

United States Senate
WASHINGTON, DC 20510

August 23, 2021

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro:

We write today to express our concern about the U.S. Department of Homeland Security's (DHS) lack of transparency regarding the issuance of notices to migrants encountered at the Southwest border. According to news reports and Congressional testimony, DHS has begun issuing notices to some migrants encountered at the Southwest border that direct these migrants to report to an immigration court or a DHS office.¹ This process differs from past DHS practice. Senators and Members of Congress have requested information regarding these notices on multiple occasions. However, DHS has not provided formal, written information about these notices since the new process was instituted in March.² We ask that the U.S. Government Accountability Office (GAO) examine, in general, DHS practices relating to issuance of notices or appearance requests to migrants encountered at the Southwest border and, specifically, DHS's use of a process known as "notice to report to ICE [U.S. Immigration and Customs Enforcement]" to release tens of thousands of migrants before formally placing them into removal proceedings.

U.S. Customs and Border Protection (CBP) has encountered over 1 million migrants at the Southwest border this fiscal year. To date, CBP has already exceeded the number of migrants encountered during the entirety of FY 2020, FY 2019, and FY 2018. CBP has set a 20-year record for the number of migrants encountered during the months of March, April, May, June, and July this year.³ DHS stated in recent court filings, "Based on current trends, the Department expects that the total encounters this fiscal year are likely to be the highest ever recorded . . ."⁴

¹ *U.S. Customs and Border Protection Resource Management and Operational Priorities: Hearing before the Subcomm. on the Dep't of Homeland Sec. of the H. Comm. on Appropriations*, 117th Cong. (May 19, 2021) (statement of Troy Miller, Senior Official Performing the Duties of the Comm'r, U.S. Customs and Border Protection), available at <https://appropriations.house.gov/events/hearings/us-customs-and-border-protection-resource-management-and-operational-priorities>; see Talia Kaplan, *Democrat Cuellar says migrants being released into US without notices to appear in court*, FOX NEWS (Mar. 23, 2021).

<https://www.foxnews.com/politics/democrat-cuellar-migrants-released-without-notice-appear-court>.

² *DHS Actions to Address Unaccompanied Minors at the Southern Border: Hearing before the S. Comm. on Homeland Sec. and Gov't Affairs*, 117th Cong. (May 13, 2021) (statement of Sen. James Lankford, Member, S. Comm. on Homeland Sec.).

³ U.S. Customs & Border Protection, *Southwest Land Border Encounters* (last updated August 12, 2021), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁴ *Huisha-Huisha v. Mayorkas*, Civ. A. No. 21-100, (D.D.C. 2021), Defs.' Mot. Leave File Suppl. Decl., ECF No. 113.

This ongoing crisis is straining the DHS' resources and raises significant questions about its ability to conduct its border security mission.

By statute, if an immigration officer determines that an arriving alien is inadmissible based on possessing fraudulent documentation or no valid entry document at all—a descriptor which covers most if not all migrants arriving on the Southwest border—the officer “shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”⁵ If a migrant indicates an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their country, then he or she is referred to a U.S. Citizenship and Immigration Services (USCIS) asylum officer who will conduct a credible fear screening to determine whether the migrant has a credible fear of persecution in his country of origin. If the migrant passes the credible fear screening, he will be issued a notice to appear (NTA) and placed into removal proceedings. Once the migrant receives a NTA, he will be required to appear in immigration court on a specific date “to show why [he/she] should not be removed from the United States.”⁶ By law and regulation, the issuance of the NTA formally places the migrant into removal proceedings.⁷

After quickly exhausting its migrant detention capacity between January and March 2021, the Biden Administration instituted a policy known as “notice to report to ICE.” According to Acting Commissioner Troy Miller, CBP instituted this process in the Rio Grande Valley (RGV) sector on March 19, 2021 after encountering 2,439 migrants in a single day in the RGV sector alone. Acting Commissioner Miller noted that CBP had stretched its detention facilities well-beyond their capacity and could not house the nearly 2,500 migrants that had arrived that day. CBP decided to manage this surge by instituting the “notice to report” process, under which migrants are asked to report to ICE within 60 days of arriving at their intended destination.⁸

Under the notice to report process, it is our understanding CBP will collect biometrics and perform certain national security checks before releasing the migrant from custody. Upon completing those checks, CBP would complete Form I-385, Form I-213, and issue Form G-56 to instruct the migrant to report to ICE not later than 60 days after receiving Form G-56. Upon reporting to ICE, ICE would issue the migrant an NTA.⁹ While current statutory and regulatory guidance requires migrants to be issued an NTA and placed into removal proceedings immediately upon release from CBP custody, the notice to report process could allow migrants to abscond from DHS before they are issued an NTA and placed into removal proceedings.

⁵ 8 U.S.C. 1225(b)(1)(A)(i).

⁶ 8 U.S.C. § 1125(b)(1)(A)-(B).

⁷ 8 U.S.C. § 1229(a)(1) (“In removal proceedings under section 1229a of this title, written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any”) (emphasis added); 8 C.F.R. § 1239.1(a) (“Every removal proceeding conducted under section 240 of the Act [...] is commenced by the filing of a notice to appear with the immigration court.) (emphasis added).

⁸ *Supra* note 1 (at 16:55).

⁹ *Supra* note 1.

ICE informed staff on the Senate Homeland Security and Governmental Affairs Committee (HSGAC) and Senate Judiciary Committee that, as of July 30, 2021, 65,531 migrants had been issued notices to report. Of those 65,531 migrants, 18,065 have not reported to ICE and are past the 60-day window.¹⁰ Senators and their staff have repeatedly requested updates on the number of migrants issued notices to report and information about the policy and operational guidance provided to CBP and ICE officers to implement this process; however, CBP, ICE, and DHS have not yet provided this information to the Senate or to the public.

Further complicating this situation, the Supreme Court held in *Pereira v. Sessions* that NTAs that do not specify the time or place of the removal proceedings do not stop an alien's accrual of the 10 years of continuous presence needed to qualify for a special type of relief known as cancellation of removal.¹¹ The Court recently clarified in *Niz-Chavez v. Garland* that a series of separate mailings, each containing part of the information statutorily required to be included in an NTA, cannot be combined to stop the clock. All of the required information must be included in a single document.¹² Unfortunately, DHS has for some time issued NTAs with "to be determined" in the form's hearing date box, allowing the aliens on whom they were served to continue to accrue time toward the 10-year presence requirement. Most recently, Acting Commissioner Miller testified that some migrants apprehended during the ongoing border crisis have been issued defective NTAs.¹³ During a hearing on May 13, 2021, Secretary of Homeland Security Alejandro Mayorkas committed to providing information regarding the number of migrants encountered along the Southwest border who have been issued defective NTAs to HSGAC. Despite subsequent requests from Senators and staff, CBP, ICE, and DHS have not yet fulfilled the Secretary's commitment by providing this information to the Senate or the public.

Through the notice to report process and the issuance of defective NTAs, the Biden Administration is failing to commence removal proceedings for tens of thousands of migrants encountered at the Southwest border. To make matters worse, ICE informed our staffs on May 12, 2021 that "U.S. Customs and Border Protection does not notify ICE directly of family unit (FAMU) releases via prosecutorial discretion."¹⁴ When asked about whether ICE is being notified of migrants who have been released through the notice to report process in a hearing on May 19, 2021, Acting Commissioner Miller stated, "We are fixing those process notifications now."¹⁵ DHS still has not provided clear evidence to Congress that ICE has the ability to track migrants released by CBP under the notice to report process. As a result, it is likely that many migrants processed through the notice to report process could easily abscond from ICE and disappear into the interior. Additionally, it is likely that the NTAs that have been issued during this crisis have been defective NTAs and may help these migrants qualify for the special

¹⁰ Email from U.S. Immigration and Customs Enforcement (August 5, 2021). (sent to the Authorizing Committees of Congress).

¹¹ *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

¹² *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).

¹³ *Supra* note 1.

¹⁴ Email from U.S. Immigration and Customs Enforcement (May 12, 2021) (sent to the Authorizing Committees of Congress).

¹⁵ *Supra* note 1.

cancellation of removal benefit, which could effectively allow for the migrants who have received a defective NTA to adjust status outside of the asylum process.

In light of DHS' abject lack of transparency surrounding the issuance of NTAs and the notice to report process, we ask that you initiate an examination that considers, at a minimum, the following questions:

1. What factors, such as facility capacity, resource availability, technology, legal parameters, and administration policy, among others, did DHS consider in deciding to institute the notice to report process to recent border crossers released from CBP custody?
 - a. On what statutory or regulatory authorities or policies has DHS relied in implementing the notice to report process?
 - b. To what extent does DHS provide temporary status or other immigration benefits, such as parole, for individuals issued notices to report?
 - c. At what point, if at all, does DHS place individuals issued notices to report in removal proceedings?
2. What are the demographics, including age, gender, and nationality, among other characteristics, of recent border crossers released under the notice to report process?
3. What are CBP's policies and procedures for processing individuals who are given notices to report?
 - a. What, if any, are the differences between DHS's past practice of issuing NTAs before releasing an individual from custody and the current notice to report process, including for national security checks, biometric collection, and biographic information collection?
 - b. In which sectors, if any, beyond the RGV sector has CBP used the notice to report process?
 - c. To what extent has DHS consistently used the same procedures for the notice to report process across all locations where this process has been deployed?
4. Since CBP began using the notice to report process, how many individuals have been processed with notices to report?
 - a. How many have reported to ICE within the 60-day deadline?
 - b. How many have reported to ICE after the 60-day deadline?
 - c. How many have not reported to ICE at all?
 - d. How many individuals with notices to report may have been issued incomplete notices to appear (e.g., lacking date certain and/or location for initial hearing)?
 - e. What have been the stated intended destinations within the United States of those processed through the notice to report process?
5. How does CBP notify ICE of individuals processed with a notice to appear, and to what extent can DHS or ICE track whether such individuals have reported within the 60-day deadline?

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- a. To what extent, if at all, have any notification methods between CBP and ICE changed over time since DHS has begun using the notice to report process?
6. Does DHS currently have any policies or operational guidance in place to ensure that individuals who have been processed through the notice to report process and fail to report to ICE within the 60-day window are prioritized for immigration enforcement and removal?
 - a. Does DHS have any plans to locate and contact individuals who failed to report to ICE?
 - b. How many individuals who have received notices to report but have failed to report to ICE have been the subject of an ICE enforcement action?

Thank you for your attention to this matter. If you have any additional questions, please do not hesitate to contact our offices. We look forward to your prompt response.

Sincerely,



James Lankford
Ranking Member
Subcommittee on Government Operations
and Border Management
Committee on Homeland Security and
Governmental Affairs



John Cornyn
Ranking Member
Subcommittee on Citizenship, Immigration,
and Border Safety
Committee on the Judiciary