

United States Senate

WASHINGTON, DC 20510

July 19, 2023

The Honorable Gene Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Comptroller General Dodaro:

We write to seek your determination regarding whether five (5) recent actions undertaken by the Department of Homeland Security (DHS) constitute rules for purposes of the Congressional Review Act (CRA).

On January 9, 2023, DHS issued 3 notices in the federal register: (1) a Notice of Implementation of a Parole Process for Cubans,¹ (2) a Notice of Implementation of a Parole Process for Haitians,² and (3) a Notice of Implementation of a Parole Process for Nicaraguans³ (hereinafter collectively referred to as *Notices*). The *Notices* create a new means by which individuals from Cuba, Haiti, and Nicaragua can legally enter the United States under the Secretary of Homeland Security's discretionary "parole authority." The *Notices* also set out the eligibility criteria and filing processes created by the Department to effectuate this new entry mechanism.

Separately, on January 5, 2023, DHS expanded U.S. asylum protocols by making its CBP OneTM Mobile App (hereinafter "CBP App") "available for noncitizens, including those who seek to make asylum claims, to schedule a time to present themselves at a port of entry for inspection and processing,"⁴ rather than having to travel to the United States to initiate the asylum process.

Lastly, on October 19, 2022, DHS issued a notice in the federal register announcing the implementation of a new parole process for Venezuelans.⁵ Similar to the *Notices*, the parole process for Venezuelans creates a means by which individuals from Venezuela can legally enter the United States using the Secretary of Homeland Security's "parole authority" and establishes eligibility criteria and filing processes to carry out this new entry mechanism.

¹ Implementation of a Parole Process for Cubans; *January 9, 2023*, 88 FR 1266. Available at: <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans>

² Implementation of a Parole Process for Haitians; *January 9, 2023*, 88 FR 1243. Available at: <https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians>

³ Implementation of a Parole Process for Nicaraguans; *January 9, 2023*, 88 FR 125. Available at: <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans>

⁴ DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes; *January 5, 2023*. Available at: <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>

⁵ Implementation of a Parole Process for Venezuelans; *October 19, 2022*, 87 FR 63507. Available at: <https://www.federalregister.gov/documents/2022/10/19/2022-22739/implementation-of-a-parole-process-for-venezuelans>

The CRA requires that, before a rule can take effect, the issuing federal agency must submit it to Congress and the Comptroller General. This submission begins an expedited period in which Congress may pass a joint resolution of disapproval to overturn the rule.⁶ For rules that are not submitted to Congress, Members of Congress may obtain a formal opinion from your office regarding whether the agency action at issue constitutes a rule.⁷

“The definition of a rule under the CRA is very broad.” “The CRA borrows the definition of a rule from 5 U.S.C. § 551 [(the APA)] as opposed to the more narrow definition of legislative rules requiring notice and comment contained in 5 U.S.C. § 553.”⁸

The APA defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁹ In pertinent part, the CRA adopts that definition.

Excluded from this definition, however, are: (1) rules of particular applicability; (2) rules “relating to agency management or personnel”; and (3) rules of “agency organization, procedure, or practice that do[] not substantially affect the rights or obligations of non-agency parties.”¹⁰

For the reasons described below, we believe that the five (5) aforementioned agency actions taken by DHS constitute rules for CRA purposes. Each action presents a separate CRA applicability question, but actions are grouped together below where appropriate.

(1)–(3) Implementation of a Parole Process for Cubans, Haitians, and Nicaraguans

In determining whether the January 9, 2023 *Notices* issued by DHS constitute a rule subject to the CRA, one must first determine if they meet the broad definition of a rule under the APA.

The *Notices* are agency statements because they are official DHS documents published in the *Federal Register*. The *Notices* are generally applicable because they apply to all Haitians, Nicaraguans, and Cubans that meet relevant criteria. Regarding the fact that the CRA covers only prospective—not retrospective—action, the *Notices* are of future effect because they implement a new parole process for broad swaths of Haitian, Nicaraguan, and Cuban nationals moving forward. And the *Notices* are designed to implement, interpret, or prescribe law or policy—rather than “merely restat[ing] existing legal requirements¹¹,” the *Notices* seek to establish new migration protocols.¹²

⁶ 5 U.S.C. § 801

⁷ GAO.gov, Congressional Review Act; *Accessed February 2, 2023*. Available at: <https://www.gao.gov/legal/other-legal-work/congressional-review-act/database>

⁸ Letter B-323772 from Government Accountability Office to Senator Orrin Hatch 3; *September 4, 2012*. Available at: <https://www.gao.gov/assets/b-323772.pdf>

⁹ 5 U.S.C. § 551(4)

¹⁰ *Id.* at § 804(3)(A)-(C)

¹¹ Letter B-331171 from Government Accountability Office to Representative Steve King 4; *December 17, 2020*. Available at: <https://www.gao.gov/assets/b-331171.pdf>

¹² Syra Ortiz-Blanes et al, *Mayorkas defends parole process for migrants*, NW. AK DEMOCRAT GAZETTE; *January 31, 2023*. [Wherein Secretary Mayorkas refers to these Notices as new “solutions” to immigration problems] Available at: <https://www.nwaonline.com/news/2023/jan/31/mayorkas-defends-parole-process-for-migrants/>

Therefore, the *Notices* meet the CRA definition of a rule, and the only question is whether they fall within any of the three exclusions: (1) rules of particular applicability; (2) rules “relating to agency management or personnel”; and (3) rules of “agency organization, procedure, or practice that do[] not substantially affect the rights or obligations of non-agency parties.”¹³

The *Notices* are not rules of particular applicability because they apply to all Haitian, Nicaraguan, and Cuban nationals so long as they pass vetting requirements and are not refugees or permanent residents or dual nationals of another country.

The *Notices* are also not rules relating to agency management or personnel, as they “do[] not deal with agency management or personnel but with [aliens who cross the U.S. border].”¹⁴ While the notices purport that they involve “a foreign affairs function of the United States,” and therefore are exempt from notice-and-comment rulemaking, even if that is the case, this provision of 5 U.S.C. § 553 does not exempt the notices from congressional review if they meet the CRA definition of a rule. The notices do not make any changes to DHS personnel management, nor do they seek to alter the department’s organizational structure, make organizational changes within the Department, or alter any other internal personnel management practices. Indeed, they entirely concern the eligibility of foreign nationals to receive certain temporary immigration benefits.

Finally, the *Notices* are not rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. As a sponsor of the CRA explained, “this exception should be read narrowly and resolved in favor of non-agency parties who can demonstrate that the rule will have a nontrivial effect on their rights or obligations.”¹⁵ The *Notices*’ impacts on **non-agency** parties are far from trivial. The *Notices* change the legal rights of enormous numbers of aliens with respect to processing, detention, and work authorization. Specifically, they allow aliens to obtain advance authorization to enter the United States, a right they did not previously possess. And under this new rule, more aliens will be provided U.S. work authorization guarantees. Thus, there is unquestionably a substantial change in the legal rights of aliens who cross the border. They are provided rights and benefits that did not previously exist.

Additionally, the substantial impact analysis goes beyond the impact on the non-agency parties most directly regulated by rule—here, aliens from Cuba, Haiti, and Nicaragua—and includes any costs imposed on states as a direct consequence of the rule. Now that these policies have been implemented, the economic harms incurred by states have become apparent. States are required by federal law to provide emergency care to “lawfully-present” aliens.¹⁶ For example, in one state alone, that costs American taxpayers up to \$90 million annually in healthcare costs.¹⁷ The cumulative effect on all states is proving to be much higher. Because the *Notices* provide U.S. admission to substantial quantities of aliens each month, they have increased the number of

¹³ 5 U.S.C. § 804(3) (A)-(C).

¹⁴ Letter B-333501 from Government Accountability Office to Senator Rand Paul 5; *December 14, 2021*. Available at: <https://www.gao.gov/assets/b-333501.pdf>

¹⁵ 142 Congressional Record H3005, statement of Rep. David McIntosh; *March 28, 1996*. Available at: <https://www.congress.gov/congressional-record/volume-142/issue-45/house-section/article/H2986-1#>

¹⁶ 42 U.S.C. § 1395dd(a)

¹⁷ Texas Public Policy Foundation, *Biden Unleashed An Illegal Immigration Whirlwind And Texas Is Paying The Price*; *October 17, 2022*. Available at: <https://www.texaspolicy.com/biden-unleashed-an-illegal-immigration-whirlwind-and-texas-is-paying-the-price/>

aliens lawfully present in the U.S., which will, imposes the aforementioned health care costs on states, among other costs.

Because the *Notices* meet the broad CRA definition of a rule and do not fall within any exclusions, the *Notices* are rules subject to congressional review under the CRA.

(4) CBP One™ Mobile App

Likewise, DHS’s new CBP App policy expanding asylum pathways constitutes a rule under the CRA.

The CBP App expansion policy is an agency statement because it publicly announces a change in DHS policies and procedures of future effect. It is a statement of general applicability because it applies to all noncitizens located in Central or Northern Mexico who seek to travel to the United States. The CBP App policy falls within the CRA’s coverage of prospective action, given that it creates a new avenue for attempting to legally enter the United States moving forward. The CBP App policy is also designed to implement, interpret or prescribe law or policy, as it seeks “to expand pathways for legal immigration.”¹⁸

Therefore, the CBP App expansion policy is a rule under the CRA unless it falls within one of three statutory exceptions, which it does not.

The CBP App expansion policy is not a rule of particular applicability because it applies to all “noncitizens located in Central or Northern Mexico.”¹⁹

The CBP App expansion policy is not a rule relating to agency management or personnel for the same reasons the *Notices* do not relate to agency management or personnel—it impacts aliens seeking to enter the U.S., not DHS personnel or the management thereof.

And for multiple reasons, the CBP App expansion policy is also not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

First, this policy creates a new right that did not previously exist for individuals to begin the asylum application process from outside of the United States or a U.S. port of entry (POE). DHS notes in a 2021 publication that the principal difference between an individual seeking asylum and an individual seeking refugee status is that, “Applicants for refugee status are outside the United States, whereas applicants seeking asylum are *either within the United States or arriving at a U.S. port of entry (POE)*.”²⁰ Indeed, 8 U.S.C. § 1158(a)(1) makes clear that generally, only an “*alien who is physically present in the United States or who arrives in the United States* [] whether or not at a designated port of arrival,” is authorized to apply for asylum.

¹⁸ DHS Scheduling System for Safe, Orderly and Humane Border Processing Goes Live on CBP One™ App; *January 12, 2023*. Available at: <https://www.dhs.gov/news/2023/01/12/dhs-scheduling-system-safe-orderly-and-humane-border-processing-goes-live-cbp-onetm>.

¹⁹ *Id.*

²⁰ *Refugees and Asylees: 2021; September 2022*. Available at: https://www.dhs.gov/sites/default/files/2023-03/2022_0920_pley_refugees_and_asylees_fy2021_v2.pdf.

However, contrary to existing practices and federal law, the CBP App expansion policy fundamentally changes the asylum process by requiring that an individual begin that process by making an appointment online from far outside the United States. Indeed, the CBP App expansion policy document states that “noncitizens, including those who seek to make asylum claims,” “do not need to be at the border to schedule an appointment” to do so. Prior to the CBP App policy, individuals seeking asylum must begin the process in the U.S. or at a U.S. POE. Now they can, and even must, initiate that claim from abroad.

While DHS may argue that this expansion policy merely amounts to a change in the scheduling process for illegal aliens, this is not the case. It is widely reported that the CBP App is the main portal for individuals seeking asylum to begin the process by scheduling an appointment with DHS.²¹ In fact, DHS recently announced separately that individuals who do *not* use the CBP App will be ineligible for asylum in the United States, absent certain extenuating circumstances. By expanding the CBP App and requiring individuals to use it to submit their asylum claimant information before arriving at a U.S. POE, the CBP App expansion creates a new step in the asylum process—a step that fundamentally transforms the U.S. asylum process from one that requires physical presence in the United States to one that practically requires physical presence somewhere else in the world.²² Unquestionably, this fundamental change to the requirements for making an asylum claim substantially affects the rights and obligations of non-agency parties.

Additionally, the substantial impact analysis goes beyond the impact on the non-agency parties most directly regulated by rule—here, asylum seekers—and includes any costs imposed on the states as a direct consequence of the rule. States are required by federal law to provide emergency care to “lawfully-present” aliens. For example, in one state alone, that costs American taxpayers up to \$90 million annually in healthcare costs. The cumulative effect on all states will be much higher. By facilitating substantial numbers of asylum seekers crossing into the U.S., the CBP App expansion policy will significantly impact the aforementioned state health care costs, not to mention other similar costs. Now that this policy has been implemented, the economic costs to states has become more clear.

(5) Implementation of a Parole Process for Venezuelans

Lastly, the October 19, 2022, DHS notice announcing the implementation of a new parole process for Venezuelans is a rule under the CRA.

This policy is an agency statement because it is an official DHS document published in the *Federal Register*. It is generally applicable because it applies to all Venezuelans that meet relevant statutory criteria. Regarding the fact that the CRA covers only prospective—not retrospective—action, the policy is of future effect because it implements a new parole process

²¹ CBS News, CBP One app becomes main portal to U.S. asylum system under Biden border strategy; *April 11, 2023*. Available at: <https://www.cbsnews.com/news/cbp-one-app-us-border-asylum-biden/>;
El Paso Times, New legal pathways for asylum-seekers: CBP One launches digital application feature; *January 12, 2023*. Available at: <https://www.elpasotimes.com/story/news/2023/01/12/cbp-one-app-website-desktop-login-migrants-title-42-immigration/69801582007/>;
Times of San Diego, Migrants Can Now Use ‘CBP One’ App to Request Asylum at Border Crossings; *January 12, 2023*. Available at: <https://timesofsandiego.com/politics/2023/01/12/migrants-can-now-use-cbp-one-app-to-request-asylum-at-border-crossings/>.

²² Circumvention of Lawful Pathways; *May 11, 2023*, 88 FR 31314. Available at: <https://www.federalregister.gov/documents/2023/05/16/2023-10146/circumvention-of-lawful-pathways>

for broad swaths of Venezuelan nationals moving forward. And it is designed to implement, interpret, or prescribe law or policy—by establishing new migration protocols.

Therefore, this new parole policy for Venezuelans is a rule under the CRA unless it falls within one of three statutory exceptions, which it does not.

This policy is not a rule of particular applicability because it applies to all Venezuelan nationals so long as they pass vetting requirements and are not refugees or permanent residents or dual nationals of another country.

The policy is also not a rule relating to agency management or personnel, as it “do[es] not deal with agency management or personnel but with [aliens who cross the U.S. border].”²³ It changes eligibility of foreign nationals to receive certain temporary immigration benefits.

Finally, this Venezuelan parole policy is not a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. It has impacts on **non-agency** parties that are far from trivial insofar as it changes the legal rights of many thousands of aliens with respect to processing, detention, and work authorization. Specifically, it allows these aliens to obtain advance authorization to enter the United States, a right they did not previously possess. Under this new policy, these aliens will also receive U.S. work authorization. Thus, there is an “underlying change in the legal rights of aliens who cross the border.”²⁴

Conclusion

For these reasons, it is our view that the *Notices*, CBP App expansion, and new parole policy for Venezuelans recently issued by DHS are rules for purposes of the CRA. we look forward to your opinion regarding this question. Given the record-setting numbers of border crossings that continue and the resulting effects upon federal, state, and local governments and the American people, it is important that Congress have the opportunity to timely consider the Department’s immigration plans under the provisions of the CRA, if they apply. Therefore, we respectfully request that you provide your opinion as expeditiously as possible.

Please let me know if our office can provide any additional information that may be helpful.

Sincerely,



Bill Hagerty
United States Senator



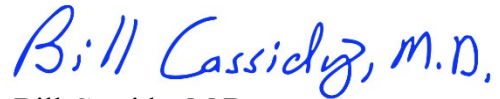
Ted Budd
United States Senator

²³ Letter B-333501 from Government Accountability Office to Senator Rand Paul 5; *December 14, 2021*. Available at: <https://www.gao.gov/assets/b-333501.pdf>

²⁴ Letter B-330190 from Government Accountability Office to Senator Edward Markey; *December 19, 2018*. Available at: <https://www.gao.gov/products/b-330190>



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