serve as a safeguard, allowing both immigration judges and ICE prosecutors to keep track of UACs while they are applying for and awaiting a decision from USCIS on their asylum applications. As an alternative to administrative closure or termination of cases involving UACs, CIS strongly urges DOJ to amend its regulatory proposal to *require* EOIR adjudicators to issuance continuances while UACs are filing asylum applications with USCIS instead of administratively closing their cases.

⁴¹ INA § 208(a)(2)(B).

⁴² See Dreier, Hannah, New York Times, *As Migrant Children Were Put to Work, U.S. Ignored Warnings* (Apr. 17, 2023); Florida Supreme Court; Case No. SC22-796, *Third Presentment of the Twenty-First Statewide Grand Jury Regarding Unaccompanied Alien Children (UAC)* (Mar. 29, 2023) (finding that “ORR is facilitating the forced migration, sale, and abuse of foreign children, and some of our fellow Florida residents are (in some cases unwittingly) funding and incentivizing it for primarily economic reasons....This process exposes children to horrifying health conditions, constant criminal threat, labor, and sex trafficking, robbery, rape, and other experiences not done justice by mere words.”); see generally Arthur, Andrew, Center for Immigration Studies, *Biden Has a Major Problem with Migrant Kids* (Aug. 2023).

⁴³ Kight, Stef, Axios, *Exclusive: Government Can’t Reach One-In-Three Released Migrant Kids* (Sep. 1, 2021); U.S. Committee on Oversight and Accountability, U.S. House of Representatives, *Hearing Wrap Up: ORR Director Fails to Answer Questions About 85,000 Lost Unaccompanied Alien Children, Flawed Vetting of Sponsors, and More* (Apr. 18, 2023); Office of Inspector General, U.S. Department of Health and Human Services, *The Office of Refugee Resettlement Needs To Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children* (May 2023); Office of Inspector General, U.S. Department of Health and Human Services, *The Office of Refugee Resettlement Needs To Improve Its Practices for Background Checks During Influxes* (May 2023).

⁴⁴ See Dreier, Hannah, New York Times, *As Migrant Children Were Put to Work, U.S. Ignored Warnings* (Apr. 17, 2023); Florida Supreme Court; Case No. SC22-796, *Third Presentment of the Twenty-First Statewide Grand Jury Regarding Unaccompanied Alien Children (UAC)* (Mar. 29, 2023) (finding that “ORR is facilitating the force migration, sale, and abuse of foreign children, and some of our fellow Florida residents are (in some cases unwittingly) funding and incentivizing it for primarily economic reasons....This process exposes children to horrifying health conditions, constant criminal threat, labor, and sex trafficking, robbery, rape, and other experiences not done justice by mere words.”); Arthur, Andrew, Center for Immigration Studies, *Biden Has a Major Problem with Migrant Kids* (Aug. 2023).

IV. The Termination and Dismissal Authorities Created by The NPRM Are Overbroad.

CIS strongly urges DOJ to restrict the ability of immigration judges and the BIA to terminate and dismiss pending removal cases.

While the terms “termination” and “dismissal” in this context are sometimes used interchangeably, a dismissal in immigration court means that the court has decided to close the case without reaching a final decision on the merits of the proceedings, without prejudice to either the alien or DHS. Termination, on the other hand, is a decision by the immigration judge to end the removal proceedings with a specific outcome, generally in favor of the alien.

While CIS agrees with DOJ’s statement in this NPRM that the termination and dismissal of proceedings in appropriate situations is consistent with immigration judges’ and the BIA’s statutory authority and duties, this rule would inappropriately grant those adjudicators the discretionary authority to terminate or dismiss cases in circumstances that are unsupported by law and unmoored from the INA.

Specifically, this NPRM proposes to amend 8 C.F.R. § 1003.1(d)(1)(ii) to direct that an EOIR adjudicator should determine whether the use of termination or dismissal meets the appropriate standard in accordance with the provisions in proposed 8 C.F.R. § 1003.1(m) or § 1239.2(c). The rule also permits “discretionary” termination of removal, deportation, or exclusion proceedings in the following circumstances:

- Where an UAC states an intent in writing or on the record at a hearing, to seek asylum with USCIS, and USCIS has initial jurisdiction over the application pursuant to section 208(b)(3)(C) of the INA;
- Where the alien demonstrates *prima facie* eligibility for relief from removal or lawful status based on a petition, application, or other action that USCIS has jurisdiction to adjudicate, including naturalization or adjustment of status;
- Where the alien is a beneficiary of Temporary Protected Status (TPS), deferred action, or Deferred Enforced Departure (DED);
- Where USCIS has granted a provisional unlawful presence waiver pursuant to 8 C.F.R. § 212.7(e);
- Where termination is otherwise authorized by 8 C.F.R. § 1216.4(a)(6);
- Where the parties have filed a motion to terminate as described in 8 C.F.R. § 214.14(c)(1)(i);
- Under comparable circumstances.

As explained above, immigration judges do not have the authority to indefinitely suspend an alien’s removal proceedings by abusing the administrative closure authority for cases other than those consistent with the INA (i.e. – to allow an alien to seek an immigration benefit from a separate agency for which the alien is statutorily eligible to apply). Similarly, immigration judges and the BIA lack the authority to end removal proceedings entirely using termination or dismissal.

As explained by the Attorney General in *Matter of S-O-G- & F-D-B-*, the “INA requires that ‘[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.’ INA § 240(c)(1)(A).”⁴⁵ The INA grants enforcement officials, not immigration judges, the general discretionary authority to cancel a Notice to Appear before removal proceedings commence or to move for the dismissal of removal proceedings after they have begun, consistent with separation-of-function principles.⁴⁶

CIS strongly recommends that DOJ amend or withdraw its proposal to permit EOIR adjudicators to terminate cases where administrative closure is appropriate (i.e., to allow an alien to apply for an immigration benefit or form of relief from a separate agency, where the alien is statutorily eligible to apply.). Terminating such cases *before* an alien has applied for or received a grant from DHS is premature and presupposes that the alien will in fact receive such grant – despite the fact that DHS, not the EOIR adjudicator, maintains jurisdiction and authority over such request. Terminating or dismissing cases in such situations would also conflict with the EOIR adjudicators’ statutory duty to determine whether aliens are removable from the United States.

As an alternative, CIS strongly recommends that DOJ amend these provisions to instead provide an exhaustive list of circumstances which would authorize an EOIR adjudicator to terminate or dismiss cases. By law, an EOIR adjudicator may only terminate or dismiss a pending removal case where DHS cannot sustain the charges of removability or where the alien has obtained an immigration benefit or form of relief that provides the alien with a lawful immigration status or U.S. citizenship, or otherwise renders the alien no longer subject to removal.

CIS also strongly warns against permitting EOIR adjudicators to terminate proceedings for UACs who express an intent to apply for asylum with USCIS in instances where USCIS has initial jurisdiction over the asylum application. As explained above, because UACs are not subject to the one-year filing deadline for asylum, and because ORR has demonstrated an unwillingness and inability to keep track of UACs after they are placed with sponsors, it serves the both the UAC’s own interest and the government’s interest in the welfare of UACs to keep such cases on EOIR’s docket until it receives confirmation that the UAC has been granted asylum by USCIS. If USCIS denies or never receives the UAC’s asylum application or other request for relief, the UAC may again become subject to removal from the United States.

Furthermore, CIS recommends that DOJ prohibit immigration judges from terminating cases *sua sponte*, or when neither party has moved for termination. Here, again, Congress stated in mandatory language that EOIR adjudicators “shall decide” whether than alien is removable from the United States consistent with section 237 of the INA.⁴⁷

As the BIA explained in *Matter of E-R-M- & L-R-M-*, an immigration judge may not override DHS’s exercise of prosecutorial discretion or inappropriately usurp such authority from DHS.⁴⁸

⁴⁵ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

⁴⁶ See 8 C.F.R. § 1239(a), (c); see also 8 C.F.R. § 1239.1.

⁴⁷ INA § 240(c)(1)(A).

⁴⁸ *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 522 (BIA 2011).

The alternative would allow EOIR adjudicators to again create a parallel immigration system outside of the confines of the INA.

V. DOJ Must Implement More Efficient Briefing Schedules to Address its Historic Backlog and Maintain the Integrity of the Immigration System.

CIS strongly recommends that EOIR adopt the briefing schedules proposed by the AA96 Final Rule or amend 8 C.F.R. § 1003.3(c)(1) to adjudicate cases more efficiently, consistent with due process.

The AA96 rule established simultaneous briefing schedules for both detained and non-detained cases, and reduced the time allowed to extend a briefing schedule from a maximum of 90 days to a maximum of 14 days, limiting all parties to one briefing extension.⁴⁹ The rule also shortened the maximum amount of time allowed for submitting reply briefs from 21 days to 14 days, and only when the BIA permitted filing of a reply brief.⁵⁰

It is important to note that the AA96 rule did not eliminate the BIA's ability to extend the time permitted for filing a brief for good cause shown or to consider a late-filed brief as a matter of discretion.⁵¹ However, it expressly limited the number of allowable extensions consistent with pre-existing BIA policy “*not to grant second briefing extension requests.*”⁵²

The AA96 rule also clarified that there is no party in any cases has a right to a briefing extension and prohibited the BIA from adopting a policy of granting extension requests without an individualized finding of good cause – while retaining the BIA’s authority to extend a deadline or request supplemental briefing where it may be beneficial in particular cases.

With this NPRM, DOJ proposes to repeal the changes made by the AA96 rule and restore the regulatory language that was in effect prior to its promulgation.⁵³ This reversal, however, will do nothing but restore the status quo of a broken and abused system, ensuring that aliens without any lawful immigration status are permitted to remain and work in the United States indefinitely – often longer than the period of any nonimmigrant status authorized by Congress.⁵⁴ Both the government and alien respondents with meritorious cases have strong interests in ensuring that the BIA adjudicates appeals expeditiously.

Given the historic backlogs EOIR is facing, CIS believes that the costs of extending simultaneous briefing requirements to all cases, rather than to only detained cases, is pointedly outweighed by EOIR’s need efficiently adjudicating appeals in timely manner and the need to deter additional illegal immigration to the United States. Expanding simultaneous briefing schedules to all cases will give the BIA another tool to address its historic backlog without undermining due process.

⁴⁹ See 88 Fed. Reg. 81587 (Dec. 16, 2020).

⁵⁰ *Id.*

⁵¹ 8 CFR 1003.3(c).

⁵² U.S. Department of Justice, *Board of Immigration Appeals Practice Manual* (Oct. 16, 2018), at 65.

⁵³ See 88 Fed. Reg. 62242, 62254-55 (Sept. 8, 2023).

⁵⁴ See INA § 214 (“Admission of Nonimmigrants”), et seq.

DOJ has acknowledged that simultaneous briefing schedules have “worked well for appeals involving aliens who are in custody” and confirmed that such requirements satisfy due process. Accordingly, as DOJ previously explained, there is no legal or operational reason to treat the two populations differently.⁵⁵ Rather, in addition to making the appellate process more efficient, imposing the same briefing timeframes to in both detained and non-detained cases makes the appellate process more equitable and fairer.

There are also significant incentives for aliens without meritorious claims (or their representatives) to delay the appellate process for as long as possible.⁵⁶ Removal from the United States imposes numerous consequences on aliens who have remained in the United States illegally for long periods of time, including but not limited to the imposition of the three- and ten- year bars⁵⁷, which bar aliens from returning the United States for three or ten years, depending on how long they have been unlawfully present in the United States. With the strong incentives for abuse in mind, DOJ must amend this rule to implement safeguards to allow appeals to proceed without undue delays.

VI. DOJ Should Impose Firmer Deadlines for Background Checks Requirements.

While CIS agrees with DOJ that the pre-AA96 Final Rule practice of remanding to the immigration court solely for a background check to be completed is an unnecessary procedural action that creates inefficiencies in case processing, we believe that 8 C.F.R. 1003.1(d)(6) should impose firmer deadlines to allow EOIR to efficiently adjudicate cases. CIS, however, strongly recommends that the Department retain its policy to deem aliens’ failure to comply with background check requirements at the BIA as an automatic abandonment of their underlying relief applications absent a showing of good cause.

As explained above, implementing additional measures to promote efficiency in the adjudication process is of utmost importance given the historic backlog EOIR adjudicators are facing, and therefore DOJ should take all measures necessary to eliminate unnecessary delays in the adjudication process.

Retaining a “good cause” exception for failures to comply with background check deadlines is sufficient to ensure that individuals who face unusual or unpredictable hardships can proceed with their cases, while also providing strong incentives for aliens in proceedings to comply with these requirements in a timely manner. CIS believes this is a stronger policy that is less likely to be abused than granting EOIR adjudicators’ discretionary authority to continue to hold cases for

⁵⁵ 85 Fed. Reg. 52491, 52499 (Aug. 26, 2020).

⁵⁶ *Cf. I.N.S. v. Doherty*, 502 U.S. 314, 323 (1992) (“Motions for reopening immigration proceedings are disfavored . . . [because] every delay works to the advantage of the alien who wishes merely to remain in the United States.”).

⁵⁷ *See* INA § 212(a)(9)(B)(i) (“Any alien (other than an alien lawfully admitted for permanent residence) who- (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244a(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.”).

aliens who may otherwise have meritorious claims, as this NPRM proposes in 8 C.F.R. § 1003.1(d)(6)(iii).

VII. DOJ Must Conduct an Environmental Assessment (EA) and an Environmental Impact Statement (EIS) of the proposed policy changes before publishing a final rule under the National Environmental Policy Act (NEPA).

In 1969, Congress passed NEPA “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”⁵⁸ In order to promote environmentally sensitive national policy, NEPA requires federal agencies to “provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment.”⁵⁹ NEPA has “twin aims.”⁶⁰ First, it obligates federal agencies “to consider every significant aspect of the environmental impact of a proposed action, and second, it ensures that the agency will “inform the public” of its environmental considerations.⁶¹ The adoption of NEPA codified explicit Congressional concern for the “profound influences of population growth” on the natural environment.⁶²

NEPA aims to “achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities”⁶³ Congress has never passed an exemption to NEPA for concerns related to population growth caused by immigration, including illegal immigration, which almost by definition increases national population. As explained above, eroding the credibility of our immigration system is a pull factor for additional illegal immigration to the United States. Therefore, this proposed rule contains the potential to increase American population growth. As the Supreme Court has found in *INS v. Doherty*, 502 U.S. 314, 323 (1992): “in a deportation proceeding...as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.” Furthermore, eroding the credibility of the immigration system and capacity to deport aliens who have settled into the country also has the capacity to further expand the already existing environmental crisis at the border.

The Council on Environmental Quality (CEQ) provides direction in its regulations to “determine what actions are subject to NEPA’s procedural requirements and the level of NEPA review where applicable.”⁶⁴ According to the statute, an agency must prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.”⁶⁵ A federal agency may

⁵⁸ 42 U.S.C. § 4321.

⁵⁹ 40 C.F.R. § 1500.1(a).

⁶⁰ *WildEarth Guardians v. Jewell*, 738 F. 3d 298, 302 (D.C. Cir. 2013).

⁶¹ *Id.*

⁶² 42 U.S.C. §4331(a).

⁶³ 42 U.S.C. §4331(b)(5).

⁶⁴ 40 C.F.R. § 1500.1(b).

⁶⁵ 42 U.S.C. 4332(2)(C).

prepare an EA to evaluate whether an EIS is required.⁶⁶ If a proposed action is determined to have no significant impact, the agency must issue a Finding of No Significant Environmental Impact (FONSI) “accompanied by a convincing statement of reasons to explain why a project’s impacts are insignificant.”⁶⁷

An agency may only avoid preparing either an EIS or an EA when the agency action is properly “categorically excluded” from NEPA review.⁶⁸ A categorical exclusion is a “category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect” in an agency’s NEPA implementing regulations.⁶⁹ The agency must invoke the categorical exclusion prior to approving the agency action, it cannot do at the point the action is challenged in court.⁷⁰

A “major federal action” is defined by the CEQ as any “activity or decision subject to Federal control and responsibility,” that does not fit into a stated exception.⁷¹ Activities or decisions that constitute exceptions are: 1) those that have effects solely outside the U.S.; 2) those that are non-discretionary; 3) those that are not final under the APA; 4) judicial or administrative civil or criminal enforcement actions; 5) non-governmental actions that receive federal funding but where the government does not control the action through the funding.

Exception 4 does not apply here. While this NPRM may relate to the rules governing administrative civil enforcement actions, is not itself an administrative enforcement action. This exception to NEPA would be a removal proceeding, but not a DOJ final rule changing the regulations governing removal proceedings.

The “effects or impacts” which must be analyzed by this impact statement are “changes to the human environment from the proposed actions” that are “reasonably foreseeable.”⁷² Specifically included by CEQ are “indirect effects, which are caused by the action and are later in time but are still reasonably foreseeable.”⁷³ Such effects “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate...”⁷⁴

Furthermore, agencies must consider cumulative effects, which result “from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions.”⁷⁵ When an agency takes several actions which will have a “cumulative or synergistic environmental impact,” their environmental consequences must be considered together.⁷⁶ That is,

⁶⁶ 40 C.F.R. §§ 1501.3, 1508.9.

⁶⁷ *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (quoting *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001)).

⁶⁸ See 40 C.F.R. § 1504.4.

⁶⁹ 40 C.F.R. § 1508.4.

⁷⁰ See *Anacostia Watershed Soc’y v. Babbitt*, 871 F. Supp. 475, 487 (D.D.C. 1994).

⁷¹ See 40 C.F.R. § 1508.1(q).

⁷² 40 C.F.R. § 1508.1(g).

⁷³ 40 C.F.R. § 1508.1(g)(2).

⁷⁴ *Id.*

⁷⁵ *Id.* at § 1508.1(g)(3).

⁷⁶ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1978).

an agency is not allowed to avoid the requirements of NEPA by “segmentation,” where the combined environmental effect of a set of agency actions is overlooked by “dividing an overall plan into component parts, each involving action with less significant environmental effects.”⁷⁷

Ultimately, the “action-forcing” provisions of NEPA and its implementing regulations by CEQ require that agencies take a “hard look” at the environmental consequences of their actions.⁷⁸ “Simply by focusing the agency’s attention on the environmental consequences” before an action is taken, NEPA “ensures important effects will not be overlooked or underestimated” and will “inevitably bring pressure to bear on agencies” to respond to the needs of environmental quality.”⁷⁹

If this NPRM is finalized, it will be a final agency action that qualifies as a major agency action under NEPA as defined in statute, NEPA case precedent, and by the CEQ that must undergo NEPA compliance. No categorical exclusion applies here, and DOJ did not cite one in the proposed rule. DOJ therefore must conduct at least an EA prior to finalizing this rule that examines whether the proposed rule has the potential to increase immigration, which would have environmental consequences prior to finalizing this rule, or it will be in violation of NEPA.

VIII. Conclusion

CIS strongly recommends that DOJ withdraw or delay this rulemaking until the public is provided necessary information to analyze this rulemaking. Without such information, the public lacks the information necessary to properly analyze the impact this regulation will have on the immigration system or to understand how these authorities have been used by EOIR adjudicators.

DOJ’s proposed expansion of EOIR adjudicators’ administrative closure, termination, and dismissal authorities is *ultra vires* and bad policy. CIS strongly recommends that DOJ amend proposed 8 C.F.R. §§ 1003.1(l), 1003.1(d)(1)(ii), 1003.10(b), 1003.18(c), and 1003.18(d) to restrict immigration judges’ and the BIA’s authority to administratively close cases. Regulations should only permit EOIR adjudicators to administratively close cases when such closure allows a separate agency to adjudicate an immigration benefit or other form of relief that the alien is eligible to apply for and, if granted, would render the alien not deportable or inadmissible under the immigration laws.

Furthermore, CIS strongly recommends that DOJ amend this NPRM to only allow an EOIR adjudicator to terminate or dismiss a pending removal case consistent with the INA: where DHS cannot sustain the charges of removability or where the alien has obtained an immigration benefit or form of relief that provides the alien with a lawful immigration status or U.S. citizenship, or otherwise renders the alien no longer subject to removal. DOJ should also amend this proposal to implement additional efficiencies in appellate briefing schedules, including reinstate the AA96 Final Rule’s policy of requiring simultaneous briefing schedules for both

⁷⁷ *Taxpayers Watchdog, Inc. v. Stanley*, 819 F. 2d 294, 298 (D.C. Cir. 1987).

⁷⁸ *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350 (1989).

⁷⁹ *Id.* at 349.

detained and non-detained cases and imposing firmer deadlines for background check-related requirements.

CIS strongly also warns against permitting EOIR adjudicators to administratively close, terminate, or dismiss removal proceedings of UACs. Maintaining UAC cases on immigration courts' dockets will provide a much-needed safeguard to allow the U.S. government to ensure the general safety and welfare of this vulnerable population while they are in the custody of sponsors.

Finally, CIS reminds DOJ that it must conduct an environment assessment and environmental impact statement of the proposed policy, consistent with NEPA, before DOJ may issue the proposal as a final rule. The NPRM is not subject to any categorical exemption for this statutory requirement.

Thank you,

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(Section VII, Re: NEPA)