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Prohibit Regulatory Actions on USCIS Forms

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***Seyfarth Synopsis:** This is the fourth installment in a series of recommendations to the Biden Administration on immigration reform previously published by the Cato Institute in “Deregulating Legal Immigration: A Blueprint for Agency Action.” Read the first, second, and third installments here. A total of five installments will be published. Please stay tuned for the final update.*

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USCIS should amend its regulations to stop automatically incorporating all form instruction changes into its regulations, bypassing notice and public comment procedures.

USCIS requires employers and applicants for immigration benefits to use forms that it creates to collect information.^[i] Along with these forms, USCIS publishes detailed instructions that explain to applicants how they must fill out the form and the types of information or evidence that must be provided. USCIS’s regulations currently assert that all form instruction changes are incorporated into the regulations themselves.^[ii] The clause allows the agency to evade a slew of federal statutes and presidential directives including the Administrative Procedure Act (APA), the Regulatory Flexibility Act, Executive Orders 12866 and 13563, and OMB Circular A-4.^[iii] It allows the agency to effectively change its regulations with only minimal notice under the Paperwork Reduction Act.

USCIS uses this vague regulation to bypass the APA and impose expensive costs on applicants without any notice or review. For example, the government updated its form instructions in 2019 to state that any application failing to answer every question—including those for which the answer is none, not applicable, or unknown—would be rejected.^[iv] Contradictory and inconsistent legal requirements can result even when USCIS issues multiple sets of instruction, as it did with the guidance for the I-9 Form.^[v] The agency should rescind the regulation and clearly require notice and public comment for all substantive changes. Instructions on agency forms should not be allowed to take effect unless there is a meaningful, substantive opportunity for comment, as the APA requires.^[vi]

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