SUMMARY AND ANALYSIS OF DHS MEMORANDUM
"Enforcement of the Immigration Laws to Serve the National Interest"

For questions, please contact: Greg Chen, gchen@aila.org

INTRODUCTION

On Wednesday January 25, 2017, President Trump signed an executive order, "Enhancing Public Safety in the Interior of the United States," announcing a massive expansion in interior immigration enforcement. On February 20, 2017, DHS Secretary John Kelly issued a memorandum outlining an implementation plan for that Executive Order titled "Enforcement of the Immigration Laws to Serve the National Interest" (Memorandum).[1]

The Memorandum leads with notice that all "existing conflicting directives, memoranda, or field guidance" regarding immigration enforcement and priorities for removal are immediately rescinded, to the extent of the conflict, and names specifically the November 20, 2014 DHS memoranda "Policies for the Apprehension, Detention and Removal of undocumented Immigrants" and "Secure Communities." The Memorandum also states that the June 15, 2012 DACA memorandum and the November 20, 2014 DACA+/DAPA memorandum are NOT rescinded. It is unclear if the Memorandum rescinds prior memoranda that prohibited enforcement actions at sensitive locations (like schools and churches) and protected victims or witnesses of crimes and other vulnerable populations like primary caregivers of children, individuals with serious mental disabilities, and pregnant and nursing mothers.

A. THE DEPARTMENT'S ENFORCEMENT PRIORITIES

The Memorandum states that "effective immediately," DHS shall faithfully execute U.S. immigration laws against "all removable aliens" and will no longer "exempt classes or categories of removable aliens from potential enforcement." The priorities in the Memorandum track those that are articulated in the Executive Order. It lists individuals described in INA 212(a)(2) [criminal and related inadmissibility grounds], 212(a)(3) [security and related inadmissibility grounds], and 212(a)(6)(C) [fraud, misrepresentation inadmissibility grounds], 235(b) [expedited removal of inadmissible "arriving aliens" and other noncitizens apprehended in the interior], 235(c) [expedited removal based on security and related grounds] and 237(a)(2) [criminal grounds of removal] 237(a)(4) [security and related grounds of removal], *as well as* "removable aliens" who:

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense that has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;

[1] The Memorandum does not address a number of the directives contained in the Executive Order, in particular those that require DHS to collaborate with other individuals and cabinet level departments. These include the provisions relating to funding for and actions against sanctuary jurisdictions (**Section 9**); resources for prosecution of immigration-related crimes (**Section 11**); sanctions against recalcitrant countries (**Section 12**) and portions of the "Reporting" and "Transparency" sections (**Sections 15** and **16**).

- Have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but have not departed; or
- Otherwise pose a risk to public safety or national security.

The Memorandum states that ICE, CBP and USCIS may, if appropriate, issue further guidance to allocate resources to prioritize enforcement activities within these categories, and calls out as examples, removable aliens who are convicted felons, as well as those involved in gang activities or drug trafficking.

Analysis:

- The Memorandum's directives on enforcement priorities and prosecutorial discretion (see below) apply to the heads of offices at not only ICE and CBP but also USCIS and thus appear to supersede the 2011 USCIS guidance regarding the issuance of Notices to Appear. The 2011 NTA guidance authorizes USCIS to issue NTAs in only specific circumstances, thus primarily delegating enforcement responsibility to ICE.
- "Committed acts that constitute a chargeable criminal offense" is an exceptionally broad phrase and includes minor infractions such as jaywalking or driving without a license. Moreover, this phrase can be applied to all undocumented individuals under the presumption that they committed the chargeable offense of improper entry.
- The priorities do not make an exception for anyone who was once charged with a criminal offense but has since been acquitted of all charges.
- The Memorandum does not explain how "abuse" related to public benefits will be interpreted.

B. STRENGTHENING PROGAMS TO FACILITATE THE EFFICIENT AND FAITHFUL EXECUTION OF THE IMMIGRATION LAWS OF THE UNITED STATES

The Memorandum directs DHS personnel to make full use of all statutory authorities to remove aliens expeditiously. It specifically mentions:

- ***Secure Communities and Detainers***: "Effective immediately," the Priority Enforcement Program (PEP) created under President Obama is rescinded and the controversial Secure Communities program is restored. DHS is directed to create new civil immigration detainer forms to replace current Forms I-247D, I-247N, and I-247X.

- ***Fast-Track Removal of "Criminal Aliens"***: ICE is directed to devote resources to expanding the Criminal Alien Program (CAP) to "any willing jurisdiction" and to coordinate with EOIR to initiate removal proceedings against incarcerated individuals under the Institutional Hearing and Removal Program authorized by INA §238(a) (special removal proceedings while in criminal custody for noncitizens convicted of certain offenses). The Memorandum also states that "administrative removal processes" such as those under INA §238(b) (removal without hearing for noncitizens convicted of an "aggravated felony") "shall be used in all eligible cases."

- ***287(g) Agreements***: Lastly, noting that there are currently 32 law enforcement agencies in 16 states that are currently participating in the 287(g) program, the Memorandum directs both ICE and CBP to expand 287(g) and delegate federal immigration law enforcement functions (including the power to arrest and detain potentially removable noncitizens) to "all qualified law enforcement agencies that request to participate and meet all program requirements." In addition,

ICE and CBP are specifically authorized to accept state services and "take other actions as appropriate" to conduct enforcement in accordance with 287(g).

Analysis:

- The Memorandum directs DHS agencies to make full use of **all** statutory authorities for removing aliens "expeditiously."
- Fast-track removal mechanisms undermine due process by bypassing immigration courts and allowing enforcement officers to act as judge and jury. Fast-track removals also block access to humanitarian protections like asylum that are guaranteed under U.S. law.
- The Memorandum directs that other "administrative removal processes" shall be used and that could include "stipulated removal," a procedure which typically effectuates removal rapidly while the individual is detained and unable to obtain legal counsel.
- Expansion of 287(g) includes allowing CBP to enter into such agreements and contemplates resuming "task force" agreements authorizing local police to arrest potentially removable noncitizens in the field. The Obama Administration discontinued the use of "task force" agreements due to significant concerns that it would encourage the use of racial profiling by local law enforcement.
- Secure Communities required local law enforcement to share with DHS information about individuals in its custody and authorized DHS to issue detainers to local jails and correctional facilities for the purpose of holding an individual beyond the scheduled release date and until ICE could take custody. In 2014, DHS terminated Secure Communities after it became mired in controversy and litigation due to constitutional concerns regarding ICE detainers and the racial profiling it triggered. Several localities now have expressly limited their roles with respect to immigration enforcement, including detainer requests, to better protect their communities and ensure their law enforcement officials comply with the Constitution.

C. EXERCISE OF PROSECUTORIAL DISCRETION

The Memorandum rescinds the pre-existing guidance on prosecutorial discretion and directs that discretion may not be exercised for classes or categories of noncitizens, except as otherwise provided in the Memorandum (referring to DACA). Instead, it directs DHS personnel to arrest, apprehend, and initiate enforcement actions against "any alien whom an immigration officer has probable cause to believe" has violated the immigration laws. This language makes clear that everyone is a priority and amounts to a widespread deportation plan.

DHS is also directed to initiate removal proceedings against "any alien subject to removal under any provision of the INA" and refer appropriate cases for criminal prosecution. Prosecutorial discretion, when used, is to be considered on a case-by-case basis in consultation with the head of the field office component that initiated the enforcement action, regardless of which entity actually files the charging document. DHS General Counsel will issue additional guidance on prosecutorial discretion for attorneys involved in immigration proceedings.

Analysis:

- The Memorandum suggests that the initial enforcement decision is to be given deference when, for example, an ICE attorney may be deciding whether to file a charging document.
- *See also*, analysis under Section A, "The Department's Enforcement Priorities."

D. ESTABLISHING THE VICTIMS OF IMMIGRATION CRIME ENGAGEMENT (VOICE) OFFICE

The Memorandum establishes the Victims of Immigration Crime Engagement (VOICE) Office under the Office of the ICE Director to act as "programmatic liaison between ICE and the known victims of crime committed by removable aliens." The office will ensure that, consistent with the law, victims and families are provided information about the offender such as immigration status and custody status, and will answer questions regarding enforcement efforts. Directs reallocation of any/all resources used to advocate for illegal aliens to the VOICE Office.

E. HIRING ADDITIONAL ICE OFFICERS AND AGENTS

The Memorandum instructs the Director of ICE to take steps to expeditiously hire 10,000 ICE agents and officers "as well as additional operational and mission support and legal staff necessary to hire and support their activities."

F. ESTABLISHMENT OF PROGRAMS TO COLLECT AUTHORIZED CIVIL FINES AND PENALTIES

Directs ICE, CBP and USCIS to issue guidance and promulgate regulations "as soon as practicable" to execute the assessment and collection of all fines and penalties against aliens and those who facilitate their unlawful presence.

Analysis:

- The INA contains a number of provisions relating to civil and criminal fines. Many relate to carrier fines [INA §231(g), failure to deliver manifest; §241(e), costs to remove stowaways; §251(d), crewman reporting; §254(a), failure to control crew; §255, employment of certain crew members; §256, improper discharge of crew members; §257, assisting unlawful entry of crew members].
- Other provisions include INA §264(e) [failure to possess green card]; §271(a) [failure to prevent unauthorized entries]; §272(a) [bringing in certain aliens]; §273 [unlawful bringing of aliens]; §274C [document fraud]; INA §274D [failure to depart]; §275(a) and (b) [penalties for EWI and fraud/misrepresentation]; §275(c) [marriage fraud]; and §275(d) [entrepreneurship fraud].
- 8 CFR §§280 and 1280 set forth procedures for imposing and collecting fines but appear to be mostly relevant to collecting carrier fines.

G. ALIGNING THE DEPARTMENT'S PRIVACY POLICIES WITH THE LAW

The Memorandum states that DHS will no longer afford Privacy Act rights and protections to individuals who are neither U.S. citizens nor lawful permanent residents. Directs the DHS Privacy Office to rescind the January 7, 2009 DHS memorandum, "Privacy Policy Guidance Memorandum" and develop new Privacy Act guidance.

Analysis:

- Since 2009, DHS has treated personally identifiable information (PII) as subject to the Privacy Act. PII includes information that is collected, used, maintained, or disseminated and includes U.S. citizens and LPRs as well as visitors and undocumented persons.

- Non-U.S. persons have had the right of access to their PII and the right to amend their records, absent an exemption under the Privacy Act, though this policy did not extend or create a right of judicial review for non-U.S. persons.
- It is unclear whether the 2009 guidance will remain in place until the DHS Privacy Office develops new guidance and unclear what DHS intends as to the scope, purpose, and intent of the new guidance.
- Under the Memorandum it is unclear how DHS will handle information provided by DACA applicants when they applied. The guidance DHS issued in the form of Frequently Asked Questions assured DACA applicants that their information would be protected and not used for enforcement except in specific circumstances.

H. COLLECTING AND REPORTING DATA ON ALIEN APPREHENSIONS AND RELEASES

The Memorandum directs ICE to develop a method of reporting statistical data on apprehensions and providing monthly reports to the public that includes: country of citizenship, convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and reason/location of release, aliens ordered removed, and aliens physically removed. ICE is also directed to provide weekly public reports on "non-Federal jurisdictions" that release aliens from custody notwithstanding an ICE detainer. The Memorandum sets forth detailed information that must be included in the weekly reports, such as information on the individual released, an explanation as to why the detainer was not honored and "all arrests, charges, or convictions occurring after the alien's release from the custody of that jurisdiction."

Analysis:

- This provision of the Memorandum that directs ICE to provided weekly public reports on "non-Federal jurisdictions" that release aliens from custody notwithstanding an ICE detainer, appears to be one tool in the Administration's tool box to pressure localities into complying with illegal ICE detainers, setting jurisdictions up for legal liability.

I. NO PRIVATE RIGHT OF ACTION

The guidance contained in the Memorandum may be modified, rescinded or superseded at any time without notice. The guidance does not create any enforceable right or benefit.