

Fact Sheet

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FACT SHEET: U.S. DEPARTMENT OF JUSTICE RACIAL PROFILING GUIDANCE
Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity

The Department of Homeland Security (DHS) is steadfastly committed to the highest standards of conduct across the Department, most acutely when it comes to the fair, unbiased, and transparent enforcement of our laws. The updated guidance released by the U.S. Department of Justice (DOJ) substantially expands from the 2003 guidance both the covered activities and scope of DHS personnel and agencies that are covered.

This policy represents significant progress, and DHS will build on the positive steps made so it continues to execute its mission in a way that preserves and protects critical civil rights and civil liberties while also ensuring our officers and agents have the tools they need to protect all Americans.

DOJ Guidance

DOJ is announcing its new profiling guidance for federal law enforcement, which will generally apply across the federal government. Among other things, the revised policy will: expand the characteristics it protects to include prohibitions on profiling on the basis of gender, national origin, religion, sexual orientation and gender identity, in addition to race and ethnicity; apply not only to federal law enforcement officers, but also state and local law enforcement officers participating in federal law enforcement task forces; and generally eliminate the broad carve-outs for law enforcement activities, with some narrower exceptions.

Application of the Guidance to DHS Activities

Existing DHS policy, updated as recently as last year, already prohibits all racial profiling at all times, by any employee of DHS. It also makes clear that DHS personnel may only use race or ethnicity as a factor “when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest.” The DOJ guidance sets forth the limited circumstances when listed characteristics may be used as one of several factors in law enforcement activities.

The updated DOJ guidance substantially expand from the 2003 guidelines both the covered activities and scope of personnel and agencies that are covered at DHS. The old guidance did not apply any requirements beyond the constitutional standard to “national security and border

integrity” (including “air transportation security”), thus excluding from the heightened standard almost everything DHS does.

This new policy will now apply stringent and expanded anti-profiling requirements to many DHS activities for the first time, including:

- All U.S. Immigration and Customs Enforcement (ICE) civil immigration enforcement, wherever it takes place.
- U.S. Coast Guard law enforcement activities.
- U.S. Border Patrol enforcement activities not in the vicinity of the border.
- DHS officers protecting federal buildings.
- Federal Air Marshals.

Given the unique nature of parts of DHS’ mission – most notably in protecting our borders and securing our skies – some DHS activity is not covered by the policy. This does not mean that officers and agents are free to profile. To the contrary, DHS’s existing policies make it categorically clear that profiling is prohibited, while articulating limited circumstances where it is permissible to rely in part on these characteristics, because of the unique nature of border and transportation security as compared to traditional law enforcement.

The exclusion of the categories of DHS activities below from the DOJ guidance does not mean they are not covered by law and policy. Indeed, these areas continue to be regulated by the Constitution, federal law, and applicable DHS and component policies setting forth the appropriate limits on use of race, ethnicity, and other characteristics. These excluded activities include:

- Screening and inspection for border and transportation security
- U.S. Border Patrol interdiction activities in the vicinity of the border and ICE Homeland Security Investigation (HSI) interdiction activities at ports of entry
- Secret Service protective activities

Additional Review

In addition, while the new policy covers several additional DHS activities such as all ICE civil immigration enforcement, DHS, the Transportation Security Administration (TSA) and U.S. Customs and Border Protection (CBP) will review activities not directly covered by the new guidance to ensure we are including every appropriate safeguard and civil rights protection in the execution of those important security activities, and to enhance our policies where necessary.

Protection of Civil Rights and Civil Liberties

Of course, announcing a new policy is only one step, and it is not the last. DHS, working closely with our Office for Civil Rights and Civil Liberties, intends to take further action to ensure that its tens of thousands of law enforcement personnel properly implement and comply with this policy. These efforts, which will be undertaken in consultation with key stakeholders, will include implementation guidance, compliance assessment, enhanced training, and enhanced statistical collection

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