



Sent via email to: DHSDeskOfficer@omb.eop.gov

September 30, 2020

Chad Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, S.W.
Washington, D.C. 20528

Paul Ray
Acting Administrator
Office of Information and Regulatory Affairs Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Michael J. McDermott
Acting Division Chief, Security and Public Safety Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services, Department of Homeland Security
20 Massachusetts Avenue, N.W., Suite 2304
Washington, D.C. 20529

Re: The Necessity of a 60-Day Comment Period for DHS Proposed Rule on the Collection and Use of Biometrics (USCIS Docket No. USCIS-2019-0007)

Dear Acting Secretary Wolf, Acting Administrator Ray, and Acting Division Chief McDermott:

The Electronic Frontier Foundation (EFF) joins more than 100 other civil society organizations in requesting that the Department grant a 30-day extension to allow for a 60-day comment period for the Notice of Proposed Rulemaking cited above.¹ EFF is a non-profit civil liberties organization with more than 30,000 dues-paying members that has extensive legal and technical expertise on issues related to the collection of biometric

¹ Letter from Catholic Legal Immigration Network, Inc., et al., to Chad Wolf, Acting Secretary, Dep't of Homeland Sec. et al. (Sept. 16, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/letter_requesting_60day_comment_period_on_proposed_rule_expanding_collection_of_biometrics.pdf.

information. EFF and EFF members have previously weighed in on other federal proposals to expand biometrics collection.²

EFF requests the extension to provide its attorneys and technologists as well as EFF's members and the general public, sufficient opportunity to evaluate the Department's proposed changes and submit meaningful comments. As a California-based organization, EFF's work has been impacted by the fires burning millions of acres across the state as well as by the unique and unprecedented pressures caused by the COVID-19 pandemic.³ As a result, EFF has not been able to devote adequate time and resources to the proposed rule. Previously, on a related matter, the Department of Justice granted EFF's request for an extension.⁴ As you are aware, by executive order, federal agencies must generally afford 60 days to allow the public "a meaningful opportunity to comment through the Internet on any proposed regulation."⁵

The additional time is particularly important because of the major changes the rule would make to existing law. The rule is 85 pages long in the Federal Register and involves complex legal and technical issues. It would both significantly expand the population of individuals—including U.S. citizens—from whom biometric information is required and the types of biometrics individuals must surrender. From just those individuals seeking an immigrant benefit, the Department estimates that "about 2.17 million new biometrics submissions will be collected annually."⁶

The proposed rule is extraordinarily broad, and is likely to have damaging—and irreversible—impacts on vulnerable populations, including children and immigrants. The

² See Electronic Frontier Foundation, Commenter Letter on Proposed Exemption of FBI's Next Generation Identification System from Key Provisions of the Privacy Act of 1974 (July 6, 2016), https://www.eff.org/files/2016/07/06/eff_comments_on_proposed_privacy_act_exemptions_and_sorn_for_fbi_ngi_system.pdf; Electronic Frontier Foundation, Comment Letter on Proposed Rule to Establish a New DHS System of Records (May 24, 2018), <https://www.eff.org/document/eff-comments-dhs-its-proposal-exempt-its-new-biometrics-and-relationship-data-us-privacy>; Electronic Frontier Foundation, Comment Letter on Proposed Rule to for DNA-Sample Collection from Immigrant Detainees (Nov. 12, 2019), <https://www.eff.org/document/eff-comments-doj-proposed-rule-collect-dna-immigrant-detainees-november-2019>.

³ Both members of the Senate and House have called on the executive branch to pause rulemakings during the pandemic. See Letter from Representatives to Office of Management and Budget (April 1, 2020), <https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf>; Letter from Senators to Office of Management and Budget (April 8, 2020), <https://www.tomudall.senate.gov/imo/media/doc/4.8.20%20United%20States%20Senate%20Letter%20to%20OMB%20Acting%20Director%20Vought%20FINAL%5B1%5D.pdf>.

⁴ See Letter from EFF et al., to Erika Brown Lee, U.S. Dep't of Justice (May 27, 2016), <https://www.eff.org/document/2016-letter-fbi-re-NGI>; Privacy Act of 1974; Implementation; Extension of Comment Period, 28 C.F.R. pt. 16 (June 6, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-06-06/pdf/2016-13352.pdf>.

⁵ Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

⁶ Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338, 56343 (proposed Sept. 11, 2020).

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collection of biometric information threatens privacy and has a disparate impact on communities of color and religious minorities. Further, there is a real security risk that, once collected, biometric and accompanying biographic data could be exposed to bad actors, as bad actors have infiltrated government biometric databases in the past.⁷

Given the rule's significant reach and impact, it is crucial that EFF, other civil society organizations, and the public at large have adequate opportunity to comment. In particular, a number of issues presented by the proposed rule are within EFF's core expertise. These are precisely the types of "important" issues that agencies must consider.⁸

U.S. Citizenship and Immigration Services has been contemplating an expansion of its biometrics collection practices for more than 14 years.⁹ Now that the agency has finally provided the public with details of its plan, the public deserves more than 30 days to review it and respond. EFF urges the Department to allow the public the opportunity for a careful examination of the proposed changes. An extension of no less than 30 days is warranted. Please contact Saira Hussain at saira@eff.org or (415) 436-9333 x 204 if you have any questions.

Sincerely,

Saira Hussain
Jennifer Lynch
Nathaniel Sobel

Electronic Frontier Foundation

⁷ See Cong. Rsch. Serv., *Cyber Intrusion into U.S. Office of Personnel Management: In Brief* (2015), <https://fas.org/sgp/crs/natsec/R44111.pdf>; Office of the Inspector Gen., Dep't of Homeland Sec., *Review of CBP's Major Cybersecurity Incident during a 2019 Biometric Pilot* (2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-71-Sep20.pdf>.

⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32 (1983).

⁹ See, e.g., U.S. Citizenship and Immigr. Servs., *Senior Policy Counsel Paper—Expanding DNA Testing in the Immigration Process*, <https://www.eff.org/document/uscis-senior-policy-council%E2%80%94dna-collection-options-paper> (records obtained through FOIA discussing USCIS plans in 2006 to update federal regulations to expand DNA collection).