



25 Massachusetts Avenue, NW  
Suite 335  
Washington, DC 20001  
202.232.5590 | 202.464.3590(fax)  
www.irli.org

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John M. Miano<sup>7</sup>

*Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.*

*IRLI is a supporting organization of the Federation for American Immigration Reform.*

<sup>1</sup> Admitted in DC & IN

<sup>2</sup> Admitted in DC & PA

<sup>3</sup> Admitted in DC, VA, MD, NY, & CT

<sup>4</sup> Admitted in DC & VA

<sup>5</sup> Admitted in DC

<sup>6</sup> Admitted in CA only; DC bar pending, under supervision of Dale L. Wilcox

<sup>7</sup> Admitted in DC, NJ, & NY

October 13, 2020

VIA FEDERAL RULEMAKING PORTAL

<http://www.regulations.gov>

The Honorable Chad F. Wolf  
Acting Secretary, U.S. Department of Homeland Security  
The Honorable Kenneth T. Cuccinelli  
Acting Director, U.S. Citizenship and Immigration Services  
20 Massachusetts Avenue, NW  
Washington, DC 20001

Re: DHS Docket No. USCIS–2019–0007:  
Collection and Use of Biometrics by  
U.S. Citizenship and Immigration Services

Dear Secretary Wolf and Director Cuccinelli:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment in response to the Notice of Proposed Rulemaking (NPRM) published at 85 *Fed. Reg.* 56338 (September 11, 2020).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful.

IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

#### Summary

The proposed rule seeks to amend the regulations of the U.S. Department of Homeland Security (DHS) “concerning the use and collection of biometrics in the enforcement and administration of immigration laws by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).” *Id.* The proposed rule envisions a comprehensive and detailed regulatory scheme for

those agencies to collect and use biometrics for purposes including the adjudication of immigration benefits and requests.

IRLI does not dispute these agencies' statutory authority to undertake the proposed rule, and supports its contemplated increased collection and use of biometrics.

IRLI believes that the collection of biometrics, as defined and expanded in the proposed rule, serves essential functions—for example, the use of DNA test results to adjudicate claimed familial relationships—and furthers immigration law enforcement needs. The proposed rule is flexible enough to adapt to changing circumstances, weeds out fraudulent immigration claims, and strengthens the nation's immigration laws.

### Comment & Analysis

DHS makes the following proposals regarding the use and collection of biometrics. *Id.*

First, DHS proposes that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, including United States citizens, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement. Second, DHS proposes to authorize biometric collection, without regard to age, upon arrest of an alien for purposes of processing, care, custody, and initiation of removal proceedings. Third, DHS proposes to define the term biometrics. Fourth, this rule proposes to increase the biometric modalities that DHS collects, to include iris image, palm print, and voice print. Fifth, this rule proposes that DHS may require, request, or accept DNA test results, which include a partial DNA profile, to prove the existence of a claimed genetic relationship and that DHS may use and store DNA test results for the relevant adjudications or to perform any other functions necessary for administering and enforcing immigration and naturalization laws. Sixth, this rule would modify how VAWA and T nonimmigrant petitioners demonstrate good moral character, as well as remove the presumption of good moral character for those under the age of 14. Lastly, DHS proposes to further clarify the purposes for which biometrics are collected from individuals filing immigration applications or petitions, to include criminal history and national security background checks; identity enrollment, verification, and management; secure document production, and to administer and enforce immigration and naturalization laws.

IRLI believes that the proposals are straightforward and permissible. There is no doubt that the proposed rule, if promulgated in its current form, will result in a significant collection of biometrics by the federal government from aliens and some U.S. citizens. The proposed rule, however, is not a carte blanche to collect DNA and other biometrics on an unbridled scale by the federal government. Instead, the proposed rule details legitimate circumstances in which biometrics may be used.

The principal purpose of the biometrics is to enforce and administer immigration law, and the proposed rule is carefully drawn to accomplish that purpose. For example, DHS’s first proposal requiring the collection of biometrics from an individual filing or associated with an immigration request would not extend to certain representatives, such as attorneys. *See* 85 *Fed. Reg.* at 56340 n. 4 & 5.

DHS’s second proposal also is reasonable. Biometrics would be collected upon the arrest of aliens, regardless of age. Many young teens are crossing the border who are in gangs, or whom gangs may seek to recruit for criminal activities. Thus, the proposed removal of age restrictions on collecting biometrics from individuals under 14 both when they request an immigration benefit and “upon arrest of an alien for purposes of processing, care, custody, and initiation of removal proceedings” serves paramount immigration law aims. DHS, moreover, has carefully drafted the proposed rule to take into account other existing collection of biometrics. “To the extent that any controversy may arise interpreting DHS and DOJ regulations regarding the removal of age restrictions for biometrics collection, until DOJ removes its age restrictions DHS intends to follow DOJ regulations with respect to age restrictions when collecting biometrics for an application or petition that will be adjudicated by [the Executive Office for Immigration Review].” 85 *Fed. Reg.* at 56340-1.

Other provisions of the proposed rule are also well drafted and necessary, including the definition and expanded use of biometrics. Immigration law would be well served to have one comprehensive and broad definition of the term to prevent misunderstandings, accomplish legitimate law enforcement goals, help adjudicate immigration benefits, and establish familial relationships. IRLI believes that it is prudent for DHS to collect biometrics to uncover any criminal history and to conduct background checks for individuals filing immigration applications.

The proposed rule also acknowledges the special concerns associated with the collection of raw DNA. “DHS proposes to treat raw DNA (the physical sample taken from the applicable individual) that is taken as a distinctive biometric modality from the other biometric modalities it is authorized to collect, and not handle or share any raw DNA for any reason beyond the original purpose of submission (*e.g.*, to establish or verify a claimed genetic relationship), unless DHS is required to share by law.” 85 *Fed. Reg.* at 56341. Though some concerns may exist regarding the collection and use of DNA for law enforcement identification purposes, the federal government already has that authority. *See id.* at 56352-3 n. 31, at 56341 n. 8. By contrast, the proposed rule seeks “to establish the authority for the use of DNA to verify claimed genetic relationships in the adjudication of immigration benefit requests.” *Id.* at 56352-3 n. 31.

Under the proposed rule, concerns also may exist regarding the number of individuals subject to biometrics collection; the retention of biometrics data; and the protection of individual privacy. Under the proposed rule, “about 2.17 million new biometrics submissions will be collected annually, and the resulting biometrics submitting population will increase from 3.90 million currently to 6.07 million, ....” *Id.* at 56343. This very increase shows the scope and gravity of

the nation's illegal immigration and criminal alien problems, and demonstrates that the proposed rule is a necessary and long-overdue measure to protect Americans' safety and livelihoods.

Respectfully submitted,

IMMIGRATION REFORM LAW INSTITUTE

By: Ralph L. Casale  
Senior Counsel