Comments of the National Venture Capital Association on the Department of Homeland Security's Proposed Rule, *Removal of International Entrepreneur Parole Program*, 83 Fed. Reg. 24,415 (May 29, 2018)

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Table of Contents

These comments are submitted for the record to the United States Department of Homeland Security (the Department) on behalf of the National Venture Capital Association (NVCA). They are offered in response to the Department's notice of proposed rulemaking (NPRM) to rescind the International Entrepreneur Rule (IER) published in the May 29, 2018 edition of the *Federal Register*.

I. Introduction.

The National Venture Capital Association is the largest organization of venture capitalists in the United States. It has a diverse membership base of venture capital firms spread across the country, investing in sectors as varied as biopharmaceuticals, information technology, and cyber-security, and in companies at various stages of growth. Many of NVCA's members, or the companies they have invested in, were founded by, employ, or otherwise rely on the contributions of immigrants and international entrepreneurs.

As the voice of the U.S. venture capital community, NVCA empowers its members and the entrepreneurs they fund by advocating for policies that encourage innovation and reward long-term investment. NVCA also serves as the definitive resource for venture capital data and unites its member firms through a full range of professional services. Because so many venture-backed firms are founded by immigrants, NVCA supports immigration solutions that benefit entrepreneurs, investors, and the United States as a whole.

The U.S. economy has long thrived on the contributions of immigrant entrepreneurs, who bring their talents, ideas, and initiative with them to the United States. Indeed, the United States is the envy of the world when it comes to startups and entrepreneurship. The American economy thrives because talented people from around the globe want to bring their innovative ideas here and found new businesses to implement them.[1]

But foreign entrepreneurs who seek to build new businesses in the United States face significant barriers to obtaining permission to travel and work here. Unlike many other countries with which America competes for top business talent, the United States lacks a dedicated visa for foreign entrepreneurs, and these individuals seeking to found companies in the United States generally do not qualify for existing employment-based or family-based visas.

To alleviate these problems and facilitate entrepreneurship, the Department promulgated the International Entrepreneur Rule on January 17, 2017.[2] Prior to finalizing the IER, the Department solicited and received extensive comments from affected entrepreneurs, the business community, and the American people during a 45-day comment period. Pursuant to its institutional mission, NVCA supported the IER, explaining why it would benefit American investors and the economy as a whole.[3]

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1 *See The "New American" Fortune 500*, P'ship for a New Am. Econ., 5 (June 2011), perma.cc/QW79-RTNP.

2 *See International Entrepreneur Rule*, 82 Fed. Reg. 5238 (Jan. 17, 2017).

3 *See, e.g.*, Comments Regarding International Entrepreneur Rule, Nat'l Venture Capital Ass'n 1 (Oct. 13, 2016), perma.cc/UC7F-JRQ4; *see also Future "Significant Public Benefit" Parole Program for Entrepreneurs*, USCIS (June 25, 2015), perma.cc/2VV3-QPRD.

The IER allows foreign entrepreneurs to apply for parole, which permits the recipient to be physically present in the United States without being legally admitted. The Rule reserves parole for only the most qualified and talented entrepreneurs. Applicants must show that they have a substantial role and ownership stake in a company founded in the United States in the last five years, and they must also show that the company received a substantial amount of funding from qualified U.S. investors or present other comparable "evidence of substantial and demonstrated potential for rapid business growth and job creation."[4]

Given this program design, only those startup founders who demonstrate that their companies exhibit a very substantial likelihood of success and rapid growth will qualify for IER parole.[5] That is, the IER is designed for companies that will grow quickly and employ many individuals—it is not for small ventures with little growth potential. It is paramount to the U.S. national interest that this sort of entrepreneur, who is likely to create a successful, fast-growing company, is located here. These startup companies are the key catalyst of job growth in America, and they are at the vanguard of emerging technologies.[6] Not only do these businesses benefit the economy, but they invent the new technologies and infrastructures that will power U.S. economic growth and competitiveness in the coming decades.

The benefits of incentivizing the next generation of startup companies to form in the United States—without regard for whether the founders are foreign-born—extend far beyond the economy: Their presence here is critical to national security. When a company is based in the United States, the federal government is able to exercise important oversight over the beneficiaries of those technologies. The United States, for example, imposes export controls to ensure that certain technologies (including supercomputers and rocket launch systems) cannot be exported to nations or entities with interests adverse to our own. But the United States can regulate such companies and technologies only when they are located here. Likewise, the United States carefully supervises the transfer of technologies critical to national security to foreign owners; it regulates data (both safeguarding data privacy and, when necessary, accessing data for law enforcement and national security purposes); and it protects essential infrastructures, like American financial and energy systems, against attack. The United States is able to achieve these key goals only when the companies that supply these technologies are subject to the reach of U.S. law. The Department's proposal to rescind the IER—which will have the inevitable effect of causing startups to form outside the United States—is thus plainly adverse to U.S. national security interests.

Other nations are well aware of the benefits that leading entrepreneurial talent brings. Countries like Canada, France, Germany, Singapore, and the United Kingdom have put in place immigration programs designed to bring entrepreneurs to their shores. And the consequences of

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4 82 Fed. Reg. at 5238.

5 *Id*. at 5275 ("This rule focuses on identifying entrepreneurs associated with types of start-up firms that are more likely to experience high growth, contribute to innovation, and create jobs in the United States."); *id*. ("[T]his rule includes threshold criteria for parole consideration meant to identify entrepreneurs associated with the kinds of promising start-up entities that appear more likely to contribute to American innovation, economic development, and job creation.").

6 *See* Ilya A. Strebulaev & Will Gornall, *How Much Does Venture Capital Drive the U.S. Economy?*, Stanford Graduate Sch. of Bus. (Oct. 21, 2015), perma.cc/82MK-XGNK.

this international competition are apparent. Twenty years ago, more than 90 percent of global venture capital investment was made in U.S. companies. Last year, that dropped to 54 percent. The United States is losing ground in the race to attract the next leading companies.

Despite the critical importance of attracting the world's leading entrepreneurs, the Department now proposes to rescind the IER.[7] This short-sighted decision, if finalized, will cost the United States hundreds of thousands of jobs. It will allow foreign nations to exercise leadership—at the expense of the United States—in critical fields like artificial intelligence, robotics, autonomous vehicles, energy, and healthcare. And it will endanger U.S. national security by encouraging the next Google or SpaceX to be founded abroad. Rescinding the IER would thus substantially harm the U.S. economy and national interests.

As we will show, the relevant policy considerations overwhelmingly support retention of the IER. The Department's proposal to rescind the IER is, by contrast, based on a number of inaccurate and unsupported factual premises. For example:

- The Department asserts that parole under the IER program is too temporary and would not allow the United States to retain productive, job-creating international entrepreneurs over the long term. The NPRM thus asserts that "parole provides neither the entrepreneur nor the qualifying source of capital (whether private or public) with certainty or predictability necessary to ensure that a start-up entity is a success and ultimately provides a significant public benefit to the United States."[8] As our comments demonstrate below, that is simply wrong.

- While acknowledging "that some foreign entrepreneurs may face difficulty establishing eligibility under existing nonimmigrant and immigrant categories," the Department asserts that "options are still available for some foreign entrepreneurs."[9] But those alternative options are manifestly inadequate.

- The Department also asserts that, "while the Department may eventually recover the costs relating to administration of the International Entrepreneur Rule," "use of the agency's present resources" to process IER applications is unwarranted.[10] But given that any initial setup costs for IER have already been expended, and that the IER program would be cost-neutral, that is a self-defeating proposition. That is especially so in light of the enormous indirect benefits of the IER program to the federal government through increased tax revenues and decreased reliance on public benefits.

The NPRM also suffers from critical procedural deficiencies:

- It violates Executive Order 12866. Because the proposed rule would have a tremendous impact on the economy, the Department was obligated to conduct a rigorous cost-benefit analysis of the proposal before it published the notice. The

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7 *See Removal of International Entrepreneur Parole Program*, 83 Fed. Reg. 24,415 (May 29, 2018).

8 *Id.* at 24,417.

9 *Id.*

10 *Id.* at 24,416.

Department not only has failed to do that, but also has not even explained its failure. As a result, the Department has not addressed the most consequential costs of the regulation. The Department has not evaluated, for example, what effect the rescission will have on the U.S. economy. The Department must rectify this procedural error before proceeding.

- The NPRM also violates the Regulatory Flexibility Act (RFA). The RFA requires agencies to determine the effect their proposals will have on small businesses, and to consider less onerous alternatives. Instead of doing that, the Department has asked the public to do the analysis on its own. But under the RFA, the analysis must come *before* notice and comment. After all, the very purpose of the RFA is to help agencies decide which rule to propose. The Department thus must withdraw the NPRM and conduct the RFA's required analysis.

- Finally, the NPRM violates the Administrative Procedure Act (APA). Although the Department has requested from the public many pieces of factual data that can be determined only through empirical study, it has given parties just 30 days to comment. In the context of this rulemaking, that period violates the public's right under the APA to a meaningful "opportunity to participate."[11] The Department must reissue the NPRM and provide the public a minimum of 60 days to comment.

At bottom, the IER is good for the economy, essential to national security, and a boon for American citizens eager to work. The Department's proposal to eliminate the IER is therefore unsurprisingly based upon a number of factual errors, the correction of which undermines the proposed repeal. For these reasons, and the numerous additional shortcomings highlighted in these comments, the Department should withdraw the proposed rule repealing the IER and allow the IER to remain in place. At minimum, it must issue a supplemental notice curing the deficiencies of the original NPRM and permit adequate time for additional comments.

II. Entrepreneurs—including international entrepreneurs—are vital to the United States.

A. Startups are the leading driver of job creation and economic growth.

Previously, examining the economic data, the Department concluded that "entrepreneurs have been and remain vital to economic growth and job creation in the United States and have generated a cohort of high-growth firms that have driven a highly disproportionate share of net new job creation."[12] That finding is undoubtedly correct.

Startups are the primary source of job creation in the United States.[13] They account for approximately 86 percent of new companies founded since the late 1970s, and they contribute to

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[11] 5 U.S.C. § 553(c).

[12] 82 Fed. Reg. at 5274.

[13] Ian Hathaway et al., *The Return of Business Creation*, Kauffman Found., 2 (July 2013), perma.cc/44BJ-HREZ; *The Importance of Young Firms for Economic Growth*, Kauffman Found., 1 (Sept. 14, 2015), perma.cc/3D2G-NKX4.

20 percent of gross annual job creation.[14] Over the past three decades, firms younger than one year old have produced an average of 1.5 million jobs every year.[15] That job growth is uniquely resilient: During the Great Recession in the late 2000s and early 2010s, startups maintained positive net employment growth rates. By contrast, net employment declined substantially among older, larger firms during the same period.[16] As the Department summarized, "[j]ob creation in the United States for the last several decades has been driven primarily by high-growth firms that tend to be young and new."[17]

Startups' job growth is catalyzed by venture capital, which is an essential ingredient in the success of most early ventures seeking rapid growth. In 2017, for instance, 214 venture capital funds raised $32.8 billion to deploy into promising startups.[18] That funding reached startup businesses in all 50 states and the District of Columbia.[19] Beyond financing, venture capitalists also worked with startups to provide "mentorship, strategic guidance, network access, and other support."[20] As a result, many venture-backed companies "have scaled, gone public, and become household names, and at the same time have generated high-skilled jobs and trillions of dollars of benefit for the U.S. economy."[21] Since 1974, 42 percent of all U.S. company initial public offerings have been venture-backed companies.[22]

Moreover, startups play a critical role in driving U.S. companies forward in a competitive global economy. Small businesses produced 46 percent of the United States' GDP in 2008.[23] According to the last-available data from the Small Business Administration, businesses from zero to four years old accounted for almost two-thirds of all businesses employing fewer than 100 employees.[24] And, over the past several years, "venture-backed companies have invested

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[14] Hathaway, *supra* note 13, at 2; John C. Haltiwanger et al., *Who Creates Jobs? Small vs. Large vs. Young*, 95 Rev. of Econ. & Stat. 347, 360 (2013), goo.gl/JCeZUA.

[15] Hathaway, *supra* note 13, at 2.

[16] Teresa C. Fort et al., *How Firms Respond to Business Cycles: The Role of Firm Age and Firm Size*, 1 (Nat'l Bur. of Econ. Research, Working Paper No. 19134, 2013), perma.cc/4FBB-6YCL.

[17] 82 Fed. Reg. at 5274.

[18] *2018 Yearbook*, Nat'l Venture Capital Ass'n, 5 (Mar. 2018), perma.cc/NWU4-VSBC. As of December 2013, 710 venture-capital-backed companies together represented a market capitalization of $4.3 trillion. Ilya A. Strebulaev & Will Gornall, *How Much Does Venture Capital Drive the U.S. Economy?*, Stanford Graduate Sch. of Bus. (Oct. 21, 2015), perma.cc/82MK-XGNK. That figure in itself "makes it clear that VC is an important part of the innovation ecosystem and has helped some of the world's most successful companies to grow." *Id.*

[19] *2018 Yearbook*, *supra* note 18, at 6.

[20] Strebulaev & Gornall, *supra* note 18.

[21] *2018 Yearbook*, *supra* note 18, at 9.

[22] *CFIUS Reform: Examining the Essential Elements*, 115th Cong. 2 (2018) (written testimony of Scott Kupor, NVCA Chair), perma.cc/Q6D4-ZT85 [hereinafter *Kupor Testimony*].

[23] Kathryn Kobe, *Small Business GDP: Update 2002-2010*, U.S. Small Bus. Admin., 1 (Jan. 2012), perma.cc/AS5T-NMEC.

[24] *Private Firms, Establishments, Employment, Annual Payroll and Receipts by Firm Size, 1988-2014*, U.S. Small Bus. Admin., perma.cc/37FB-QDEY(last visited June 11, 2018).

$115 billion in research and development (R&D), accounting for 85 percent of all R&D spending."[25]

Naturally, startups in general—and venture-backed startups in particular—help to grow the national tax base and reduce citizens' reliance on government aid and benefit programs. According to data from the Bureau of Labor Statistics, approximately 450,000 new startups were created in 2016.[26] These new businesses pay federal income, Social Security, and Medicare taxes to support vital government programs.[27] And those startups that break through to become especially successful (the likes of which include Google, Amazon, Facebook, and Netflix) contribute even more substantially to the tax base. These new firms and jobs also narrow the federal deficit by reducing government expenditures on unemployment benefits and beyond.

These startups provide opportunity for Americans all across the country. In 2017, all 50 states and the District of Columbia a reported "startup density" of more than 50 businesses less than one year old for every one thousand employer businesses.[28] Missouri, Texas, Nevada, Florida, and Utah reported some of the highest startup density figures, each in excess of 90 per one thousand.[29] And Oklahoma, Wyoming, Alaska, and Montana each saw the highest rates of new entrepreneurs starting businesses.[30] Put simply, "[s]tartup activity is happening everywhere in cities and towns across America."[31] And that startup activity has a positive effect even on non-entrepreneurial firms: Recent studies show that "entrepreneurial firms produce important spillovers that affect regional employment growth rates of *all* companies in the region in the long run."[32]

Entrepreneurs are diverse in race, age, educational attainment, and veteran status. Approximately half of new entrepreneurs are non-white.[33] New entrepreneurs are uniquely diverse in terms of age, too. The segments from age 20 to 34, 35 to 44, 45 to 54, and 55 to 64 each make up approximately one quarter of all new entrepreneurs.[34] These new entrepreneurs

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[25] *Kupor Testimony* at 2.

[26] *The Kauffman Startup Activity Index: National Trends*, Kauffman Found., 22 (May 2017), perma.cc/C427-A5UM.

[27] *Understanding Employment Taxes*, Internal Revenue Serv., goo.gl/HWCQxP (last visited June 11, 2018).

[28] *The Kauffman Startup Activity Index: State Trends*, Kauffman Found., 6, 12 (May 2017), perma.cc/3XGS-KXLB.

[29] *Id.* at 12.

[30] *Id.* at 14.

[31] Michael Mandel, *How the Startup Economy is Spreading Across the Country*, Progressive Policy Inst., 1 (Mar. 29, 2017), perma.cc/NQ3N-JGDR.

[32] C. Mirjam van Praag & Peter H. Versloot, *What is the Value of Entrepreneurship? A Review of Recent Research*, 29 Small Bus. Econ. 351, 351 (2007) (emphasis added), goo.gl/uH3rLa; 82 Fed. Reg. at 5276 ("[M]any economists believe innovation creates positive externalities and spillover effects that further drive economic growth.") (citing *SMEs, Entrepreneurship and Innovation*, Org. for Econ. Co-operation and Dev. (2010), perma.cc/PMY6-87DX). Furthermore, foreign-born entrepreneurs may inspire native-born entrepreneurs to undertake their own enterprises, given that "the entrepreneurial instinct often is, like many human behaviors, imitative." *See* Paul Kedrosky, *Getting the Bug: Is (Growth) Entrepreneurship Contagious?*, Kauffman Found., 2 (Oct. 2013), perma.cc/BU6X-U3CS.

[33] *The Kauffman Startup Activity Index: National Trends*, *supra* note 26, at 31.

[34] *Id.* at 35.

also vary in terms of educational attainment. More than two-thirds of new entrepreneurs do not have a college degree, and about 4 percent of new entrepreneurs have served in our nation's military.[35]

Of course, even one successful startup can produce a substantial number of jobs, especially with the advent of on-demand services. Uber alone has about 750,000 active drivers; Lyft has 1.4 million drivers in the United States and Toronto.[36] High-growth firms are valuable to the nation especially because they create enormous amounts of jobs for American workers. From 2009 to 2012, approximately 97,000 firms classified as high-growth firms—which largely tended to be young and initially small firms—were responsible for 35 percent of all gross job gains.[37] This confirms, the Bureau of Labor Statistics found, the decades-old idea that "small businesses are the fountain of job growth."[38]

In short, startups play uniquely valuable roles in the American economy, creating millions of jobs. "It is quite clear that the American economy is dependent on the economic activity that comes from young firms scaling into successful companies."[39] Startups grow the tax base and drive the national economy forward. And they allow a diverse group of new businessmen and businesswomen to engage in and contribute to the U.S. economy. There can be little doubt why the emergence of a "truly entrepreneurial economy" in the United States has been described as "the most significant and hopeful event to have occurred in recent economic and social history."[40]

B. International founders are an essential part of the American economy.

A significant share of American firms, including some of the nation's most prominent companies, were founded in whole or in part by international entrepreneurs. More than half of all of the nation's startup companies worth $1 billion or more had at least one immigrant founder.[41] The value of these immigrant-founded companies amounts to a collective $168 billion[42]—a figure in excess of the national GDP of more than 130 countries.[43] Studies have found that

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35 *Id.* at 37, 39.

36 Dara Keer, *Lyft Grows Gangbusters in 2017*, CNET (Jan. 16, 2018), goo.gl/ayC4ig.

37 Richard L. Clayton et al., *High-Employment-Growth Firms: Defining and Counting Them*, Bureau of Labor Statistics (June 2013), perma.cc/T7JG-WLHX; *see also* Spencer L. Tracy, Jr., *Accelerating Job Creation in America: The Promise of High-Impact Companies*, U.S. Small Bus. Admin. (July 2011), perma.cc/8VA4-6XJQ (surveying the "relatively small class of [startup] firms [that] was responsible for generating nearly all net new jobs" in the United States); Dane Stangler, *High-Growth Firms and the Future of the American Economy*, 2 (March 2010), perma.cc/N88P-BZ8B ("Fast-growing young firms, comprising less than 1 percent of all companies, generate roughly 10 percent of new jobs in any given year.").

38 Stangler, *supra* note 37, at 2.

39 *Kupor Testimony* at 3.

40 Peter F. Drucker, *Innovation and Entrepreneurship* vii (1985).

41 Stuart Anderson, *Immigrants and Billion Dollar Startups*, Nat'l Found. for Am. Policy, 1 (Mar. 2016), perma.cc/6ZTT-UX43.

42 *Id.*

43 *World Economic Outlook Database*, Int'l Monetary Fund (2018), goo.gl/foWWKj.

immigrant entrepreneurs have founded or co-founded more than one-quarter of all science and technology firms in the United States.[44]

Some of America's most prominent companies have international founders. Google, Goldman Sachs, eBay, Pfizer, and AT&T are among them.[45] These large, prominent firms create a substantial number of jobs for American workers. Among the billion-dollar startup companies just discussed, immigrant founders have created approximately 760 jobs per company in the United States,[46] amounting to hundreds of thousands of jobs in total. SpaceX alone has approximately 4,000 employees; Mu Sigma, approximately 3,500.[47]

More broadly, companies with international founders help to create jobs at disproportionately high rates.[48] Small businesses with at least one international founder employed 4.7 million American workers in 2007.[49] Although immigrants constitute only about fifteen percent of the nation's population, they account for approximately one-quarter of U.S. entrepreneurs.[50] Studies demonstrate that these immigrant-owned startups are more likely to survive and exhibit greater employment growth.[51] And one in five Fortune 500 companies in 2010 was founded by an immigrant; when considering the additional 114 Fortune 500 companies founded by the children of immigrants, that share grows to 43 percent of all Fortune 500 companies.[52] Immigrant-founded Fortune 500 companies alone employ more than 12.8 million people and boast a combined revenue of $5.3 trillion.[53]

The benefits that foreign-born founders provide in terms of job creation are felt across the economy. Throughout the United States, new immigrants accounted for an average of 16.7 percent of all business owners across all states.[54] Studies have documented the "significant role

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[44] Marcia Drew Hohn, *Immigrant Entrepreneurs: Creating Jobs and Strengthening the Economy*, Am. Immigration Council, 3 (Jan. 2012), perma.cc/L8MS-5ZZG.

[45] Caroline Fairchild, *16 Iconic American Companies Founded by Immigrants*, Huffington Post (Apr. 22, 2013), goo.gl/AS2aZw.

[46] Anderson, *supra* note 41, at 4; *see also* Stuart Anderson, *American Made 2.0: How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy*, Nat'l Venture Capital Ass'n (June 2013), perma.cc/YE56-QP43 (surveying foreign-born entrepreneurs' "heroic contributions to America's economy").

[47] Anderson, *supra* note 41, at 4.

[48] This phenomenon is observed internationally as well. *See* Fed. Reg. at 5276 (citing Maria Vincenza Disiderio & Josep Mestres-Domènech, *Migrant Entrepreneurship in OECD Countries*, Org. for Econ. Co-operation and Dev. (2011), perma.cc/YXM7-C7EK).

[49] James Jennings et al., *Immigrant Entrepreneurs: Creating Jobs and Strengthening the U.S. Economy in Growing Industries*, Immigrant Learning Ctr., Inc., 2 (Apr. 2013), perma.cc/4TRV-HHV6.

[50] Sari Pekkala Kerr & William R. Kerr, *Immigrants Play a Disproportionate Role in American Entrepreneurship*, Harvard Bus. Review (Oct. 3, 2016), perma.cc/3ZKL-35CX.

[51] Sari Pekkala Kerr & William R. Kerr, *Immigrant Entrepreneurship in America: Evidence from the Survey of Business Owners 2007 & 2012*, 14 (Nat'l Bur. of Econ. Research, Working Paper No. 24494, 2018).

[52] *Immigrant Founders of the 2017 Fortune 500*, Ctr. for Am. Entrepreneurship (2017), goo.gl/tokHPK. Moreover, 23 percent of the 2017 Fortune 500 companies were not on the 2010 list, illustrating startups' rapid growth potential. *See id.*

[53] *Id.*

[54] Robert W. Fairlie, *Estimating the Contribution of Immigrant Business Owners to the U.S.* Economy, U.S. Small Bus. Admin., 23 (Nov. 2008), perma.cc/JR5G-HF72.

that immigrant entrepreneurs are playing in the development" of Nashville,[55] immigrants' "key role as entrepreneurs in Minnesota,"[56] and "substantial and growing contribution" to Silicon Valley's regional wealth and job creation alike.[57] Further, they generate nearly one-quarter of all business income in California, as well as one-fifth of business income in New York, Florida, and New Jersey.[58] Immigrant founders from top venture-backed firms have created a stunning *150 jobs per company* for American workers.[59] One in every ten people employed at a privately owned company in the United States works at an immigrant-owned firm.[60]

The pace of startup growth in the United States, however, has declined for decades. That decline has been especially pronounced in recent years.[61] New business creation in the United States was at a nearly 40-year low in 2014, according to the U.S. Census Bureau.[62] This makes it all the more crucial that the United States seek to leverage international talent to restore startup growth and economic dynamism.[63]

That is especially so given that even "when native-owned business income stagnated and even declined in inflation-adjusted dollars, immigrant-owned business income soared" from 2000 to 2010.[64] Between 2000 and 2010, the income of immigrant-owned small businesses grew from $67 billion to more than $109 billion—a staggering increase of more than 60 percent. In contrast, non-immigrant-owned firms grew by only 14.4 percent over that same period.[65] That firms with foreign owners grow especially quickly, employing more Americans in the process, is only more reason to seek this international talent.

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[55] Galen Spencer Hull, *Immigrant Entrepreneurs: The Face of the New Nashville*, Sci. Research Publ'g (2009), perma.cc/M5NM-8SWA.

[56] *US Economic Competitiveness at Risk: A Midwest Call to Action on Immigration Reform*, Chi. Council, 40 (2013), perma.cc/67WL-AHGQ.

[57] AnnaLee Saxenian, *Silicon Valley's New Immigrant Entrepreneurs* viii (1999).

[58] Fairlie, *supra* note 54, at 27.

[59] Stuart Anderson, *Immigrant Founders and Key Personnel in America's 50 Top Venture-Funded Companies*, Nat'l Found. for Am. Policy, 1 (Dec. 2011), perma.cc/GPA8-3X3U.

[60] Robert W. Fairlie, *Open for Business: How Immigrants Are Driving Small Business Creation in the United States*, P'ship for a New Am. Econ., 14 (Aug. 2012), perma.cc/DD4E-AAVD.

[61] *See* John Haltiwanger et al., *Where Have All the Young Firms Gone?*, Kauffman Found., 3 (May 2012), perma.cc/PB29-NNTE; *see also* Ryan Decker et al., *The Secular Decline in Business Dynamism in the U.S.* (June 2014), perma.cc/US6M-JVCY; John Haltiwanger et al., *Historically Large Decline in Job Creation from Startup and Existing Firms in the 2008-2009 Recession*, Kauffman Found. (Mar. 2011), goo.gl/5Jr5Fp.

[62] Heather Long, *Where Are All the Startups? U.S. Entrepreneurship Near 40-Year Low*, CNN (Sept. 8, 2016), perma.cc/U7DP-BSCR; *see also* Ryan Decker et al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamism*, 28 J. of Econ. Perspectives 3, 3 (2014) ("Evidence along a number of dimensions and a variety of sources points to a US economy that is becoming less dynamic. Of particular interest are declining business startup rates and the resulting diminished role for dynamic young businesses in the economy."), goo.gl/bNdfeq.

[63] *See generally* Vivek Wadhwa et al., *Then and Now: America's New Immigrant Entrepreneurs, Part VII*, Kaufmann Found. (Oct. 2012), perma.cc/D9Q3-WL7Z.

[64] Fairlie, *supra* note 60.

[65] *Id.*

International founders have been at the helm of some of the nation's most substantial companies. And international founders have been leaders, too, of the smaller startups that make enormous contributions to the American economy.

C. Startups are at the vanguard of emerging technology and infrastructure.

It is vital that the United States remain the world's leading innovator. Today, startups predominately account for this innovation; "innovations in mobility, sensors, analytics, and artificial intelligence promise to quicken the pace of growth and create myriad new opportunities for innovators, entrepreneurs, and consumers."[66] As one cutting-edge technology begets another, startups will continue to produce and innovate in the coming years at only faster rates. For the United States to reap the benefits of these new markets, it is essential that startups produce and innovate *in the United States.*

Startups have reached and transformed countless fields. It goes without saying that startups have played a uniquely valuable role in technology- and Internet-based startups—including venture-backed startups like Amazon, eBay, Facebook, and Google.[67] But the impact of startups extends far wider. Startups, and especially venture-backed startups, "are engaged in more novel and more highly cited innovations" than incumbent firms in the renewable energy sector.[68] Ride-sharing companies like Uber and Lyft have fundamentally changed the transportation industry. The biotechnology industry "is populated by small firms"[69] that have led research on everything from regenerating heart muscle in patients who have had heart attacks to producing synthetic biomaterial that can be used in knee joint replacements.[70] Financial technology companies—companies from PayPal to Stripe, a payments-processing startup valued at $9.2 billion[71]—are changing the ways that businesses and consumers operate.

These transformations have self-evidently profound effects on American consumers. They create innovative and often cost-saving solutions that benefit consumers. The empirical data show that "new ventures and small entrepreneurial firms play a key role in generating innovations" that benefit the lives of American consumers in arenas from transportation to life-saving medical treatments.[72]

Retaining the United States' perch as the epicenter of startups is therefore critical if America is to remain a leader in the fields that will dominate the coming decades including (though certainly not limited to) artificial intelligence, robotics, autonomous vehicles, renewable

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66 Michael Mandel & Bret Swanson, *The Coming Productivity Boom*, 1 (Mar. 2017), perma.cc/9GHX-7MT7.

67 *See Technology: Overview*, Nat'l Venture Capital Ass'n, perma.cc/4Q4G-3WK3 (last visited June 12, 2018).

68 Ramana Nanda et al., *Innovation and Entrepreneurship in Renewable Energy*, Harvard Bus. Sch., 1 (Oct. 2013), perma.cc/LQ29-94ES.

69 Daniel J. Monti et al., *Immigrant Entrepreneurs in the Massachusetts Biotechnology Industry*, Immigrant Learning Ctr., 3 (June 2007), perma.cc/D9XJ-LG48.

70 Mark Terry, *Top 20 Life Science Startups to Watch in 2018*, BioSpace (Jan. 2, 2018), perma.cc/A2Q4-98NU.

71 Becky Peterson, *11 Most Valuable Fintech Startups Worth Over $1 Billion*, Inc. (Oct. 24, 2017), goo.gl/nu9DYM.

72 David B. Audretsch & Zoltan J. Acs, *Entrepreneurship, Innovation, and Technological Change* 3 (2005).

energy, healthcare innovation, and financial technology. Successful new startups will create the in-demand products and services used the world over.

These startups will be founded somewhere—either in the United States or abroad.[73] U.S. economic leadership turns on a substantial plurality of these new startups being based here. If, by contrast, those companies are founded outside the United States, not only will the nation lose essential employment opportunities, but the trade deficit will widen, as American consumers turn to goods and services created abroad.

D. Basing startups in the United States benefits national security.

The United States' national security interests are better served if the next generation of leading startups—the next Google, Apple, Microsoft, or SpaceX—are located *in the United States*.

To begin with, the U.S. controls exports of goods and services in important ways to advance security and policy interests. More than 300,000 U.S. companies exported goods and services in 2014, and 98 percent of those companies were small- or medium-sized.[74] The United States government controls certain aspects of the terms of those exports. That is all the more true for those startups that grow quickly and stand to export significant amounts of goods and services. Indeed, the larger firms grow, "the greater their export intensity and export diversity."[75] Among other things, keeping these firms under the purview of U.S. export laws would help to "limit the spread of technologies useful in . . . developing weapons of mass destruction"[76] and manage concerns about national security or foreign policy concerns according to U.S. interests.[77] It is easy to understand why it is beneficial for U.S. national security that a company like SpaceX be based in the United States—and subject to U.S. export control laws—rather than abroad, outside the regulatory reach of the federal government.

Ensuring that startup businesses are established in the United States also provides that those firms will fall under the oversight of the Committee on Foreign Investment in the United States (CFIUS). CFIUS review—an extensive process consisting of a 30-day formal review, as well as an additional 45-day national security investigation in the case of any unresolved risks—further protects national security when foreign investors seek to invest in U.S. companies.[78] Naturally, that review process is mandated only when those companies are subject to U.S. law.

Indeed, the United States appears poised to expand CFIUS review, to include minority investments into technology companies. The Senate recently passed Senate Bill 2098, the

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[73] *See infra*, pages 25 to 27, for a full discussion of the international competition to attract startups.

[74] *U.S. Export Fact Sheet*, Int'l Trade Admin. (Apr. 5, 2016), perma.cc/Z8J2-K3HZ.

[75] J. John Wu & Robert D. Atkinson, *How Technology-Based Start-Ups Support U.S. Economic Growth*, Info. Tech. & Innovation Found., 12 (Nov. 2017), perma.cc/3AVF-6Q2G.

[76] *Export Controls: National Security Risks and Revisions to Controls on Computer Systems Before the Senate Committee on Armed Services*, 106th Cong. 4 (2002) (statement of Harold J. Johnson), perma.cc/8MLD-Q7FE.

[77] *See Export Controls: National Security Issues and Foreign Availability for High Performance Computer Exports*, Gov't Accountability Office, 1 (Sept. 1998), perma.cc/Z4KM-APQP.

[78] James K. Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, Cong. Research Serv., 11 (Mar. 13, 2018), perma.cc/A47G-ZDF9.

Foreign Investment Risk Review Modernizations Act of 2017 (FIRRMA), which would extend CFIUS review to certain "covered transaction[s]" within the startup ecosystem.[79] The House recently passed substantively similar legislation (House Bill 4311). The Administration strongly supports this legislation: "FIRRMA, by modernizing CFIUS, would strengthen our ability to protect national security and enhance confidence in our longstanding open investment policy."[80] As the United States seeks to expand national security protections relating to critical new startups, it would be counterproductive for the Department to enact a policy that will cause startups to form outside the United States—and thus outside the reach of CFIUS.[81]

On top of that, ensuring that these companies are established in the United States affects the ability of U.S. law enforcement to subpoena user data. As the United States explained in recent litigation, when foreign companies house their user data outside of the United States, the government lacks the means to access "data critical to law enforcement and national security."[82] That "the government may ask foreign law enforcement to gather and share foreign-stored data" is often "not an effective alternative" to using U.S. law enforcement.[83] Ensuring that new startup companies are created in the United States is a necessary step to provide law enforcement the tools necessary to protect national security.

These interests extend beyond law enforcement. Companies that once began as venture-backed startups—including Amazon, Microsoft, and Google—house enormous troves of confidential and valuable information—information of individuals, companies, and governments alike. If those companies were based *outside* the United States, the national security risks would be manifest. Foreign governments, with interests quite disparate from our own, could obtain access to this critical information. In sum, the United States has very substantial interests in ensuring that the next generation of these consequential companies are founded here—not abroad.

The U.S. presence of new companies is also critical to economic security, as it ensures proper regulation and consumer protection. In the quickly emerging space of financial technology, for example, new companies are providing several different kinds of services

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79 Letter from Bobby Franklin, NVCA President and CEO, to House Financial Services Committee (Apr. 11, 2018), perma.cc/H699-7RVP; *see also* John Cornyn & Dianne Feinstein, *FIRRMA Act Will Give Committee on Foreign Investment a Needed Update*, The Hill (Mar. 21, 2018), perma.cc/6C9Z-8U8V.

80 *Statement by the Press Secretary Supporting the Foreign Investment Risk Review Modernization Act*, The White House (Jan. 24, 2018), perma.cc/82J2-PCGG.

81 Indeed, the White House is taking active steps to restrict Chinese access to U.S. technology—much of which is created by startups. *See Statement on Steps to Protect Domestic Technology and Intellectual Property from China's Discriminatory and Burdensome Trade Practices*, The White House (May 29, 2018), perma.cc/BR4F-2UT3 ("To protect our national security, the United States will implement specific investment restrictions and enhanced export controls for Chinese persons and entities related to the acquisition of industrially significant technology. The proposed investment restrictions and enhanced export controls will be announced by June 30, 2018, and they will be implemented shortly thereafter."). It is counterproductive for the Department to simultaneously adopt policies that will drive new startups—and the technology they produce—to foreign countries, including China.

82 Brief for the United States at 44, *United States v. Microsoft Corp.*, No. 17-2, 138 S. Ct. 1186 (2018).

83 *See id.* at 44-45.

directly to consumers.[84] They are also providing critical aspects of the financial services "backbone."[85] If those companies are located in the United States, they will be subject to appropriate regulation by the responsible authorities, not least of which include the Securities and Exchange Commission, the Federal Trade Commission, the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau, the Federal Reserve Board, and a panoply of other federal and state regulators. If U.S. immigration policy drives financial innovation abroad, it will be far more difficult for U.S. regulators to protect American investors, the financial services infrastructure, and the broader U.S. economy.

Through these mechanisms and others, the United States can best protect the American people if startup companies—and the emerging industries that they create—are located here. Because the Department's proposed rule will push startups abroad, it is detrimental to U.S. national security interests.

III. Rescinding the International Entrepreneur Rule would have devastating economic and national-security consequences.

If the United States is to revitalize its entrepreneurial economy, it will need the support of international entrepreneurs who hope to bring the next Google or SpaceX to America. There is little wonder why "startup founders, investors, economic development organizations, and civic leaders dedicated to growing our local economies" alike have supported the rule.[86]

It is heartening that "DHS stands by its previous findings that foreign entrepreneurs have made substantial and positive contributions to innovation, economic growth, and job creation in the United States."[87] Given those acknowledged facts, the Department's suggestion that the IER program is "not a good use of DHS resources" is inexplicable.[88]

The Department's earlier findings were correct. As it explained then:

> DHS anticipates that establishing a parole process for those entrepreneurs who stand to provide a significant public benefit will advance the U.S. economy by enhancing innovation, generating capital investments, and creating jobs. DHS does not expect significant negative consequences or labor market impacts from

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[84] *See* Dana Stalder & Allen Miller, *Financial Technology Startups Emerged as Serious Challengers to Financial Services in 2017*, TechCrunch (Dec. 29, 2017), perma.cc/5R3W-F32M.

[85] *See* Antoine Gara, *Forbes Fintech 50 2018: The Future of Wall Street and Big Data*, Forbes (Feb. 13, 2018), perma.cc/5NTA-HGBA.

[86] National Venture Capital Association et al. Letter to President Donald J. Trump (May 23, 2017), perma.cc/EC55-XRND.

[87] 83 Fed. Reg. at 24,421.

[88] *Id.* It is also less than encouraging that during this notice-and-comment period, the U.S. Small Business Administrator, Linda McMahon, was entirely unfamiliar with the IER or justification for rescinding it. *U.S. Small Business Administrator Linda McMahon at Code 2018*, Recode (May 30, 2018) (Q: "I'm curious, as a Small Business Administrator, what is the logical argument for why the international entrepreneur rule or a startup visa is a bad idea. What's the argument there?" A: "I'm sorry. I can't speak to that. I'm not familiar with it." Q: "As the head of the SBA, you're not familiar with the international entrepreneur-" A: "Not with that particular rule."), perma.cc/K8BG-2VRF. The Department should have actively solicited input from the Small Business Administration, the agency responsible for protecting the interests of small businesses in America.

> this rule; indeed, DHS believes this rule will encourage entrepreneurs to pursue business opportunities in the United States rather than abroad, which can be expected to generate significant scientific, research and development, and technological impacts that could create new products and produce positive spillover effects to other businesses and sectors. The impacts stand to benefit the economy by supporting and strengthening high-growth, job-creating businesses in the United States.[89]

The NPRM offers no valid reason to depart from these findings. Nor could it. The literature and available empirical data all demonstrate that rescinding the IER program will have detrimental effects on the United States.

A. U.S. venture capitalists will invest in IER-linked startups, and the Department's assertions to the contrary are unfounded.

In promulgating the IER, the Department made several findings that it would benefit the United States as a whole. Necessary to those conclusions was the Department's view that many U.S. venture capitalists would invest in startups founded by entrepreneurs whose immigration status in the United States depends on the IER.

To begin with, the Department estimated that approximately 2,940 individuals each year would be eligible for—and benefit from—the IER program.[90] These individuals, the Department concluded, would "create and develop start-up entities with high growth potential in the United States."[91] This would "facilitate research and development in the country, create jobs for U.S. workers, and otherwise benefit the U.S. economy through increased business activity, innovation, and dynamism."[92]

In reaching this conclusion, the Department determined that at least a significant number of qualified U.S. investors *would* invest in companies with IER founders:

> DHS appreciates that international entrepreneurs may face many challenges in starting and growing a business in the United States, including attracting investment capital or government grants or awards. DHS disagrees with the premise, however, that qualifying investors will be very reluctant to make a qualifying investment in a start-up entity that is wholly or partially owned by an individual that will be seeking a grant of parole under this rule. DHS believes that there are a myriad of factors that go into a decision to invest significant funds in a start-up entity. While the underlying immigration status, or lack thereof, of the start-up entity's owner(s) may be a factor presenting a degree of additional risk, DHS believes that this rule will effectively mitigate some of that risk by providing a known framework under which certain significant public benefit parole requests will be reviewed and adjudicated. This final rule provides investors and

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89 82 Fed. Reg. at 5242.

90 *Id*. at 5242, 5277.

91 *Id*. at 5238.

92 *Id.*

> entrepreneurs with greater transparency into the evaluation process and manner in which such requests will be reviewed, so that those individuals and entities can weigh the various risks and benefits that might apply to the particular investment decision being considered.[93]

Without identifying any new factual evidence or intervening developments, the Department appears to back away from that earlier finding. The Department now states:

> Although parole under the IE Final Rule may be granted for up to 30 months, with possible re-parole for an additional 30 months, it is highly uncertain whether paroled entrepreneurs, including those who successfully start or grow a business in the United States, would qualify for an existing employment-based nonimmigrant or immigrant classification after an approved period of parole ends. The entrepreneur, if unable to qualify for an employment-based nonimmigrant or immigrant classification, most likely would be required to depart the United States and possibly move their operations abroad, eliminating possible further benefit to this country, and possibly creating some negative impacts to U.S. investors. Thus, reliance upon parole adds an additional degree of risk and unpredictability for the U.S. investors who may not be able to achieve the anticipated return on their investment, as well as any U.S. workers employed by or seeking employment with the start-up. This same degree of risk and unpredictability would generally not apply to entities started by U.S. entrepreneurs or even foreign entrepreneurs lawfully relying upon existing nonimmigrant or immigrant visa classifications.[94]

The Department has not identified any evidence—new or otherwise—that supports this analysis. Nor has it explained why the Department's earlier views, reached on analysis of the evidence then before it, were faulty.

NVCA, however, can put to rest any speculation that the Department may have as to whether investors will invest in startups founded by individuals with IER status. The answer is undoubtedly "yes." A broad cross-section of the nation's leading venture capitalists will invest in new startups only if the founder has the ability to live and work in the United States, and those same leading venture capitalists have confirmed that the IER program is an acceptable path for immigration status. Thus, the Department is factually wrong to suggest that U.S. investors will not invest in firms with IER founders.

NVCA can attest to this with extra confidence because it conducted a survey of its members to evaluate these facts.[95] 21 leading venture capitalists responded. After ensuring that each participant was a "qualified investor"[96] within the meaning of the IER, NVCA asked the investors three questions.

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93 *Id*. at 5263.

94 83 Fed. Reg. at 24,417.

95 We have attached the results of the survey as the first exhibit of the appendix.

96 *See* 8 C.F.R. § 212.19(a)(5).

The first was: "In making your investment decisions, is it important to you whether the founder(s) of a start-up may live and work in the United States?" The respondents answered:[97]

In making your investment decisions, is it important to you whether the founder(s) of a start-up may live and work in the United States?	%	Responses
Essential factor - I will only invest in a company if the founder(s) can live and work in the US.	66.67%	14
Important factor - Whether a company's founder(s) can live and work in the US is an important factor in my investment decision.	28.57%	6
Minor factor - Whether a company's founder(s) can live and work in the US is a minor factor in my investment decision.	0.00%	0
Irrelevant factor - It is irrelevant to my investment decision whether the founders can live and work in the US.	4.76%	1
Total	100%	21

20 of 21 respondents—over 95 percent—explained that it is either an "essential" or an "important" factor for their investment that a company's founders may live and work in the United States. And two-thirds of the respondents said it was "essential" to their investment decision; those investors indicated that they *will not* invest in a startup if a founder cannot live and work in the United States.

This data is not surprising. U.S. venture capital is "considered a 'high touch' business" in which venture capitalists "are generally much more intertwined with the startup than an ordinary investor."[98] Many venture capitalists "are reluctant to invest in businesses when they cannot have regular personal contact with the founding team, as such involvement and mentorship is often crucial to the success of an early business."[99]

Indeed, in response to our survey, NVCA members confirmed at length the importance of domestic presence of a startup's founders. Leading venture capitalists, for example, explained the following:[100]

- "Investing in start-ups usually involves intensive contact with the founders, usually every [f]ew days. We won't invest without this ability. And, generally [we] want to meet face to face at least monthly. This is not feasible with a business located in another country." Anthony Lamport, The Lambda Funds.

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97 *NVCA Survey: International Entrepreneur Rule*, 3 (June 22, 2018) [hereinafter *NVCA Survey*].

98 Declaration of Bobby Franklin at 3, *Nat'l Venture Capital Ass'n v. Duke*, No. 1:17-cv-01912-JEB (D.D.C. Nov. 29, 2017) (Dkt. No. 12-3).

99 *Id.*

100 *NVCA Survey* at 4-5.

- "Assuming the company is based in the US then the founder must be where the company management team is. The founder is the life blood of the company and needs to be present." Ted Schlein, Kleiner Perkins.

- "For our accelerator companies, the founder is making critical decisions and needs to be immersed in the innovation culture we created, surrounded by peers that can help them avoid mistakes and support their growth. Networking in this community also allows them access to US talent as they scale their growth." Shaun Arora, MiLA Capital (a/k/a Make in LA).

- "Active oversight of entrepreneurs is an essential element to successful venture investing." Pascal Levensohn, Dolby Family Ventures and Levensohn Venture Partners.

- "The founder needs to live in the US as the company needs access to a highly talented labor pool to fuel the growth of the company." Kurt Betcher, Norwest Venture Partners.

- "We need the founder to be able to hire, meet with partners and raise capital in the US. In addition to that, we need to be close to our founders at early stage companies to avail them of our relationships, resources and strategy assistance." Maha Ibrahim, Canaan Partners.

The second question NVCA asked its members was: "For qualifying entrepreneurs, IER provides up to 5 years of legal status. Would this 5-year limit impact your decision to invest in a startup company whose founder(s) currently live and work in the US on the basis of IER status?" Respondents replied:[101]

For qualifying entrepreneurs, IER provides up to 5 years of legal status. Would this 5-year limit impact your decision to invest in a startup company whose founder(s) currently live and work in the US on the basis of IER status?	**%**	**Responses**
No impact: The 5-year limit would have no impact on my investment decision.	33.33%	7
A little impact: The 5-year limit would have a little impact on my investment decision.	47.62%	10

[101] *NVCA Survey* at 6.

Significant impact: The 5-year limit would have a significant impact on my investment decision.	19.05%	4
Disqualifying: Because of the 5-year limit, I would never invest in a company with IER founders.	0.00%	0
Total	100%	21

For more than 80 percent of qualified investors, therefore, the limitation on the IER program would have no or only a "little" impact on their investment decisions. This data disproves the Department's recent suggestion—which the Department asserted without any evidence—that the limitations of the program make it ineffective. A very substantial number of leading investors will supply capital to startups with IER founders, notwithstanding the acknowledged risks of the IER program.

The third question in the survey was: "If the founder(s) of a portfolio company loses his or her US immigration status, would that affect the likelihood that you would supply additional investment to that company?" 20 respondents answered this question:[102]

If the founder(s) of a portfolio company loses his or her US immigration status, would that affect the likelihood that you would supply additional investment to that company?	**%**	**Responses**
Substantial effect: I would be substantially less likely to supply additional investment.	65%	13
Some effect: I would be somewhat less likely to supply additional investment.	35%	7
No effect: It would have no effect on my decision to supply additional investment.	0%	0
Total	100%	20

The study thus confirms that, if founders of a company lose their immigration status, NVCA members are either substantially or somewhat less likely to continue their investment in that company. The Department's suggestion that investors would continue to fund a startup company in these circumstances is belied by this data.[103]

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[102] *NVCA Survey* at 9.

[103] In its proposed rule, the Department fails to appreciate this reality. *See, e.g.*, 83 Fed. Reg. at 24,422 ("It is possible that when the IE leaves, the start-up could lose additional funding from both current and future investors, but it is also possible that current and future investors could be undeterred by the IE's departure and could continue to fund the start-up entity's continued operations and growth. DHS is not able to predict the behavior of these entrepreneurs or their investors at this time."); *id.* at 24,423 ("DHS cannot predict the behavior of a start-up entity's current or future investors."). On the contrary, as we explain, DHS decidedly *can* predict the behavior of many investors. That is especially true given recent trends: "While . . . a large pool of capital is available to the [venture

NVCA's data confirms what the Department initially concluded: entrepreneurs and their investors will use IER as a cornerstone of founding new, innovative companies in the United States. The Department has no evidence to the contrary.[104] As Pascal Levensohn of Dolby Family Ventures and Levensohn Venture Partners summed up, IER is certainly "better than nothing."[105]

B. Ending the IER program would therefore deny the United States the substantial economic, technological, and national security benefits that IER-founded startups would provide.

Rescinding the IER program would prevent the United States from realizing the substantial economic and security benefits that locating new startup companies in the United States will provide. Efforts taken to quantify these effects have shown that rescinding the IER will have enormous negative implications on the economy.

One economic analysis, conducted by the Partnership for a New American Economy, estimates that rescinding the IER will cost the U.S. hundreds of thousands of jobs and billions of dollars in lost GDP.[106] The full potential effects of rescinding the IER are stunning.

The New American Economy estimated the number of jobs that the IER would create over a ten-year period under three different scenarios. The first assumes that each IER firm creates only five jobs during its initial two-and-a-half-year period.[107] Using this assumption, the IER would create 135,240 jobs during the first ten years.[108] In the first year alone, this would

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capital] industry, investors are working to stay disciplined in their approach, translating into overall fewer deals taking place." *Venture Monitor 4Q 2017*, PitchBook, 3 (Jan. 15, 2018), perma.cc/Q7PE-PSEN.

[104] The IER program's results observed during its short window of operation are not indicative of the likely effects of the program. When USCIS launched the program following the district court's order, the press release announced its intent to move quickly to rescind the rule. It stated that "[w]hile DHS implements the IER, DHS will also proceed with issuing a notice of proposed rulemaking (NPRM) seeking to remove the Jan. 17, 2017, IER. DHS is in the final stages of drafting the NPRM." *See USCIS to Begin Accepting Applications Under the International Entrepreneur Rule*, USCIS (Dec. 14, 2017), goo.gl/RNtddq. Indeed, The U.S. Citizenship and Immigration Services (USCIS), by its own admission, has "not approved *any* parole requests." Letter from L. Francis Cissna, Dir., USCIS, to Charles E. Grassley, Chairman, U.S. Senate Judiciary Comm. 3 (Apr. 4, 2018) (emphasis added), goo.gl/M9rGr3. And a USCIS spokesperson suggested that international entrepreneurs "consult an immigration attorney and find an alternative vehicle." *Only 10 People Have Applied for Obama-Era Startup Visa*, Bloomberg (Apr. 24, 2018), goo.gl/uVdYFw. Because the Department has affirmatively suggested to entrepreneurs that they should *not* use IER during this time, the existing application rate is not probative of the program once it has been fully implemented—without USCIS's statement that it intends to rescind it hanging over the program. The Department has not suggested otherwise in its NPR, nor has it provided any data to suggest that IER would not be utilized in the manner the Department had earlier determined.

[105] *NVCA Survey* at 8.

[106] *Opportunity Lost: The Cost of Rescinding the International Entrepreneur Rule*, New Am. Econ. (June 2018), perma.cc/6BVZ-JJ6Z [hereinafter *Opportunity Lost*]. This study assumes that 2,940 foreign nationals would be annually eligible. *Id*. at 2. That is consistent with the Department's findings in promulgating the initial IER. 82 Fed. Reg. at 5242. The Department has not backed away from that factual determination now. *See* 83 Fed. Reg. at 24,421*; see also infra*, note 193.

[107] *Opportunity Lost* at 2.

[108] *Id*. at 3.

create more than $351 million in direct additional wages, and more than $252 million in indirect additional value added into the GDP.[109] The numbers would then increase over time.[110] The study thus projects that IER would have more than $5 billion of economic effect within the first ten years:[111]

Year	Total Jobs Created	Direct Additional Wages	Indirect Additional Wages/Earnings	Indirect Additional Value Added (GDP)
1	5,880	$351,366,986	$127,753,733.23	$252,737,499.97
2	11,760	$702,733,972	$255,507,466.47	$505,474,999.94
3	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
4	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
5	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
6	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
7	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
8	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
9	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
10	14,700	$878,417,465	$319,384,333.08	$631,843,749.92
Total	135,240	$8,081,440,676	$2,938,335,864.36	$5,812,962,499.29

Assuming, however, that IER-linked firms grew at the average rate of firms in the United States, those figures would increase significantly. Then, IER-linked firms would create more than 176,000 jobs within the first ten years.[112] And the broader economic effects would be even more substantial:[113]

Year	Total Jobs Created	Direct Additional Wages	Indirect Additional Wages/Earnings	Indirect Additional Value Added (GDP)
1	7,693	$459,705,139.92	$167,144,467.65	$330,664,895.79
2	15,386	$919,410,279.84	$334,288,935.29	$661,329,791.59
3	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
4	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
5	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48

[109] *Id*. at 6.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 7.

[113] *Id*.

6	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
7	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
8	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
9	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
10	19,233	$1,149,262,849.80	$417,861,169.12	$826,662,239.48
Total	176,939	$10,573,218,218.15	$3,844,322,755.87	$7,605,292,603.24

Finally, if the vast majority of IER-linked firms are related to STEM fields, the numbers grow greater yet. And it is virtually certain that the vast majority of venture capital-backed startups will be in the STEM fields. Indeed, the Department previously identified that STEM fields would dominate in this space.[114] Likewise, PitchBook—the leading data provider for the venture capital space—captures data on investment activity. In 2017, the vast majority of investment was in STEM fields, including software, pharmaceuticals biotechnology, healthcare, information technology, and energy.[115] Indeed, PitchBook's proprietary data indicates that, from 2013 until today, STEM companies represent 85.5% of the number of venture-backed investments.[116] And 88.9% of the capital invested during that time in U.S.-based venture-backed companies has been in a STEM-related company.[117]

Accordingly, when New American Economy assumes that a majority of startups are in the STEM field, the job creation protection grows to more than 429,000 in the first ten years.[118] In this scenario, the IER would account for more than $25 billion of direct additional wages over 10 years, and it would inject more than $18 billion of indirect additional value into the U.S. economy:[119]

Year	**Total Jobs Created**	**Direct Additional Wages**	**Indirect Additional Wages/Earnings**	**Indirect Additional Value Added (GDP)**
1	18,683	$1,116,439,317.20	$405,926,841.20	$803,052,344.69
2	37,366	$2,232,878,634.39	$811,853,682.41	$1,606,104,689.39
3	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73

[114] *See* 82 Fed. Reg. at 5276 ("Many high-growth firms are involved in activities classified in the STEM (science, technology, engineering, and math) fields. The high concentration of immigrant entrepreneurs in these industries has garnered much attention."); *id.* ("A survey of entrepreneurs in technology-oriented privately held companies with venture backing also showed about one-third were foreign born, and 61 percent held at least one patent."); *id.* ("The intense involvement of immigrant entrepreneurs in successful technology-driven activities suggests substantial economic contributions."); *id.* at 5279 (noting that DHS' analysis "focuses on the sectors of the economy linked to STEM activity").

[115] *Venture Monitor 4Q 2017*, PitchBook, 14 (Jan. 15, 2018), perma.cc/Q7PE-PSEN.

[116] This data was generated from PitchBook's proprietary platform as of 6/25/18 and analyzed by NVCA.

[117] *Id*.

[118] *Opportunity Lost* at 8.

[119] *Id.*

4	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
5	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
6	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
7	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
8	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
9	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
10	46,708	$2,791,098,292.99	$1,014,817,103.01	$2,007,630,861.73
Total	429,714	$25,678,104,295.54	$9,336,317,347.68	$18,470,203,927.95

If anything, the New American Economy study drastically *understates* the value of the IER to the U.S. economy, for at least two reasons. *First*, all of the numbers just described relate to each IER-linked firm's first two and a half years only, which corresponds to the initial 30-months of IER status.[120] New American Economy has not calculated the likely effect that those IER-linked startup firms will have on the economy for the entire life-cycle of the company, the majority of which will often occur *after* the initial 30 months of the company's existence. That is especially true given that IER-linked firms, by the very nature of the program and the rigorous and evidence-based approach to approving applications, are especially likely to become "high-growth firms" that contribute substantially to job growth in the United States.[121] The entire economic effects of IER are, therefore, enormous.

Second, New American Economy's STEM-specific analysis turns on the assumption that each STEM firm creates 21.37 jobs.[122] But even that estimate is likely too conservative. A report from the Bureau of Labor Statistics (BLS) indicates that high-employment-growth firms—which are the firms that satisfy the IER eligibility requirement[123]—create yet *more* jobs. BLS calculates that such firms created, on average, 43.3 jobs over the three-year period from 2009 to 2012.[124] This figure would more than double the economic implications.

Rescinding the IER program would also weaken U.S. national security. As we explained above, the United States would lose the ability to carefully regulate the exports of companies like SpaceX, as well as the ability to subpoena what would have been U.S.-based company records to assist law enforcement in their mission of protecting Americans.

The economic and national security costs of rescinding the IER are thus substantial, and the Department must account for them as it considers its proposal to rescind the IER.

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120 *Id.* at 6-8.

121 Clayton et al., *supra* note 37.

122 *Opportunity Lost* at 4.

123 *See* 82 Fed. Reg. at 5275; *see also id.* at 5267, 5273 (citing Nina Roberts, *For Foreign Tech Entrepreneurs, Getting a Visa to Work in the US Is a Struggle*, The Guardian (Sept. 14, 2014), perma.cc/L9FP-REKN).

124 Clayton et al., *supra* note 37.

C. Because there are no alternative immigration options for most international founders, rescinding the IER means closing the United States to this leading talent.

The NPRM suggests that, instead of the IER, alternative immigration options (such as E-2, EB-2-NIW, or EB-5 visas) may suffice. This factual assertion, however, conflicts with the Department's earlier findings—and the Department has offered no adequate reasoning to support its change in position.

The Department has already recognized[125] that most entrepreneurs have no viable alternatives to the IER. In particular, having previously reviewed the facts and considering the *same* visa options, the Department *rejected* the assertion "that sufficient avenues for international entrepreneurs already exist."[126]

The Department's new position demonstrates no awareness of the agency's previous conclusion, and the Department offers no reason for abandoning its earlier finding. None of the proposed alternatives would be a plausible substitute for the IER.

1. EB-5 visas are inadequate.

The EB-5 visa is entirely irrelevant to the problem solved by IER. The IER is for people "*receiving* substantial investment, grants or awards"—and that money must be funded by *U.S.-qualified* investors.[127] The EB-5 is different on both points. First, EB-5 visas are for foreign individuals who have "*invested* . . . or [are] actively in the process of investing" capital in the United States.[128] The EB-5 program is thus irrelevant for all but the sliver of entrepreneurs who fund themselves. Even if a foreign founder *could* fund himself, the founder's own money categorically does not count as "qualified investment" within the meaning of the IER, because it is only *U.S.* investors that qualify. That is because the IER is designed to incentivize the U.S. venture capital industry and others to fund the most promising entrepreneurs from around the globe to establish their new companies in the United States.

Not only is an EB-5 visa structurally deficient to accomplish the IER's ends, but it requires two to four times as much investment as the IER, and it is thus a poor fit for nascent startups.[129] And EB-5 visas have a backlog of five years or more.[130] Even if an EB-5 were an otherwise workable solution—and it is not—that delay is fatal to virtually any innovative startup venture, where timing and speed are critical. EB-5 visas are not a viable alternative.

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[125] 82 Fed. Reg. at 5267 ("DHS disagrees with the . . . assertion[] that sufficient avenues for international entrepreneurs already exist.").

[126] *Id*.

[127] *Id.* at 5238 (emphasis added).

[128] 8 U.S.C. § 1153(b)(5)(A).

[129] *Compare* 8 U.S.C. § 1153(b)(5)(C) (noting that the EB-5 visa recipients must invest at least $1,000,000 in capital, or $500,000 in certain "target employment areas"), *with* 82 Fed. Reg. at 5241 (noting that the IER requires $250,000 in investment or alternative demonstration of significant likelihood that the business will succeed).

[130] Javier C. Hernández, *Wealthy Chinese Scramble for Imperiled Commodity: U.S. 'Golden Visa,'* N.Y. Times (Apr. 27, 2017), goo.gl/WkzrmC.

2. E-2 visas are inadequate.

E-2 visas are even less promising. In fact, the E-2 visa program is in direct tension with the IER. The IER promotes *domestic* investment. Foreign investment does not count toward the rule's investment minimum. E-2 visas, by contrast, do not just encourage foreign investment. They require it. The visas are for "alien employee[s]" of companies that are at least half foreign-owned.[131] Thus, the IER and E-2 programs overlap only when a company has significant American investment but even *more* foreign investment. Ironically, the company might then have to turn away any further American investment, because too much of it would cause its employees to lose their visas.

That is only the first hurdle. Not only must half the company be foreign, but also it must be owned by citizens of the *same* foreign country.[132] Nor will just any country suffice. It must have signed a treaty with the United States[133]—something two-thirds of countries, including the five most populous non-U.S. countries, have not done.[134] Non-treaty countries include Brazil, China, India, Russia, Indonesia, Nigeria, Vietnam, and Myanmar. These conditions will exclude most foreign entrepreneurs, and even the lucky few who satisfy them will have limited flexibility to raise any more money. Plainly, EB-2 serves a very different goal than the IER. It is not a plausible substitute.

3. EB-2-NIW and O-1 visas are inadequate.

EB-2-NIW visas will also capture only a miniscule and inadequate portion of entrepreneurs. These visas are available only for professionals "holding advanced degrees or aliens of exceptional ability."[135] To obtain a visa of this sort, immigrants need not only an advanced degree, ten years of work experience, a processional license, membership in a leading professional society, awards, *or* a high salary—they must have *several* of those credentials.[136] These criteria are a Catch-22 for startup founders. By definition, these entrepreneurs have not yet successfully created their company. They want to come the United States to establish a successful business, but the EB-2-NIW visa will not let them in until after they have already done so.

But even if an entrepreneur could get around that problem, he or she would be at the end of a very long line: Depending on the country, the backlog for EB-2 workers is up to *one hundred and fifty years*.[137] Since the EB-2-NIW program is for all types of workers, entrepreneurs will have to wait behind hundreds of people who have no plans to start a business. The EB-2 visa is no substitute for IER.

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131 8 C.F.R. § 214.2(e)(3).

132 *Id*.

133 8 U.S.C. § 1101(a)(15)(E).

134 *See Treaty Countries*, U.S. Dep't of State, perma.cc/9KNS-8V5W (last visited June 27, 2018).

135 8 U.S.C. § 1153(b)(2).

136 *See Employment-Based Immigration: Second Preference EB-2*, USCIS, perma.cc/V7RP-KR5P (last visited June 27, 2018).

137 David Bier, *150-Year Wait for Indian Immigrants with Advanced Degrees*, Cato Inst. (June 8, 2018), perma.cc/343B-ZA5L.

O-1 visas present the same problem to an even greater degree. They are for individuals with "extraordinary ability," as demonstrated by "sustained national or international acclaim."[138] This definition will capture already well-established and widely recognized professionals, and very few entrepreneurs who are seeking funding.

The very purpose of the IER was to fill in the gaps left by other immigration programs.[139] Those gaps will necessarily return if the rule is rescinded. Without the rule, entrepreneurs will more often than not find it impossible to create successful startups to serve the United States.

D. If the IER is rescinded, the United States will lose out in the global competition for leading entrepreneurs.

Before the IER, the United States failed to aggressively recruit international entrepreneurs, counting on them to come to the U.S. without prompting and despite high barriers to lawful immigration. When the United States was the only significant player in the startup ecosystem, that strategy posed less cost on the country as a whole. But the international landscape is now quite different; "other countries see the benefits that entrepreneurship has brought to the American economy and are increasingly competing with the U.S."[140] As a result, the U.S. is increasingly losing out on this key driver of economic growth. Rescinding the IER would substantially amplify this growing problem.

Today, other nations are "employing aggressive recruitment strategies" to attract the international talent that every country—theirs and ours—needs to compete.[141] "While America was once the first and only choice for young dreamers with the next big idea, ambitious entrepreneurs now look to places like China, India, Brazil, and Singapore and see enormous markets and opportunities; receptive business climates; and governments that are eager to recruit them."[142]

Put simply, "the United States is no longer the sole—nor the most sophisticated—national player engaged in [the] global race for talent."[143] The list of countries eagerly recruiting foreign entrepreneurs is a long one. Australia,[144] Canada,[145] Chile,[146] France,[147] Germany,[148]

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138 *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, USCIS, goo.gl/Lwu3Cn.

139 82 Fed. Reg. at 5269.

140 *Kupor Testimony* at 3.

141 *Not Coming to America: Why the U.S. is Falling Behind in the Global Race for Talent*, P'ship for a New Am. Econ. & P'ship for N.Y.C., 1 (May 2012), perma.cc/2PUZ-HQKY.

142 *Id.* at 10.

143 Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. Rev. 148, 150 (2006), perma.cc/H77H-HWVF.

144 *Business Talent Visa*, Australian Gov't, Dep't of Home Affairs, perma.cc/AT8V-QTD2 (last visited June 13, 2018).

145 *Start-Up Visa Program*, Gov't of Can., perma.cc/9KKA-XNK7 (last visited June 13, 2018).

146 *Start-Up Chile Seed Opens Applications*, Start-Up Chile, perma.cc/92G3-N3GT (last visited June 13, 2018).

147 *French Tech Visa*, French Tech Visa, goo.gl/D4yCZU (last visited June 13, 2018).

148 *Visa for Self-Employment*, Ger. Fed. Ministry of Foreign Affairs & Energy, perma.cc/NR83-K5HE (last visited June 13, 2018).

Ireland,[149] Israel,[150] Italy,[151] New Zealand,[152] Portugal,[153] Singapore,[154] Spain,[155] and the United Kingdom[156] each have versions of a startup immigration program like the IER for would-be international entrepreneurs or similar initiatives to recruit foreign workers. Many more countries offer fellowships, grants and project funding, scholarship and allowances, tax benefits and subsidies, and other benefits in seeking to attract international talent.[157] The United Kingdom announced on June 13, 2018 an additional route that will "widen the applicant pool of talented entrepreneurs and make the visa process faster and smoother for entrepreneurs coming to the UK."[158] It is no coincidence that this announcement came in the middle of the comment period to rescind the IER. These other countries are improving their own programs for attracting international talent while the United States seeks to eliminate its program altogether.

These countries, of course, "aim to attract the same pool of highly skilled researchers[,] scientists," and entrepreneurs.[159] In other words, "America's loss is the world's gain."[160] As Instagram co-founder and Brazil native Mark Krieger noted, navigating the United States' complex visa system took longer than actually building Instagram.[161] As Krieger candidly admitted, "I had moments where I was like, 'Maybe I should just tell [co-founder Kevin Systrom] to forget about it.'"[162] Jyoti Bansal, founder of AppDynamics, expressed similar limitations: "I waited 7 years for my employment-based green card and I wanted to leave my job and start a new company but couldn't."[163] Today, AppDynamics employs more than 900 people and was purchased for $3.7 billion in 2017.[164]

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149 *Start-Up Entrepreneur Programme*, Irish Naturalisation & Immigration Serv., perma.cc/WLX2-B6FF (last visited June 13, 2018).

150 *Israel to Offer Startup Visa for Foreign Innovators*, Isr. Ministry of Econ. & Indus., goo.gl/Yahxdt (last visited June 13, 2018).

151 *Italia Startup Visa*, It. Ministry of Econ. Dev., perma.cc/6U95-TPTQ (last visited June 13, 2018).

152 *Entrepreneur Visas*, N.Z. Immigration, perma.cc/AJ4Y-2D3V (last visited June 13, 2018).

153 *Portugal StartUp Visa Applications*, Port. StartUps, perma.cc/N8LU-JSEA (last visited June 13, 2018).

154 *EntrePass*, Sing. Ministry of Manpower, perma.cc/S5P2-GP5L (last visited June 13, 2018).

155 *How to Successfully Obtain an Entrepreneur Visa (in Spain)*, Tech.eu, perma.cc/M5LP-GMWV (last visited June 13, 2018).

156 *Tier 1 (Entrepreneur) Visa*, U.K. Gov't, perma.cc/78FM-NEJD (last visited June 13, 2018).

157 *See The Global Competition for Talent: Mobility of the Highly Skilled*, Org. for Econ. Co-operation & Dev., Annex A at 1-49 (2008), perma.cc/NB5L-GUTZ.

158 *New Start-Up Visa Route Announced by the Home Secretary*, U.K. Gov't (June 13, 2018), perma.cc/6GT5-VVSC.

159 *The Global Competition for Talent*, *supra* note 157, Executive Summary at 16, perma.cc/VPY9-DQHR.

160 Vivek Wadhwa et al., *America's Loss is the World's Gain: America's New Immigrant Entrepreneurs, Part IV*, Kauffman Found. (Mar. 2009), perma.cc/343A-M85X.

161 Sarah Frier, *Getting a Visa Took Longer Than Building Instagram, Says Immigrant Co-Founder*, Bloomberg (Apr. 8, 2015), goo.gl/fdau9Q.

162 *Id.*

163 *Startup Visa Proposals and Job Creation*, Nat'l Found. for Am. Policy, 4 (Mar. 2016), perma.cc/RKB8-YB97.

164 *Id.*; Stuart Anderson, *A Guide for Future Immigrant Entrepreneurs*, Forbes (Dec. 3, 2017), goo.gl/HkURVL.

If the IER program is rescinded, many international entrepreneurs will surely "forget about" doing business in America. In the face of "an immigration system that is not designed to facilitate startup activity,"[165] many promising entrepreneurs will not wait for years to do business in United States. Instead, they will establish and grow their businesses abroad, depriving the United States of the benefits that the program would offer. That is especially true as those countries abroad vigilantly seek to recruit them.[166]

Those effects are becoming manifest in investment trends. "Two decades ago, U.S. startups received more than 90 percent of global venture capital investment. That number fell to 81 percent a decade ago and fell further to 54 percent last year."[167] In 2016, "China attracted $35 billion in venture investment in 2016 and is now the second largest destination in the world for venture capital."[168] Similarly, in 2006, the U.S. accounted for all ten of the largest venture deals in the world; by 2016, "six out of the ten largest venture deals in the world occurred in China."[169] That number grew to seven of the ten largest in 2017.[170] This is all to say, China's share of global innovation is increasing—at the expense of the United States.

Providing access to the United States for foreign entrepreneurs is critical to maintain U.S. leadership in this field. A 2013 study found that one-third of U.S. venture-backed companies that went public between 2006 and 2012 had at least one foreign-born founder.[171] In order to ensure that America remains at the forefront of innovation and entrepreneurship, it is vital that investors be able to leverage the talent of those people who seek to bring their talent and creativity to the United States. Rescinding the IER would simply benefit China and the host of America's competitors who seek to grow their entrepreneurial economy at our expense.

E. The Department has not given an adequately reasoned basis for rescinding the IER program.

The Immigration and Nationality Act provides that the Secretary of Homeland Security has the authority to grant parole to those aliens who stand to provide a "significant public benefit" to the United States.[172] By statute, the Department of Homeland Security's "primary

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165 *Startup Visa Proposals and Job Creation*, Nat'l Found. for Am. Policy, 2 (Mar. 2016), perma.cc/RKB8-YB97.

166 As the MIT Graduate Student Council explained, MIT students and faculty have created more than 30 thousand companies that employ 4.6 million people and generate annual revenues of $1.9 trillion. Comments Regarding International Entrepreneur Rule: Delay of Effective Date, MIT Graduate Student Council (Aug. 10, 2017), perma.cc/AF2F-AKY9. But 43 percent of those graduate students are international students, so many of these companies are founded abroad in light of the "absence of straightforward immigration solutions for [U.S.]-trained entrepreneurs." *Id. See also* Comments Regarding International Entrepreneur Rule: Delay of Effective Date, Bus. Forward (Aug. 10, 2017) (collecting comments from "a cross-section of industries," documenting the uniquely valuable impacts that foreign-born entrepreneurs have throughout the nation), perma.cc/KP4P-5REL.

167 *NVCA, Entrepreneurs, and Startups File Lawsuit Challenging Delay of International Entrepreneur Rule*, Nat'l Venture Capital Ass'n (Sept. 19, 2017), perma.cc/4ZYJ-VCZW.

168 *Kupor Testimony* at 3.

169 *Id*.

170 This data was generated from PitchBook's proprietary platform as of 6/25/18 and analyzed by NVCA.

171 Anderson, *supra* note 46, at 5.

172 8 U.S.C. § 1182(d)(5).

mission" requires it to "ensure that the overall economic security of the United States is not diminished."[173] Additionally, the Department is tasked with "reduc[ing] the vulnerability of the United States" to national security threats.[174]

As the Department observed in its final rule, "[t]he Secretary's parole authority is expansive."[175] The IER program, designed specifically to provide a significant public benefit to the United States,[176] plainly falls under the purview of the Secretary's authority. Yet the Department now seeks to undo the rule, despite that it will create jobs, grow American wealth, narrow the budget deficit, bolster the nation's long-term economic security, keep critical new technologies on American soil and protected by American laws, and promote the national security of the United States. The only practical explanation that the Secretary has offered for rescinding the IER is "resource allocation." To call this backward would be an understatement.

As we have explained,[177] there are no viable alternative mechanisms for most international entrepreneurs to obtain the immigration status necessary for them to found there companies in the United States and for venture capitalists to be willing to invest in their startups. Rescinding the IER program necessarily means that the mass of entrepreneurs seeking to do business in the United States will be unable to do so—and they will go elsewhere, taking their job-growing, security-fostering efforts to other nations. In turn, the United States will necessarily be deprived of the "business activity, innovation, and dynamism" that these international entrepreneurs would provide.[178] The nation will be deprived of the "research and development," "jobs for U.S. workers," and "start-up entities with high growth potential" that the Department acknowledges these international entrepreneurs would produce.[179]

Despite the manifest benefits of the IER, the Department baldly asserts that "the program is not a good use of DHS resources."[180] In light of all the benefits identified in our comments and by the Department when it first promulgated the IER, that determination is not plausible.

The Department concedes multiple times that the IER program will pay for itself: The monetary costs associated with administering the program are recovered by the application fees that USCIS charges.[181] Indeed, the original rule requires that "[a]pplicants for parole under this rule will be required to submit a filing fee to *fully cover* the cost of processing of

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173 6 U.S.C. § 111(b)(1)(F).

174 *See id.* § 111(b)(1).

175 82 Fed. Reg. at 5242.

176 In fact, the program is so merit-based that "only an estimated 0.00004 percent of the world's population would likely be eligible." Doug Rand & Stuart Anderson, *Doesn't Trump's America Need More Entrepreneurs?*, Bloomberg (June 14, 2018), perma.cc/Q4U7-98CV.

177 *Supra*, pages 22-24.

178 82 Fed. Reg. at 5238.

179 *Id.*

180 83 Fed. Reg. at 24,421.

181 *See id.* at 24,418, 24,421.

applications."[182] As a matter of program design, therefore, it *cannot* cost the Department any resources that it will not recoup.

The program, moreover, has already been live since mid-December 2017,[183] and the Department has not pointed to a single net dollar of cost incurred in running the program. And, because the IER program is now live, the Department cannot identify any initiation or training costs. Those resources have, the Department asserts, already been expended.[184]

In an apparent recognition of this fact, the Department instead asserts—without empirical support—that it "will not be able to offset the opportunity costs" associated with implementing the program.[185] But if opportunity cost were really the driving concern, the Department could charge higher application and processing fees to hire more personnel. It has not proposed to do so—again, without explanation.

Not only does the Department fail to substantiate its assertion concerning opportunity costs with evidence or explanation, but it also makes no effort to weigh the supposed opportunity costs of the IER program against the acknowledged benefits (direct and indirect) that the program will generate. On the contrary, the Department has incorporated its "previous findings that foreign entrepreneurs have made substantial and positive contributions to innovation, economic growth, and job creation in the United States, and that therefore the removal of the rule could cause potential loss of some of these economic benefits."[186] According to the Supreme Court, the Department must "examine the relevant data and articulate a satisfactory explanation for its action."[187] The Department's *ipse dixit* about "opportunity cost" is not sufficient to that task.

That is especially so because the opportunity costs are not one-sided. Rescinding the IER program would forego the opportunity to realize all the gains that the Department has recognized would follow from the IER.[188] It would impose a further opportunity cost of depriving the United

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[182] 82 Fed. Reg. at 5268 (emphasis added).

[183] *USCIS to Begin Accepting Applications Under the International Entrepreneur Rule*, *supra* note 104.

[184] *See* Declaration of Daniel Renaud, *Nat'l Venture Capital Ass'n v. Duke*, No. 1:17-cv-01912-JEB (D.D.C. May 22, 2018) (Dkt. No. 41-1); Declaration of Daniel Renaud (June 25, 2018) (Dkt. No. 44-1).

[185] 83 Fed. Reg. at 24,418.

[186] *Id.* at 24,421.

[187] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

[188] *E.g.*, 82 Fed. Reg. at 5238 ("DHS believes that this final rule will encourage foreign entrepreneurs to create and develop start-up entities with high growth potential in the United States, which are expected to facilitate research and development in the country, create jobs for U.S. workers, and otherwise benefit the U.S. economy through increased business activity, innovation, and dynamism."); *id.* at 5242 ("DHS believes this rule will encourage entrepreneurs to pursue business opportunities in the United States rather than abroad, which can be expected to generate significant scientific, research and development, and technological impacts that could create new products and produce positive spillover effects to other businesses and sectors. The impacts stand to benefit the economy by supporting and strengthening high-growth, job-creating businesses in the United States."); *id.* ("DHS anticipates that establishing a parole process for those entrepreneurs who stand to provide a significant public benefit will advance the U.S. economy by enhancing innovation, generating capital investments, and creating jobs."); *see also* 83 Fed. Reg. at 24,417 ("DHS stands by its previous findings that foreign entrepreneurs make substantial and positive contributions to innovation, economic growth, and job creation in the United States.").

States of technological and national security benefits, which are central to the Department's mission. In its perfunctory discussion of relative costs and benefits, the Department focuses exclusively on administrative costs (which it previously found would be a net wash) and nowhere weighs the nominal compliance costs of running the program against the significant consequences of rescinding it. We are unable to comment on the substance of the Department's analysis of the relative opportunity costs because there is no substantive analysis to respond to.

IV. The Department has not complied with essential procedural requirements.

Agencies may not "impos[e] unacceptable or unreasonable costs on society."[189] Thus, they must exhaustively consider the social and economic effects that their economically significant regulations will have. They must also leave adequate time for the affected parties to do the same. These procedural requirements are established by Executive Order 12866, the Regulatory Flexibility Act, and the Administrative Procedure Act. Each helps to ensure that agencies act in the public interest. But the Department has complied with none. Before taking further action on the IER, it must address these procedural shortcomings.

A. The Department has not complied with Executive Order 12866.

Recognizing that federal regulations must "impose the least burden on society," the President promulgated Executive Order (E.O.) 12866.[190] Under the order, agencies must subject economically significant regulations to a rigorous cost-benefit analysis. The Department has not complied with the order because it has failed to undertake the kind of cost-benefit analysis required. As a result, the Department proposes to do exactly what the order was designed to prevent—ignore the proposal's most important costs. The NPRM is therefore procedurally invalid in its current form.

1. The IER is economically significant under E.O. 12866.

Under the order, rules are economically significant if they are "likely to . . . [h]ave an annual effect on the economy of $100 million or more" or "adversely affect in a material way the economy, a sector of the economy, productivity, competition, [or] jobs."[191] The IER qualifies under either definition.

First, the IER was promulgated on the basis of certain estimates that the Department reached—and that the Department does not now challenge. Previously, the Department "estimate[d] that 2,940 entrepreneurs will be eligible for parole annually."[192] The Department does not now disagree.[193] To be eligible, entrepreneurs generally must have obtained at least

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189 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) [hereinafter E.O. 12866].

190 *Id.*§ 1(b)(11).

191 *Id.* § 3(f).

192 82 Fed. Reg. at 5242.

193 83 Fed. Reg. at 24,421. Nor could it. Previously, the Department analyzed multiple sets of data to arrive at this conclusion. The Department began by estimating available public and private investment capital and the number of firms in which that capital is invested. 82 Fed. Reg. at 5277-78. It also cross-checked its analysis by examining a database of startup companies. *Id*. at 5278-79. The Department has not identified any factual material at odds with these conclusions, and it states that it will not object to its earlier findings.

$250,000 in private startup capital or $100,000 in public startup capital.[194] Of course, many companies will have obtained far more than these requirements.

The Department previously estimated that of the 2,940 annual parole grants, there would be roughly "2,105 new firms with investment capital and about 835 new firms with Federal research grants."[195] If these companies each obtained only the minimum investment for the respective category, that would amount to more than $609 million annually in investment capital.[196] Indeed, even if all of the 2,940 new firms obtained the $100,000 fundraising threshold for publicly funded entities, the rule would still have an annual impact of $294 million. The Department's own assumptions plainly indicate that the rule affects the economy in an amount of more than $100 million annually.

Second, the effect on the economy of rescinding the IER would exceed $100 million many times over. As we described earlier, New American Economy's conservative estimate is that a rescission will lower GDP by about $600 million per year.[197] More likely, its effect will be over $800 million and may exceed $2 billion per year.[198] To be significant, a rule need only "*likely*" have an effect greater than *$100 million*. The IER—the express purpose of which is to foster domestic investment in startup companies founded by international entrepreneurs—assuredly crosses that threshold.

Third, the effect on employment of rescinding the IER independently establishes its economic significance. As we described earlier, estimates show that, over ten years, the IER is likely to create between 135,240 and 429,714 jobs. As the New American Study concludes:

> Given this range of job creation outcomes, it is clear that keeping the IER on the books and allowing it to be implemented would be a win-win for the U.S. economy. To put these findings into more context, the second, middle-range estimate shows that the IER would produce more jobs than the number of people GE employs in the United States—roughly 131,000 people. In the third scenario, the total number of jobs created reaches more than 429,000 workers, almost 50 percent more than the number of taxi drivers and chauffeurs working in the entire country in 2014.[199]

Fourth, as we have described,[200] the rule has a significant effect on the venture capital sector of the economy. In 2017 alone, "214 venture capital funds raised $32.8 billion to deploy into promising startups."[201] Ensuring that international entrepreneurs are physically present in the United States is essential to most venture capital firms' willingness to invest in immigrant-

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194 82 Fed. Reg. at 5239.

195 *Id*. at 5273.

196 ($250,000 * 2105) + ($100,000 * 835) = $609,750,000.

197 *See supra*, text accompanying notes 106-113.

198 *Id*.

199 *Opportunity Lost*, *supra* note 106, at 9.

200 *See supra*, Part III.

201 *2018 Yearbook*, *supra* note 18.

founded companies.[202] Rescinding the IER would immediately undermine investors' willingness to support startups founded by foreigners here on American soil, impacting venture capital investing alone by more than $100 million per year. [203] As we have described, a survey of NVCA members reveals that more than 95 percent—20 of 21 respondents—view it an "essential" or an "important" factor for their investment that a company's founders may live and work in the United States.

The rescission would be economically significant if it had just one of these effects. The presence of all of them confirms that further economic scrutiny under E.O. 12866 is required.

2. The Department has not subjected the rescission to the required cost-benefit analysis.

Because the Department mistakenly concludes that rescinding the IER is not economically significant,[204] it has not undertaken the required cost-benefit analysis. That is not a defensible conclusion. Although the IER's purpose was to promote innovation, the Department did not even "attempt[] to estimate the total number of jobs that might not be produced or . . . new economic activity that might not take place with the removal of [the] rule."[205] It is hard to imagine how the Department could have acted without this information. With no data on the likely effects of the IER, the agency's decision was just a guess. That is not permissible under the APA.[206]

The executive order requires agencies to confront a regulation's main effects and quantify them to "the extent feasible."[207] Even when an effect is uncertain, the agency is not off the hook. It still must "report benefit and cost estimates . . . that reflect the full probability distribution of potential consequences"—including "[w]here possible, . . . the upper and lower bound estimates."[208] And even "[i]f fundamental scientific disagreement or lack of knowledge prevents construction of a scientifically defensible probability distribution, [the agency] should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each alternative scenario."[209]

If that too is impossible, an agency still may not throw up its hands and move on. Instead, it must "provide a discussion of the strengths and limitations of the qualitative information. This should include information on the key reason(s) why they cannot be quantified."[210] If the reason is a lack of data, the agency should consider "deferring the decision . . . pending further

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202 *See supra*, text accompanying note 103.

203 *See supra*, text accompanying notes 196-198.

204 *Removal of International Entrepreneur Parole Program*, Office of Info. & Regulatory Affairs, perma.cc/7YPX-CZZ6.

205 83 Fed. Reg. at 24,421.

206 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency conclusions must be supported by reasoning and evidence).

207 E.O. 12866 § 6(a)(3)(C).

208 *Circular A-4*, Office of Mgmt. & Budget, 18 (Sept. 17, 2003), perma.cc/HC7J-57MQ.

209 *Id*.

210 *Id.* at 27.

study."[211] And even if the ultimate dollar effect of a policy is incalculable, the agency should still quantify "informative physical units."[212]

The Department has done none of this. Instead, it asserts that the analysis would depend on "the extent to which entrepreneurs would avail themselves of other immigration programs," something the Department claimed it was "not able to predict."[213] This recitation is inadequate under E.O. 12866. The Department must explain, at minimum, *why* a prediction is impossible. In fact, the Department easily could have obtained an answer to its question. As we explained elsewhere in these comments, very few entrepreneurs would have other programs available. The Department could have obtained precise numbers through a simple survey.

Even if the number of entrepreneurs with access to alternative programs was truly unknowable, the Department should have calculated the expected economic impact of the rescission per affected entrepreneur. Then, it could have calculated the total economic impact under various assumptions about the number of people who would be affected. Had it done so, it might have realized that the regulations would cost hundreds of millions of dollars even under a very conservative estimate, as we have just demonstrated above. To comply with the executive order, the Department must issue a supplemental notice providing the absent analysis.

B. The Department failed to comply with the Regulatory Flexibility Act.

The proposal to rescind the IER has not been conducted in compliance with the Regulatory Flexibility Act (RFA).[214] The RFA was developed in recognition of the economic importance of small businesses, and it attempts to ensure that regulations be promulgated with these entities in mind. Thus, the RFA requires agencies to analyze the impact a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative.[215] If the agency has performed an analysis and developed enough information to support a determination of no- or low-impact for small entities, the agency can certify that there would not be a "significant economic impact on a substantial number of small entities."[216] Importantly, if an agency does not have the factual data to support a certification, it cannot certify and must comply with detailed RFA impact analysis requirements, including the identification of alternatives that minimize the increase in cost for small businesses.[217] This assessment of less burdensome alternatives is at the heart of the protections afforded under the RFA.

The Department asserts that the RFA does not apply to its proposal to rescind the IER because "there would be [no] direct impact to entrepreneurs who are individuals" and "impacts

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211 *Id.* at 39.

212 *Id.* at 26.

213 83 Fed. Reg. at 24,421.

214 5 U.S.C. § 601 *et seq.*; *see also Comment Letter on Proposed International Entrepreneur Rule*, U.S. Small Business Administration (Oct. 14, 2016), goo.gl/4uZxwN.

215 5 U.S.C. § 604(a).

216 *Id.* § 605(b).

217 *Id.* § 603.

imposed on small entities that are tied to these entrepreneurs" would be only "indirect."[218] Both positions are wrong.

First, there *would* be a direct impact on individual entrepreneurs because, as we have shown, alternative avenues for parole or immigration status are legally inadequate and will often be unavailable as a practical matter. In addition, the methods for obtaining alternative parole or immigration status are different and very likely to be more costly.

Second, the impact on small businesses founded by international entrepreneurs would not be indirect. International entrepreneurs covered by the IER are not merely employees of the small businesses they found; rather, they are closely tied to and typically share an identity with their businesses. In fact, they must have "significant . . . ownership" in the business.[219] They must also have "an active and central role in the operations and future growth of the entity."[220] And they must continue to work for the business for the duration of the parole.[221] NVCA's survey data confirms that the presence of the founder is critical to investment in the business itself.[222] And the founder's centrality to the business is confirmed by the Department's own acknowledgement that the startup risks failing if the entrepreneur leaves.[223] For all of these reasons, the impact of rescinding the IER on paroled entrepreneurs' businesses would not be "indirect." Nor would any of these consequences be indirect in venture capital firms that qualify as small businesses—a point that goes entirely unaddressed in the NPRM.

Remarkably, the Department acknowledges that it lacks the data necessary to undertake the required RFA analysis: "DHS does not currently have conclusive information to determine how many [IER-linked startups] would be small entities and what the impact might be," nor does it "have enough information at this time to estimate the number of small entities that may employ the spouses of these entrepreneurs."[224] The NPRM then "welcomes public comments or data on the number of small entities that might be impacted by this proposed rule and what the impact might be to those small entities."[225]

That is not how the RFA and the APA work. According to the RFA's plain language, the Department was required to provide an initial impact analysis in the *Federal Register* at the time the rule was proposed,[226] and later to publish a final analysis, taking account of public comments on the initial analysis, with the final rule.[227] This required the Department to describe the "'no

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218 83 Fed. Reg. at 24,424.

219 82 Fed. Reg. at 5239.

220 *Id.*

221 *Id.* at 5240.

222 *See supra*, pages 15-19.

223 *See* 83 Fed. Reg. at 24,417.

224 *Id.* at 24,425.

225 *Id.*

226 5 U.S.C. § 603(a).

227 *Id.* § 604(a).

action' baseline: what the world will be like if the proposed rule is not adopted."[228] It is manifestly inadequate for the Department to state that it lacks the data and evidence to describe the no-action baseline and, in turn, to place the burden on commenters to provide it with the missing information. That follows not only from the text of the RFA, but from the basics of the APA itself: A "conclusory statement with no evidentiary support in the record does not prove compliance with the Regulatory Flexibility Act."[229]

In the absence of the pertinent data or an initial analysis of that data, we are unable to comment on the Department's RFA analysis, except to say that it has not undertaken one.

Nor does it appear that the Department considered meaningful alternatives to the proposed rescission of the IER. Although the Department considered adjusting the investment threshold,[230] it did not explain how such an adjustment would have served as an alternative to achieving the Department's goal of avoiding opportunity costs. Other alternatives are readily apparent. For example, the Department could consider increasing application and processing fees, so that the IER program is not just revenue-neutral but in fact generates a positive cash flow sufficient to offset the cost of hiring additional Department personnel, avoiding the supposed "opportunity costs" of assigning personnel to the IER program. This is an obvious alternative to "accomplish the [Department's] stated objectives" while "minimiz[ing] [the] significant economic impact of the proposed rule on small entities"[231] that the Department is required by statute to address.

In light of these shortcomings, the Department at minimum must issue a supplemental notice with the missing data and analysis and provide the public an opportunity to comment before issuing a final rule.

C. The Department has not given adequate time to comment.

The Department, moreover, has failed to provide the public a meaningful "opportunity to participate in the rule making."[232] In the context of this rule change, the 30-day window to comment on its proposal is inadequate and unreasonably short.

Prior to publishing the NPRM, the Department failed to undertake a thoroughgoing investigation or analysis of the IER's costs or benefits. Indeed, the Department has repeatedly and candidly admitted that it lacks the necessary evidence or data to make an informed decision about the costs and benefits of the IER.[233] Although it is not the public's burden to do so, we

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228 *Circular A–4*, *supra* note 208, at 2.

229 *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990).

230 83 Fed. Reg. at 24,425.

231 5 U.S.C. § 603(c).

232 *Id.* § 553(c).

233 *See*, e.g., 83 Fed. Reg. at 24,423 (stating that it "does not have information to determine how many individuals [would be affected by an alternative proposal]," but "welcom[ing] any public comment"); *id.* at 24,421 (stating that it was unable to "estimate the total number of jobs that might not be produced or to quantify any new economic activity that might not take place with the removal of this rule," but "specifically request[ing] comment" on this point); *id*. (stating that it "is not able to predict which other programs these entrepreneurs would be eligible for," but "request[ing] any data or comments"); *id.* at 24,424 ("requesting more information on the[] impacts" of the proposal

have endeavored to collect evidence to fill the gaps—evidence that uniformly casts doubt on the Department's factual assertions. Yet the unduly short comment period has precluded us and other commenters from adequately addressing the evidentiary holes in the NPRM.

Against this background, the Department should have given parties at least 60 days to comment. Anything less is contrary to extensive executive branch authority and past practice. The Administrative Conference has instructed that "agencies should use a comment period of at least 60 days" for "significant regulatory actions,"[234] a category to which the IER indisputably[235] belongs. Further, E.O. 12866 provides that a "meaningful opportunity to comment on any proposed regulation . . . in most cases should include a comment period of not less than 60 days."[236] And E.O. 13565 agrees that "[t]o the extent feasible and permitted by law, . . . [the] comment period . . . should generally be at least 60 days."[237] Accordingly, agencies typically use a 60-day window.[238]

The Department has offered no justification for a shorter window. Furthermore, as the District Court for the District of Columbia recently noted, the agency's long delay in proposing this rule contradicts the claim that rescission of delay is a matter of any urgency.[239] Therefore, the 30-day window is unreasonable and violates the APA. When the Department reissues its proposal to cure the other defects, it should give parties at least 60 days to comment. And, in any event, this defect is alone a necessary reason why the Department must reissue its proposed rule.

V. The Department must comply with the Congressional Review Act before it promulgates a final rule.

The Congressional Review Act (CRA)[240] creates a streamlined procedure for Congress to monitor agency regulations. It imposes heightened requirements on agencies when they promulgate "major rules." Agencies must alert the Comptroller General to their major rules, so that he can prepare a report on them for Congress.[241] And they must delay their effective date.[242]

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on small businesses); *id*. at 24,425 (noting that it "does not currently have conclusive information to determine how many [impacted] entities would be small entities" and "does not have enough information at this time to estimate the number of small entities that may employ the spouses of these entrepreneurs," but "welcom[ing] public comments or data on the number of small entities that might be impacted").

234 *Rulemaking Comments,* Admin. Conference of the U.S. (June 16, 2011), perma.cc/ERF9-UBAJ.

235 While the Department incorrectly concluded that the IER was not "economically significant," it did correctly note that the regulation was at least "significant." 83 Fed. Reg. at 24,420.

236 E.O. 12866 § 6(a)(1).

237 Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011).

238 *E.g., Regulatory Timeline*, Regulations.gov, perma.cc/B52W-NUXQ ("Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods.").

239 *Nat'l Venture Capital Ass'n v. Duke*, 2017 WL 5990122, at *16-17 (D.D.C. 2017).

240 5 U.S.C. § 801 *et seq.*

241 *Id.* § 801(a)(1)(A)(ii).

242 *Id.* § 801(a)(3)(A).

The Department has stated that it does not intend to abide by these requirements, because it concluded that the rescission is not a major rule.[243] This assertion is incorrect. A rule is major if it is "likely to result in an annual effect on the economy of $100,000,000 or more" or result in "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to complete with foreign-based enterprises in domestic and export markets."[244]

As we have described above, this rule qualifies as major on both grounds. First, rescinding the IE Rule is likely to have an effect on the economy far exceeding $100 million,[245] and a significant adverse effect on jobs. In addition, it also will harm innovation and the ability of American venture capitalists to compete with their foreign rivals.[246]

Therefore, if the Department promulgates a final version of this rule, it must go through the CRA's procedures. Otherwise, the rule will be invalid, and the lack of notice will prevent Congress from fulfilling its role as the "ultimate guardian[] of the liberties and welfare of the people."[247]

VI. Conclusion.

In sum, NVCA urges the Department to not continue with its proposed rescission of the International Entrepreneur Rule. The program provides enormous benefits to the United States as a whole, including substantial economic growth for the U.S. economy and significant contributions to U.S. national security. And it helps ensure that the United States remains a leader in newly emerging and growing industries. The Department has failed to adequately justify the change in position represented by the proposed rule, or to account for the enormous costs that it will impose on the national economy and national security.

For all of these reasons, the Department must withdraw the proposed rule. If it does not leave the IER in place and unchanged, it must at minimum work with stakeholders, including the venture capital community and Small Business Administration, to develop a revised rule that is more in line with the facts on the ground and the national interest.

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243 83 Fed. Reg. at 24,425.

244 5 U.S.C. § 804(2).

245 *See supra*, text accompanying notes 196-198.

246 *See supra*, Section II.D.

247 *Mo, Kan. & Tex. Ry. Co. of Tex. v. May*, 194 U.S. 267, 270 (1904).