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Submitted via regulations.gov

Comment in Opposition to Interim Final Rule: Imposition and Collection of Civil Penalties for Certain Immigration-Related Violations

Dear DHS and EOIR,

The Immigrant Legal Resource Center (ILRC) writes to comment in opposition to the Interim Final Rule (IFR) Imposition and Collection of Civil Penalties for Certain Immigration-Related Violations published in the Federal Register on June 27, 2025 and found at 8 CFR Part 281; 8 CFR Parts 1003 and 1280 (DHS Docket Number ICEB-2025-0034).

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates, and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC publishes advisories and manuals for legal practitioners in many areas of family and humanitarian immigration law. Through our extensive network with service providers, immigration practitioners and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income immigrants of color seeking immigration benefits. The comments that follow are gleaned from the experiences of many low-income immigrants of color who we and our partners serve.

I. This IFR Violates the Eighth Amendment's Excessive Fines Clause

The fines proposed by this IFR violate the Eighth Amendment's prohibition against excessive fines. The Eighth Amendment states: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted."[8]

The Supreme Court has held that the Excessive Fines Clause applies to civil penalties where it is a punishment for some offense. If a penalty in any way serves "either retributive or *deterrent* purposes [it] is punishment."[11] The Excessive Fines Clause applies to this IFR because the intent of the IFR is to "help *deter* future unlawful entries and encourage greater compliance with removal and voluntary departure orders consistent with this Administration's focus on securing the border and restoring integrity to our nation's immigration system."[12] To determine whether a penalty is excessive, the courts must consider the following factors (1) Congress's judgment about the appropriate punishment; (2) the gravity of the offense, including the extent of unlawful activity and related illegal activities; and (3) the harm caused to the other parties.[13]

The courts will likely find these to be excessive in violation of the Eighth Amendment because they are wholly disproportionate to the underlying civil immigration violations. Here, people are being assessed excessive fines where they either entered the United States without inspection or admission; where they overstayed a voluntary departure order; or where they willfully failed to leave the United States after being ordered deported. We note that there are a myriad of circumstances surrounding people's decisions to come to the United States or to remain in the United States after being ordered deported, or after requesting voluntary departure. Many people who entered without inspection were fleeing persecution in their home countries or were simply seeking a better life for themselves or their children. Many people who overstayed a voluntary departure order may have been unable to leave due to illness or financial problems for themselves or a family member, or they may have sought a petition for review in a federal court of appeals. Finally, many people who were ordered deported and did not leave were often ordered deported in absentia and were unaware of the order. Others simply could not leave their families.

We note, with arduous objection, that the IFR contains repetitive language stating that the imposition of fines in this manner is intended to incentivize those with final orders of removal to depart the United States and to disincentivize irregular entry to the United States. This is an impermissible use of federal law made worse by the violation of the U.S. Constitution. These penalties violate the Excessive Fines Clause of the Eighth Amendment and cannot be enforced as written.

II. The rule is improperly issued as an interim final rule.

On June 27, 2025, DHS and DOJ jointly published this Interim Final Rule (IFR) creating new regulations governing the imposition of civil monetary fines. The agencies attempted to justify the publication of the rule without proper notice and comment by asserting that the rule is procedural and does not impact the substantive rights of the affected public or otherwise change the substantive standards. The agencies also assert an exception to the notice and comment requirements of the Administrative Procedures Act (APA) on the basis that the rule pertains to the foreign affairs of the United States.

A. The IFR significantly curtails the rights and protections of those impacted and is not appropriate for publication without public notice and comment.

The IFR is not a procedural rule because it significantly impacts the substantive rights of the public. The agencies assert that the IFR merely changes the process used to impose fines for immigration violations but does not change the criteria for issuing fines, so the changes to the rule do not alter the rights of the public. This assertion is disingenuous and incorrect.

Under the prior regulatory scheme, noncitizens who DHS believed to be subject to civil monetary penalties for failure to depart or for improper entry were provided certain limited rights through the process. In particular, impacted individuals were afforded the following rights under the prior regulations to:

1. Receive notice of the agency's intent to levy fines against them;
2. Contest the allegations underlying the intended fines;
3. Request mitigation or remission of the intended fines;
4. Submit evidence in response to the allegations in the notice of intent to fine;
5. Request a personal interview or hearing;

6. Receive the final order and decision; and
7. Appeal any decision imposing fines to the DOJ's Board of Immigration Appeals (BIA).

Under the new regulations, noncitizens who DHS determines have failed to depart or have improperly entered the United States are afforded the following rights to:

1. Receive the final order and decision imposing fines; and
2. Appeal any decision to a supervisory immigration officer employed by DHS.

Additionally, the IFR reduces the amount of time a member of the public has to respond to the assessment of a fine from thirty days to fifteen days. Further, the IFR alters the manner of service for the notice of the fine by eliminating the requirement for certified mail or in person service. The IFR also removes a layer of accountability by vesting the appeals process within DHS, rather than BIA.

The agencies assert that this new regulatory framework merely changes the manner and timetable in which a noncitizen may contest the civil penalties. However, the **new regulations significantly curtail the rights of noncitizens to receive notice and to contest civil penalties that may be wrongly levied against them before a final order is issued.** Under the new structure, individuals have only half the time to respond to the fines that are issued, if they even receive the order imposing the fine through regular mail. Further, the mechanism to contest the fine is now fully internal within DHS, which will result in the lack of any meaningful and impartial review. Under the new regulatory structure, there is a greater chance that individuals will not receive notice of any fines assessed, affected individuals will have less time to contest erroneous fines, and the appeal process will lack any meaning. As such, the new regulatory structure greatly impacts the public and the rights they have. These changes are not procedural in nature and reflect the agencies' disregard for the due process rights of those impacted by the rule.

B. The IFR signifies a dramatic shift in practice with regard to the imposition of fines and thus significantly curtails the rights and protections of those impacted.

We note, additionally, that the agencies' actions thus far do not comport with the assertion that the rights of the public have not been altered. While true that the presence of regulatory language and mechanism to issue these fines is well-established, the federal government's choice to generally not enforce these penalties until now represents a significant shift in the rights of the public as they have come to understand them. The agencies freely admit in the IFR that these fines have not been readily assessed to the public in the past but also assert that thousands[1] of notices of intent to fine have been sent out in 2025 with some fines totaling into the millions.[2] An escalation of this magnitude is a de facto change in the substantive rights of the public; to assert otherwise is disingenuous. Such a change must be accompanied by notice to the public and a meaningful opportunity to comment on the proposed changes.

C. The rule does not fall under the foreign affairs exception to the APA.

The agencies further assert that the rule falls under the foreign affairs exception to the APA and therefore is appropriately promulgated as an IFR. In justifying their actions, the agencies state that the rule is inextricably linked to the foreign affairs of the United States because the intention of the rule is to incentivize immigrants to leave the

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[1] U.S. Dept. of Homeland Security, DHS and DOJ Announced Streamlined Process for Fining Illegal Aliens, June 27, 2025, https://www.dhs.gov/news/2025/06/27/dhs-and-doj-announce-streamlined-process-fining-illegal-aliens.

[2] Ted Hesson and Kristina Cooke, Trump administration fined this low-income migrant $1.8 million, Reuters (May 20, 2025), https://www.reuters.com/world/us/low-income-migrants-fined-up-18-million-by-trump-administration-2025-05-20/; Trevor Huges, Undocumented immigrants face massive fines under new Trump rule, USA Today (June 27, 2025), https://www.usatoday.com/story/news/politics/2025/06/27/undocumented-immigrants-massive-fines-trump-rule/84390565007/; Hamed Aleaziz, Trump's New Penalty for Undocumented Immigrants: Billions of Dollars in Fines, New York Times (May 22, 2025), https://www.nytimes.com/2025/05/22/us/politics/trump-administration-fine-undocument-immigrants.html.

United States.[3] The agencies assert that immediate action is needed to show other countries that the United States is serious about addressing border security and irregular migration to the U.S. Southern border.[4] Finally, the IFR cites the Secretary of State's recent declaration that all immigration regulations fall under the foreign affairs exception.[5]

These justifications are too broad and the connections too tenuous to accurately assert the foreign affairs exception[6] and strongly indicate a bad faith assertion of the exception. The immediacy cited as justification for issuing the rule without notice and comment does not pass muster; the fines imposed have been in the regulations for years and only sparsely used by the federal government. In light of the government's circumvention of asylum law to shut down asylum process at the Southern border, the imposition of fines that the agency has little to no intention of collecting[7] does not appear that it will have an appreciable effect on border operations.

Further, in the absence of any documentation that this IFR is in direct response to international obligations or agreements, there is no evidence that the agencies are obligated to issue this rule without even the customary 30-day effective date delay. The burden placed on the public by the IFR far outweighs the government's interest in adding yet another level of intimidation to immigrant communities in the United States.

III. The IFR will result in the erroneous imposition of fines causing significant harm to U.S communities.

Individuals impacted by this rule may face the imposition of civil penalties that range from several thousand dollars to nearly $2 million dollars. These fines are not token amounts, and they have the ability to bankrupt or financially decimate individuals, families, businesses, and communities. With the limited due process rights afforded to individuals believed to be subject to these fines under the IFR, the possibility of fines being imposed or levied in error or in bad faith is extremely high. The new IFR curtails important rights which serve as safeguards against such errors or bad acts. Without these rights in place, the risk of millions of dollars or more in fines being incorrectly or unfairly levied against US communities is high.

The agencies assert that determinations regarding the civil penalties are straightforward and easily verified. Nevertheless, earlier this year, prior to the publication of the IFR, DHS issued thousands of notices of intent to fine under INA § 274D to individuals it claimed willfully failed to depart after a final removal order.[8] However, many were received by individuals who had pending motions seeking to reopen or rescind the final order of removal based on lack of notice or other grounds.[9] Other notices were issued by DHS to individuals who had since been granted temporary or permanent status by the agency itself. The number of errors seen in the previously issued notices raises concerns that under the new regulations the number of improper or incorrect orders imposing civil penalties will be even higher, but with less recourse to challenge them. The agencies assert that a fifteen-day period in which to appeal an erroneous decision is ample and that a cursory review by a supervisory officer conducted within ten days will be sufficient to address any errors, but such assertions are disingenuous.

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[3] 90 FR 27454.
[4] Id. At 27455-6.
[5] *See Determination: Foreign Affairs Functions of the United States,*90 FR 12200 (Mar. 14, 2025)
[6] While Circuits are split on the correct test to assess where the foreign affairs exception applies to regulations, traditional examples of foreign affairs exceptions have included regulations having to do with international trade and visa issuance.
[7] The agencies state repeatedly in the IFR that the intention behind its promulgation and the subsequent issuance of fines is to incentivize immigrants to depart the United States on their own or to deter unlawful entry.
[8] https://www.cbsnews.com/news/undocumented-immigrant-1-point-82-million-dollar-fine-failing-to-leave-u-s-after-2005-removal-order/.
[9] See NBC News, 4,500 Migrants Told to Pay Fines up to $1.8 million, https://www.nbcnews.com/news/latino/4500-migrants-told-pay-fines-ranging-18-million-rcna207958; CBS News, Undocumented immigrant faces $1.82M fine for failing to leave US after 2005 removal order, documents show, https://www.cbsnews.com/news/undocumented-immigrant-1-point-82-million-dollar-fine-failing-to-leave-u-s-after-2005-removal-order/.

The potential for billions of dollars in erroneously imposed fines is extremely high under the IFR. The impact such fines could have on families, communities, and businesses can be catastrophic. With such high stakes, it is hard to imagine a valid reason for curtailing due process.

IV. The IFR Fails to Inform Officers or the Public that there is a Five-Year Statute of Limitations for the Enforcement of Civil Penalties

This IFR fails to clarify that the Department may not start an enforcement action for any civil fine, penalty, or forfeiture, unless that action is started within five years from the date that the claim first accrued.[1] The U.S. Supreme Court has addressed the issue of civil penalties twice over the past twelve years. In 2013, the Supreme Court held that *for all* enforcement actions, the statute begins to run when the claim or fraud "first accrued" and not when the fraud was discovered by the government.[2] Four and a half years later, the Supreme Court ruled that the government had to bring a disgorgement claim within five years of when the claim first accrued.[3] In these two cases, the Supreme Court set out the basic and long-standing principles it has applied to statute of limitations issues since 1805. These principles include the importance of the certainty created by a fixed time to bring an action; the undesirability of allowing cases to be brought at a distant time; the need to avoid stale claims, lost evidence, or faded memories; and the importance to the welfare of society by promoting timely justice and stability in human affairs. Chief Justice Marshall wrote in 1805:

> In expounding this law, it deserves some consideration that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.[4]

The IFR does not clarify that the Department may not attempt to collect civil fines or penalties where the person was ordered removed under INA § 240, was granted voluntary departure under INA § 240B, or where the person attempted to enter or entered the United States illegally in violation of INA § 275(b) over five years ago. In other words, DHS may not impose civil monetary penalties under INA §§ 240B(d), 274D(a)(1), or 275(b) where the civil violation occurred five and a half years ago, ten years ago, or twenty years ago. As such, the IFR should be rescinded immediately.

Further still, the Government may not criminally prosecute a person who entered the United States without being inspected or admitted more than five years ago. Similarly, this Department may not impose a civil penalty under INA § 275 where the statute of limitations for the underlying criminal violation has run. Where a criminal statute does not reference a statute of limitations, the default statute of limitations for all criminal violations is five years.[5] Because INA § 275 does not reference a specific statute of limitations, by default, the statute of limitations is five years. The statute of limitations begins to run when the crime is complete.[6] In this case, the crime of illegal entry or attempted illegal entry begins to run when the person illegally enters the United States. In all cases where the Department is unable to establish that the person entered the United States within the past five years, it may not issue a civil penalty for violation of INA § 275(b). Similarly, any attempt to collect a penalty after five years violates the statute of limitations for the collection of civil penalties.[7]

V. This IFR is Discriminatory on its Face, Where it Only Applies to Individuals as Opposed to Carriers that Violate the Immigration Laws

This IFR is discriminatory on its face as it only applies to individuals. Carriers are still afforded the protections for civil penalties listed in 8 C.F.R. § 280 including (1) being allowed thirty days to contest a Notice of Intent to Fine (NIF);[14] (2) being allowed an in-person interview at the carrier's request to contest the NIF;[15] (3) being allowed to apply mitigation or remission;[16] and (4) being allowed to appeal the decision to the Board of Immigration Appeals.[17] The agencies' justification for this discrepancy is disingenuous on its face. In the IFR, the agencies assert that they can still afford to provide these protections from unreasonable penalties and fines for carriers because, from

October 1, 2022, to May 5, 2025, only 1,428 carrier fines were initiated.[18] By contrast, the Department notes that these fines were in place from 2017 through 2021, and that as of 2021, there were 26 active cases against noncitizens.[19] From March 17, 2025, through June 13, 2025, ICE has initiated nearly 10,000 NIFs.[20] The agencies argue that with these large numbers of NIFs, it is impossible to afford noncitizens the same due process rights and protections as it can afford carriers. The agencies' argument is similar to a person who kills their parents and then asks the court for mercy because they are an orphan. For three years from 2017 through 2021, there were only 26 active cases for NIFs against noncitizens, while from October 1, 2022, to May 5, 2025 (a different three-year period), 1,428 fines were brought against carriers.[21] In other words, there were 5392% more cases brought against carriers than those brought against individuals. DHS has created a "crisis" of its own making by issuing thousands of NIFs to individuals, which the agencies now cite to show a pressing need for action in promulgating this rule without the benefit of notice and comment periods prescribed by the APA. On its face, this rule is discriminatory, and the situation DHS finds itself in is an "emergency" of its own making.

VI. The IFR is Discriminatory on its Face, Where it Does not Allow for the Consideration of Factors in Imposing Fines on Noncitizens, Where it Allows for the Consideration of Factors in Determining Other Civil Monetary Penalties

Under the Immigration Reform and Control Act (IRCA) of 1986, the government sought to curb illegal immigration by assessing fines against employers of undocumented immigrants. In assessing these fines the Administrative Law Judge adjudicating the case must consider the following factors: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized immigrant; and (5) the employer's history of previous violations.[22]

By contrast, there are no similar factors in this IFR to protect noncitizens. In fact, under the prior regulations, individuals who received a notice of intent to fine had the right to submit an answer explaining "why a fine should not be imposed, or if imposed, why it should be mitigated or remitted."[10] However, under the IFR, this right has been curtailed. Now, there is no consideration of why the noncitizen entered the United States without inspection or admission; why a person failed to leave the United States after getting a voluntary departure order; or why a person failed to leave after a removal order. Rather than consider a totality of circumstances--including if the person was fleeing persecution, in the United States to support their family, suffering from health issues or unable to depart for other reasons, or if they were unaware of the existence of a removal order in their case --the IFR seeks to impose debilitating fines without consideration of individual circumstances. The agencies belie their discriminatory intent in issuing this rule by failing to account for the personal situations of the individuals they seek to fine. This Rule and the other rules governing civil fines and penalties are discriminatory against individuals while protecting companies and corporations. As these fines are discriminatory against noncitizens on their face, the IFR should be rescinded in its entirety.

VII. Conclusion

The promulgation of this rule as an IFR violates the APA and the imposition of the fines themselves is unconstitutional and violate other federal laws. The IFR should be rescinded immediately.

Sincerely,

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[10] 8 CFR 280.12; 8 CFR 280.51.