



**March 27, 2023**

**TO: Department of Homeland Security, U.S. Citizenship and Immigration Services  
Department of Justice, Executive Office for Immigration Review**

**RE: Notice of Proposed Rulemaking: “Circumvention of Legal Pathways”  
88 FR 11704  
RIN:1125-AB26, 1615-AC83  
Document Number: 2023-03718**

The Department of Homeland Security (DHS) and Department of Justice’s (DOJ) proposed rule seeks to amend the asylum process for people who enter the country illegally at the southern border. The proposed rule, entitled “[Circumvention of Legal Pathways](#),” is purportedly intended to reduce the anticipated migrant surge that will take place when President Biden terminates the public health emergency declaration on May 11. At that time, border officials will no longer be able to use President Trump’s successful Title 42 authorization to expel migrants at the border, which was originally invoked to limit the spread of Covid-19.

The Biden Administration is issuing the rule in an attempt to cover up the catastrophic impact of its deliberate and consistent implementation of open borders policies, which have created a crisis of historic proportions at the southern border. The introduction of the rule acknowledges this more subtly, stating the rule “is justified in light of the migration patterns witnessed in late November and December of 2022 and the concern that the possibility of a surge in irregular migration upon, or in anticipation of, the eventual lifting of the Title 42 public health Order.” The Administration hopes that the issuance of this new rule will “encourage migrants to avail themselves of lawful, safe, and orderly pathways into the United States, or otherwise to seek asylum or other protection in countries through which they travel, thereby reducing reliance on human smuggling networks that exploit migrants for financial gain.”

The proposed rule lays out a number of reasons why the Biden Administration must take this measure of putting conditions on asylum, almost as if they are trying to appeal to the open border advocates who unabashedly oppose any border security or asylum restrictions. The rule cites recent changes in demographics and drastic surges in migration, highlighting how border encounters have dramatically increased since President Biden took office in January of

2021. These migratory flows, it states, have affected every country throughout the Western Hemisphere.

For once, the Administration cites the cost of illegal immigration as another justification for the rule, openly recognizing that an insecure border is draining taxpayers. The rule acknowledges that “DHS operations are subject to significant resource and capacity constraints” and that “the impact has been particularly acute in certain border sectors.” It also points out the impact illegal immigration has had on taxpayer-funded agencies, including Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and the Federal Emergency Management Agency (FEMA). It goes on to note that the increase in encounters of illegal aliens at the southern border also places additional pressures on states, local communities, and nongovernmental organization (NGO) partners at the border and in the interior of the country. That crisis is about to get a whole lot worse when Title 42 is canceled, it notes, and an estimated 11,000-13,000 illegal migrants are expected to be encountered every day.

While the rule acknowledges that there is a fiscal cost associated with illegal immigration, it fails to consider the full spectrum of the costs borne by federal agencies not directly associated with the enforcement of U.S immigration laws. These include, but are not limited to, programs such as Medicaid, the Children’s Health Insurance Program (CHIP), the Supplemental Nutrition Assistance Program (SNAP), and the Women, Infants, and Children (WIC) program. Additionally, various state and federal tax credits, such as the earned income tax credit (EITC), are available to those illegal aliens with authorization to work in the United States.

A recent report demonstrates that illegal immigration costs U.S. taxpayers a net total of approximately \$150.7 billion annually.<sup>1</sup> While the largest single cost of illegal immigration to U.S. taxpayers pertains to K-12 education, a significant portion of these costs are also attributable to state and federal benefits programs. While many illegal aliens use fraudulent methods to access these programs, many also access these programs via lawful means. For example, individuals who are paroled into the country for a term greater than one year are afforded instant access to Medicaid and numerous other federal benefits programs.

Similarly, Unaccompanied Alien Minors (UAMs) are also eligible for a large number of federal benefits immediately upon entering the country.<sup>2</sup> Additionally, 45 CFR § 400.116 requires states to grant UAMs the same access to state-funded welfare programs afforded to other foster children, including: “foster care maintenance (room, board, and clothing) payments; medical assistance; support services; services identified in the State's plans under titles IV-B and IV-E of the Social Security Act; services permissible under title XX of the Social Security Act; and expenditures incurred in establishing legal responsibility.”<sup>2</sup>

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<sup>1</sup> “The Fiscal Burden of Illegal Immigration on United States Taxpayers,” The Federation for American Immigration Reform (FAIR), March, 2023, <https://www.fairus.org/issue/publications-resources/fiscal-burden-illegal-immigration-united-states-taxpayers-2023> <sup>2</sup>

“Unaccompanied Refugee Minors Program,” Office of Refugee Resettlement (ORR), Accessed March, 2023, <https://www.acf.hhs.gov/orr/programs/refugees/urm>

<sup>2</sup> “§ 400.116 Service for Unaccompanied Minors,” Code of Federal Regulations, The United States National Archive, <https://www.ecfr.gov/current/title-45/subtitle-B/chapter-IV/part-400/subpart-H/section-400.116>

The report also found that very few illegal immigrants contribute more in taxes than they receive in taxpayer-funded benefits and services at both the federal and state levels. This is especially true for those unlawful migrants who have recently entered the country and are granted work authorization and access to certain federal medical and welfare benefits.

As the Biden Administration expands the usage of humanitarian parole and other programs as a means to release illegal immigrants into the United States, the costs associated with providing these parolees with federal benefits has certainly increased at a significant rate. However, detailed information regarding how many of these migrants are utilizing federal benefits, and at what cost, has not been publicly released by the Administration.

Thus, FAIR requests that the Department elaborate on the true costs borne by states and local communities as a result of illegal immigration and recommends that the Departments consider the aforementioned report before finalizing the rule.

In a remarkable admission, the Biden Department of Homeland Security also points to asylum fraud as a justification of the rule. It concedes that the overwhelming majority of migrants pouring across our southern border will never get asylum and that the burden they place on the system prevents truly deserving applicants from getting protection from persecution.

In plain terms, the rule places conditions, albeit weak and ineffective, on illegal immigrants who enter the United States and immediately seek asylum to remain in the country. It prohibits people from applying for asylum if they have traveled through several countries and did not seek asylum in those safe countries before arriving in the United States.

Specifically, the rule creates a rebuttable presumption that a person is ineligible for asylum in the United States if they enter without proper documentation. Importantly, this rebuttable presumption has several key exceptions. It will not apply to illegal aliens if:

1. the alien sought asylum or other protection in a country through which they traveled and received a final decision denying the application;
2. the alien applied and was approved to travel to the U.S. through a DHS-approved parole process; or
3. the alien used the CBP One mobile app and presented at the point of entry at a scheduled time — or demonstrated that the mechanism for scheduling was not possible to access or use.

While it may appear, on the face, that the rule limits the ability of illegal immigrants to claim asylum, it may not impact many people. That is because, in part, nearly all illegal aliens have access to the CBP One mobile app, a free, publicly available application that can be downloaded on personal phones, and will inevitably submit a request for the so-called parole process that the Biden Administration illegally created. If the illegal immigrant also claims that the app is not accessible, they can get around the rule. In fact, the rule states, “The Departments also have proposed to address those who nonetheless continue to have access concerns, by excepting from the rebuttable presumption individuals who arrive at ports of entry without a pre-scheduled time and place if the noncitizen demonstrates by a preponderance of the evidence that it was not

possible to access or use the CBP One app due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle.”

The rule also states that the “presumption could be rebutted, and would necessarily be rebutted if, at the time of entry, the noncitizen or a member of the noncitizen’s family had an acute medical emergency; faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or satisfied the definition of “victim of a severe form of trafficking in persons” provided in [8 CFR 214.11](#). The presumption also would be rebutted in other exceptionally compelling circumstances, as the adjudicators may determine in the sound exercise of the judgment permitted to them under the proposed rule.” This language, in particular, opens the door to creating an exception for any reason. FAIR recommends eliminating these exceptions in the final rule

Federal law, specifically section 208 of the Immigration and Nationality Act, expressly authorizes the Secretary of Homeland Security to place “limitations and conditions...under which an alien shall be ineligible for asylum.”<sup>44</sup> In a surprising move, the Biden Administration is using the same defense used by the Trump Administration to place conditions on asylum. But, the similarities stop there – this rule has many exceptions that nullify the intent.

The real objective of this proposed rule is not to enact true border security measures or to end large-scale asylum abuse, but rather to cover up the extent of the crisis so that the Biden Administration can continue implementing open border policies. The only real restriction the rule places on asylum-seekers, the overwhelming majority of whom have unfounded or false claims, is that they must now make an appointment, using an official mobile app, to claim asylum at a port of entry. Even this requirement, however, is swallowed up with open-ended exceptions, and FAIR recommends eliminating these exceptions

Additionally, the rule is merely temporary in nature and is set to sunset automatically. FAIR recommends that the government better explain why a significant rule impacting asylum system would be temporary in nature and not permanent for this and future administrations. If the policy is sound, why are the changes not permanent?

Further, the NPRM only applies to the southern border, not the northern. FAIR recommends that the final rule include similar restrictions for those who illegally enter the country at the Northern border and our maritime borders.

Ultimately, FAIR recommends that the Administration withdraw the Notice of Proposed Rulemaking and revert back to many of the policies that worked from 2017-2020. This rule is not only bad policy that will do little to protect our borders, but it does not close the loopholes or problems with our asylum system.

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<sup>44</sup> Section 208 of the INA authorizes the Secretary of Homeland Security or the Attorney General to grant asylum to a noncitizen who has applied for asylum in accordance with the requirements and procedures established by the Secretary or the Attorney General under section 208 if the Secretary or the Attorney General determines that the noncitizen is a refugee. INA 208(b)(1)(A), [8 U.S.C. 1158\(b\)\(1\)\(A\)](#). As stated in the NPRM, section 208 thereby authorizes the Secretary and the Attorney General to “establish” “requirements and procedures” to govern asylum applications. *Id.* The statute further authorizes them to “establish,” “by regulation,” “additional limitations and conditions, consistent with” section 208, under which a noncitizen “shall be ineligible for asylum.”