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Sharon Hageman, Deputy Assistant Director
Office of Regulatory Affairs and Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW, Mail Stop 5006
Washington, DC 20536

RE: DHS Docket No. ICEB-2021-0015
53358 Federal Register / Vol. 88, No. 151 / Tuesday, August 8, 2023 /
Immigration Bond Notifications

Dear Ms. Hageman:

In response to the U.S. Department of Homeland Security's (DHS) request for comments on the interim final rule published by DHS regarding immigration bond notifications, DHS Docket No. ICEB-2021-0015, the undersigned organizations respectfully submit the following comments.

I. Introduction of stakeholders and expertise

The American Immigration Council (Council) is a not-for-profit educational and charitable organization. The Council was established to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens and citizens, and educate the public about the enduring contributions of immigrants. Through research, analysis, litigation, and transparency work, the Council seeks to hold the government accountable for unlawful conduct and restrictive interpretations of the law and for failing to ensure that the immigration laws are implemented and executed in a manner that comports with due process. The Council advocates for greater transparency in U.S. Immigration and Customs Enforcement's (ICE) practices relating to bond payments to ensure the fair and timely release of individuals from immigration detention.

The American Immigration Lawyers Association (AILA), established in 1946, is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA members' collective expertise and experience makes AILA particularly well-qualified to offer views that will benefit the public and the government.

Both the Council and AILA have an interest in securing the rights of individuals in ICE detention and ensuring they are released without delay. The Council and AILA welcome improvements to systems seeking to modernize the way in which people are released from immigration detention. However, we are concerned that DHS's push to fully shift the service of bond-related notifications to an electronic system with proven flaws, and that seemingly is still in development, could undermine the liberty interest of individuals eligible for release from detention and increase the number of cases on the Immigration Court's detained docket.

II. Background on implementation of electronic payment of immigration bonds

On April 20, 2023, ICE announced that the agency would implement an electronic method for obligors to post immigration bonds to secure the release of individuals in immigration detention. The agency has advertised the electronic system, named Cash Electronic Bonds Online or CeBONDS, as giving obligors the ability to pay an immigration bond electronically without having to make the payment in-person at an ICE office.¹ Initially, the agency planned for CeBONDS to "fully" replace the in-person method of bond payments by June 1.

ICE's efforts to inform the public about this transition have failed to provide timely, clear, and consistent information about its plans for full implementation of CeBONDS. The Council and AILA appreciate and recognize the work of ICE's Office of Partnerships and Engagement (OPE) to provide answers to numerous questions raised by the implementation of CeBONDS. OPE provided an initial stakeholder engagement on April 17 and a follow-up engagement on May 23, 2023. During the May 23 engagement, stakeholders urged ICE to retain the option for obligors to make bond payments at designated ICE field offices beyond the June 1 deadline. ICE initially provided only forty-five days from the initial announcement for the public, stakeholders, and the legal community to transition to an electronic system with such weighty implications, which stakeholders viewed as insufficient.

Further confusing matters, it appears that ICE has not terminated the ability of obligors to pay bonds in person at ICE offices. Despite the agency's previously announced June 1 deadline to fully transition to CeBONDS, ICE's dedicated webpage for CeBONDS indicates that the agency will take in-person bond payments on a "case-by-case" basis.² The webpage does not acknowledge that the June 1 deadline has expired and does not provide further guidance about which cases are accepted for in-person bond payment and which ones are not.

On August 8, DHS announced the adoption of an Interim Final Rule (IFR) that allows ICE to serve bond-related notices and information electronically to obligors. Even though the IFR does not specify the method by which ICE will serve notices electronically, it is clear from the text in

¹ *ICE launches online CeBONDS capability to automate bond payments*, NEWS RELEASES AND STATEMENTS, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Apr. 20, 2023), <https://www.ice.gov/news/releases/ice-launches-online-cebonds-capability-automate-bond-payments>.

² *Post a Bond, Frequently Asked Questions, How can I pay a bond if I have little to no access to banking services, internet, or computing devices?* U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detain/detention-management/bonds> (Sept. 6, 2023).

DHS's notice that the agency plans to rely on CeBONDS to accomplish this task.³ Accordingly, it is important to note how CeBONDS works.

The agency's explanatory text implies CeBONDS is simpler to use than it is in reality. In the IFR's accompanying text discussing in-person payment options, DHS states that the agency anticipates high adoption of CeBONDS because it will be more convenient posting an immigration bond "online" rather than physically traveling to the appropriate ICE office.⁴ However, CeBONDS does not allow obligors to make a payment fully online. Obligor must go to a financial institution and make a payment through only two accepted forms of payment: Fedwire, a system for the electronic transfer of funds operated by the Federal Reserve Bank; or the Automated Clearing House (ACH), an electronic network of banks that allows the transfer of money from one account to the other.⁵ Thus, obligors who need to use CeBONDS must have access to a computer or smartphone, access to the internet, and access to a financial institution—which many potential obligors may not have. Additionally, information about CeBONDS's use is only available in English and Spanish and the CeBONDS system itself is only available in English, which further limits who may use it.

On May 31, several organizations sent a letter to DHS and OPE documenting issues organizations encountered when using CeBONDS and pointing out that CeBONDS is not a straightforward online service.⁶ Additionally, AILA has received multiple reports from attorneys who experienced issues with CeBONDS, including getting locked out of their accounts and banks not recognizing the system. The agency's expectation of "high adoption" of CeBONDS overlooks the system's deficiencies and the hurdles the public faces in using it.

III. Comments on the IFR

1. The process for serving bond obligors with notices established by the IFR relies on the faulty CeBONDS system.

Despite the documented limitations of the CeBONDS system, the IFR tethers electronic service of crucial bond documents to the newly developed CeBONDS. The Council and AILA understand that the rule itself does not require electronic service to be completed via CeBONDS. The rule simply states that ICE may serve "demand notices" and "any other bond-related notifications" electronically.⁷

³ Immigration Bond Notifications, 88 Fed. Reg. 53358, 53361 (proposed Aug. 8, 2023) (to be codified at 8 C.F.R. § 103.6) (stating "CeBONDS will incorporate the functionality of eBONDS to allow ICE to issue and serve all bond notices electronically to any cash obligor who registers with the CeBONDS system.").

⁴ *Id.* at 53362.

⁵ *Post a Bond, Frequently Asked Questions, How can I pay a bond if I have little to no access to banking services, internet, or computing devices?* U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detain/detention-management/bonds> (Sept. 6, 2023).

⁶ Letter from ABISA, et. al to Todd J. Thurlow, Acting Deputy Assistant Director, Dep't of Homeland Security Immigration and Customs Enforcement Office of Partnership and Engagement, et. al (May 31, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/ice_to_preserve_the_option_of_in-person_bond_payments_letter.pdf.

⁷ Immigration Bond Notifications, 88 Fed. Reg. at 53371.

However, the IFR's accompanying text clarifies the connection between CeBONDS and electronic service of bond-related notifications. The IFR's background text states, "CeBONDS will incorporate the functionality of eBONDS to allow ICE to issue and serve all bond notices electronically to any cash bond obligor who registers with the CeBONDS system."⁸ The IFR's accompanying text also confirms ICE's plan to largely transition to an electronic environment for the posting of immigration bonds.⁹ Thus, CeBONDS may soon become the only available method to receive bond notifications electronically.

ICE plans to use electronic service to send notices to obligors for the following instances: bringing noncitizens to report to ICE offices or immigration courts; breaches of bond conditions; bond cancellations; errors in the issuance of bond breach notifications; or the reinstitution of bonds.¹⁰ These notifications can have a significant impact on the outcome of removal proceedings for individuals released on bond. In certain cases, the notices inform obligors to bring noncitizens to important appointments with ICE, and noncitizens' failure to appear at these appointments could amount to a breach of bond conditions. The system also financially impacts obligors, as these events can determine whether ICE will return funds paid as bonds. If an obligor fails to receive timely notification of a breach, their opportunity to appeal the bond breach determination is limited, which may lead to the forfeiting of the bond amount.¹¹ While contributing to only a small portion of the overall immigration detention bed funding, breached bond funds are used to pay for detention beds.¹² As such, potential increases in the Breached Bond Discretionary Fund ("BBDF") are linked directly to the prospect of expanding immigration detention bed space, a system with a record of abuses and medical neglect.¹³ In other circumstances, failure to receive certain notifications may lead to obligors not requesting a return of the paid bond amount. A 2019 report indicates that in 2018, ICE held more than \$200 million in bond funds unclaimed by obligors.¹⁴

The Council and AILA appreciate that the agency adopted certain safeguards to ensure obligors receive bond-related notifications. For example, ICE indicated it will reissue the notifications in paper-based service to an obligor's most recent address if the electronic notification is returned as undeliverable;¹⁵ or the system method of tracking unopened notification.¹⁶ However, for this to be effective, ICE must provide clear information to obligors, the public, and most importantly,

⁸ *Id.* at 53361.

⁹ *Id.* at 53362.

¹⁰ *Id.* at 53360.

¹¹ See 8 C.F.R. § 103.6.

¹² See 8 U.S.C. § 1356.

¹³ Project on Government Oversight, *DHS's Secret Reports on ICE Detention* (Aug. 21, 2023), <https://www.pogo.org/investigation/2023/08/dhss-secret-reports-on-ice-detention>.

¹⁴ Immigrants' Rights Clinic at Stanford Law School, et. al, *Following the Money, New Information about the Federal Government's Billion Dollar Immigration Detention and Bond Operations* (Apr. 26, 2019), <https://law.stanford.edu/press/stanford-law-schools-and-uc-davis-law-schools-immigration-clinics-reveal-new-information-about-the-federal-governments-billion-dollar-immigration-detention-and-bond-operation/>.

¹⁵ Immigration Bond Notifications, 88 Fed. Reg. at 53363.

¹⁶ *Id.* at 53362.

to individuals released from detention about the methods ICE will use to provide notifications about their conditions of release.

Further, the agency's plan to serve notices on obligors through CeBONDS will subject them to the same problems that plague obligors attempting to pay via CeBONDS. For example, the system requires individuals serving as obligors to have a certain level of tech savvy to use CeBONDS. In addition, the system currently does not offer information in a language other than English and Spanish, thus limiting access to information to those who understand one of those two languages. This limitation is particularly problematic given that ICE's 2020 update to its Language Access Plan shows ICE provided interpretation services for thousands of immigrants who speak languages other than Spanish including 6,552 requests for Mandarin interpretation.¹⁷

In other circumstances, obligors may find it easier to go to an ICE office to pay bonds, particularly if they live near an ICE office that accepts these payments. Further, ICE's Bond Management Handbook says that obligors can pay bonds in cash, i.e., currency, money order, certified check, or cashier's check.¹⁸ Some obligors may prefer to pay in cash or write checks to cover bond amounts and go to an ICE office to present payment instead of going to their banks and dealing with the Fedwire or ACH systems.

The in-person option also may be necessary for individuals who are not as comfortable using the internet or who may have concerns about the privacy of their information. For these individuals, receiving bond-related notifications in the mail also may be preferable. Eliminating the option of in-person bond payments by fully transitioning to the CeBONDS system leaves many obligors unable to comply with ICE requirements.

Additionally, several passages in the IFR's accompanying text suggest that CeBONDS's capability to send notifications remains in development and is untested. For example, the IFR states that "ICE is currently developing [emphasis added] the CeBONDS system to allow cash bonds to be posted online."¹⁹ The IFR's section on implementation says, "when developed and fully implemented, CeBONDS will notify the cash bond obligor by generating an email notification."²⁰ These passages suggest that, as of August 8, the electronic system was not ready to perform the functions described by DHS, which is problematic considering that ICE anticipated a full transition to the CeBONDS system by June 1. Given the uncertainty about CeBONDS's readiness and the lack of information about implementation, it also is difficult to understand, how the rule will be effective on September 7 as DHS indicated in the *Federal Register*.²¹

¹⁷ U.S. Immigration and Customs Enforcement, *ICE Language Access Plan Supplemental Update Covering Fiscal Years 2019 and 2020* (July 21, 2020), https://www.dhs.gov/sites/default/files/publications/ice_supplemental_language_access_plan_07-21-20_508.pdf.

¹⁸ U.S. Immigration and Customs Enforcement, *Enforcement and Removal Operations, Bond Management Handbook*, 23 (Aug. 19, 2014), https://www.ice.gov/doclib/foia/dro_policy_memos/eroBondManagementHandbook2018-ICFO-31476.pdf.

¹⁹ Immigration Bond Notifications, 88 Fed. Reg. at 53361.

²⁰ *Id.* at 53362.

²¹ *Id.* at 53358.

The IFR makes the service of bond-related notifications dependent on a system that has experienced flaws, is still in development, and may not be ready to perform the necessary functions according to the timeline set forth by the agency. This is concerning given the liberty of individuals in immigration detention depends on the system functioning properly. According to DHS figures, ICE received an average of approximately 42,000 cash bonds per year between 2018 to 2020.²² This IFR could impact the tens of thousands of obligors who post cash bonds per year, as well as the individuals those obligors are trying to release from detention.

2. *Obligor will be required to consent to electronic service once CeBONDS is established.*

ICE's planned method to obtain obligors' consent to receive bond-related notifications electronically is not voluntary and is therefore not real informed consent. The IFR states that obligors will need to give consent before ICE can serve notifications electronically.²³ However, ICE plans to force nearly all obligors to use CeBONDS to pay immigration bonds. The agency clarified in the accompanying text of the IFR that "[a]ll obligors posting bonds in eBONDS or CeBONDS must consent to receive electronic bond-related notifications as a pre-condition of enrolling in and using the systems."²⁴ Thus, virtually all obligors will be required to consent to electronic bond-related notifications because ICE plans to completely transition to the use of CeBONDS.

The IFR's accompanying text suggests that ICE will continue to accept in-person bond payments at ICE offices in certain cases,²⁵ but the IFR and other agency information about CeBONDS lack sufficient clarity for this to be a viable alternative. The IFR's accompanying text states that ICE does not intend to refuse individuals from posting bonds in person at the appropriate ICE office.²⁶ However, ICE's CeBONDS informational webpage states that the agency "will work with obligors who walk into an ICE office, *on a case-by-case basis*."²⁷ ICE must provide clear guidance to the public and potential obligors about the factors officers consider in determining in which cases obligors would be able to pay bonds in person or which cases should be rejected. Currently, ICE's informational webpage fails to inform the public when ICE may accept an in-person bond payment. Without clear information, obligors who may not be able to use CeBONDS due to its systemic deficiencies, or simply prefer to pay in person to avoid the technological hassles, are at the mercy of inconsistent policies that may vary depending on each field office or even individual officers. This lack of consistent information translates to obligors' lack of meaningful alternatives to secure the release of loved ones in ICE custody. This means that people who may not want to use CeBONDS must risk that their family members, community members, or loved ones remain in detention.

²² *Id.* at 53365.

²³ *Id.* at 53371.

²⁴ *Id.* at 53363.

²⁵ Immigration Bond Notifications, 88 Fed. Reg. at 53362.

²⁶ Immigration Bond Notifications, 88 Fed. Reg. at 53362.

²⁷ *Post a Bond, Frequently Asked Questions, How can I pay a bond if I have little to no access to banking services, internet, or computing devices?*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detain/detention-management/bonds> (Sept. 6, 2023) (emphasis added).

The Council and AILA acknowledge that the IFR addresses how obligors receive certain bond-related notices rather than how to make bond payments. But, the IFR's accompanying text explicitly links the electronic service of bond-related notifications to the new CeBONDS bond payment system. Other than the IFR's accompanying text, ICE has not published further information about its plans to use CeBONDS to provide notices to obligors. The agency must provide greater transparency on how CeBONDS will be used for electronic service of bond-related notices.

- ICE should separate the consent process from the use of CeBONDS.

Accordingly, the agency should reconsider the planned process of how it obtains consent from obligors to receive bond-related notifications. To ensure the IFR's consent element is meaningful, the consent process must be independent from the use of CeBONDS, particularly if ICE continues to accept in-person bond payments. This would ensure obligors are not being strong-armed by ICE to accept electronic service through the use of CeBONDS.

- ICE should ensure notification and consent forms are provided in languages obligors understand.

As DHS considers alternatives to the use of CeBONDS for service of notifications on obligors, the agency must also ensure that whatever method the agency adopts to obtain consent from potential obligors is available in languages other than English or Spanish so that obligors can fully understand the process to which they are consenting. Having information not only on the consent element, but also about the process of receiving electronic bond-related notifications, in other languages is crucial for obligors to understand their duties and responsibilities during the bond process.

Further, as DHS modernizes systems used to process immigrants and adopts technology that will help with this endeavor, it is incumbent upon the agency to adopt best practices to ensure that users' consent is freely given. These best practices should strive to implement measures of transparency so that the public is fully aware of the benefits and risks inherent in using the new technology and provide viable and well-publicized options for those who opt not to use it. Unfortunately, this IFR fails to provide a good model due to the lack of clarity for those who wish to opt out of using CeBONDS.

3. *ICE guidance on the use of CeBONDS has been contradictory and should be clearer and more transparent.*

The agency must adopt clear guidance to the public about whether obligors will be required to use CeBONDS to pay bonds and to receive bond-related notifications. ICE's message to the public is plagued by inconsistencies, including within the IFR's accompanying text. First, it is unclear from the IFR's accompanying text whether obligors can opt out of receiving electronic bond-related notifications. As noted, the IFR allows electronic service for those "who consent to electronic delivery,"²⁸ implying that potential obligors may choose to receive notifications

²⁸ Immigration Bond Notifications, 88 Fed. Reg. at 53371.

through other means than electronic notifications. A closer inspection of the IFR's accompanying text, however, suggests that giving consent to receive electronic notifications is a prerequisite to the use of CeBONDS,²⁹ and obligors will be required to use CeBONDS to secure the release of individuals in immigration detention. This requirement is thus inconsistent with the spirit of the interim regulation.

Second, ICE has not been clear about its timeline to fully replace the in-person bond payment method with CeBONDS and has published conflicting information about the availability of in-person payments. On May 28, ICE tweeted that the agency was moving away from walk-in immigration bond payments to the CeBONDS system.³⁰ On July 22, ICE informed the public through the agency's Instagram account that "mandatory use" of CeBONDS began on June 1.³¹ However, the IFR's accompanying text states that ICE "does not intend to refuse" individuals from posting a bond in person.³² This lack of clarity as to whether CeBONDS is mandatory confuses obligors as to the system's use. This confusion could force obligors to consent to electronic service of bond-related notices when they do not have to, particularly if they believe that CeBONDS's use is obligatory as announced by ICE's Instagram account.

ICE should provide clear information about its intended use of CeBONDS to stakeholders and the public, including service providers. Thousands of individuals in detention are unrepresented in immigration courts and must retain enough information about the process from the numerous instructions imparted upon them by immigration judges. This makes it difficult for those individuals to relay such information to friends or family members who may serve as obligors. Clear and concise information about how obligors will receive notifications is necessary so that service providers could help fill the knowledge gaps.

4. ICE should provide potential obligors information about the privacy risks associated with CeBONDS and make the information widely accessible.

Thus far, ICE has not published a Privacy Impact Assessment (PIAs) to address how obligors' information entered into CeBONDS will be protected and has provided misleading information about where the public may find guidance as to the privacy of their personal information. Agencies are required to conduct a PIA when there are new or substantial changes to technology that collects, maintains, or disseminates personally identifiable information.³³ On its webpage, ICE informs users that the agency updated two bond-related PIAs to "assess the privacy risks associated with this program and to document ICE's privacy protections for the collection and maintenance of information on detained noncitizens and obligors involved in the processing and posting of immigration bonds."³⁴ However, the agency does not provide any links to these PIAs

²⁹ *Id.* at 53363.

³⁰ U.S. Immigration and Customs Enforcement, Twitter (May 28, 2023, 8:12 AM), <https://twitter.com/ICEgov/status/1662794018391044102>.

³¹ U.S. Immigration and Customs Enforcement, Instagram (July 22, 2023), <https://www.instagram.com/p/CvAeOwHsZAW/>.

³² Immigration Bond Notifications, 88 Fed. Reg. at 53362.

³³ E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2922 (2002).

³⁴ *Post a Bond, Frequently Asked Questions, What steps has ICE taken to ensure CeBONDS provides data privacy and security as part of its process?*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detain/detention-management/bonds> (Sept. 6, 2023) (emphasis added).

and a review of the PIAs do not contain any indication that they have been updated to include information about CeBONDS. A search on DHS's PIA electronic collection for the term CeBONDS yields no returns. ICE also states that the agency "initiated the Bonds Management Program PIA in January 2023,"³⁵ but a search for such PIA does not yield any results and ICE's webpage does not contain a link to that PIA. In short, it is clear that ICE has not conducted a stand-alone PIA for CeBONDS. Further, the documents ICE claims it updated to provide more information about privacy risks fail to indicate any updates. As such, the public has not been informed about the privacy impact of ICE's collection of information from obligors and ICE's statements about the updates are misleading.

5. ICE should permanently give obligors the option to accept service of bond notifications electronically or via other methods.

The agency's plan to transition the bond payment entirely to electronic processing, which includes electronic service of bond-related notifications as outlined in the IFR, fails to consider that some potential obligors may not be able to access the system electronically. The Council and AILA appreciate the agency's efforts to modernize the arcane requirements of the bond payment process that forced obligors to travel to an ICE office to pay the bond that would secure the release of a loved one. Commenters also acknowledge that CeBONDS's functions, both for bond payment and service of bond-related notifications, may be useful for many potential users. We do not dispute the agency's assertions that it is easier for many individuals to pay the immigration bond at their local bank rather than traveling to an ICE office.

However, CeBONDS should not be the only option for bond payment or through which obligors receive bond-related notifications. In several important circumstances, using CeBONDS to post payment and receive notifications will not be possible. Potential obligors may not speak English or Spanish; they may lack the tech-savviness to create a profile and navigate the system; they may lack reliable internet access; they may have concerns about their privacy given ICE's lack of assurances regarding the security of their personal information; they may lack access to a bank; or it may be more straightforward for a person—for reasons related to age or other circumstances—to receive and keep track of the bond process by mail. ICE has erroneously fashioned a one-size-fits-all approach to an issue that should be tailored to the needs of those who are paying, often thousands of dollars, to secure the liberty of loved ones.

While the IFR, as written, seemingly permits some of this desired flexibility, ICE must publicly clarify obligors still have the option of walking into an ICE office and paying a bond in person, and that this option will be permanently available. The agency should also clarify that obligors have the option of receiving bond-related notifications through means other than CeBONDS.

If ICE does not permit an alternative to CeBONDS to make bond payments, then the agency should explore different ways in which it can obtain consent to the receipt of bond-related notices from potential obligors and develop alternative methods by which to deliver bond-related notices electronically. The IFR notice explains that ICE is implementing certain safeguards in the CeBONDS system to ensure that electronically served bond-related notices are not ignored or

³⁵ *Id.*

dismissed by obligors, and thus, alternatives also must include these measures so that noncitizens are not harmed by the failure to receive timely notice of certain events like court hearings.

IV. Conclusion

Accordingly, we urge DHS and ICE to revisit this rule and the agencies' plan to implement it while ICE addresses the aforementioned issues. The current plan, as explained in the IFR notice, is not a viable option for a multitude of potential obligors and fails to meet the spirit of the regulation.

For any questions, you may contact Jennifer Ibañez-Whitlock at jwhitlock@aila.org or Raul Pinto at rpinto@immcouncil.org.

Very truly yours,

THE AMERICAN IMMIGRATION COUNCIL

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION