Office of Policy

U.S. Department of Homeland Security
500 12th St. SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Ellen McClain
Assistant General Counsel (Enforcement)
Office of the General Counsel
Department of Homeland Security

THROUGH: Susan M. Cullen
Director, ICE Policy

FROM: Sarah B. Dorsey
Senior Policy Advisor

SUBJECT: Implementation of DOJ Final Rule "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction"

Purpose

To respond to the Secretary's request that U.S. Immigration and Customs Enforcement (ICE) provide an implementation plan for the Department of Justice's (DOJ) Final Rule on DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction.[1]

Background

On December 10, 2008, DOJ published a final rule amending regulations on DNA-sample collection. Under this rule, effective January 9, 2009, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons[2] who are detained under the authority of the United States."[3] On January 12, 2009, then Deputy Secretary of the Department of Homeland Security (DHS), Paul A. Schneider, wrote to the Attorney General that DHS's implementation of the rule was not feasible due to resource limitations and operational exigencies.

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[1] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932 (Dec. 10, 2008).
[2] The term "non-U.S. persons" includes "persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p)." 28 CFR § 28.12(b).
[3] 28 CFR § 28.12(b).

program and its costs, it is premature to conclusively determine "operational exigencies or resource limitations." However, three possible exemptions are discussed below.

CC: Beth Gibson

Attachment

Homeland Security Investigations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

JUN 15 2010

MEMORANDUM FOR: All Special Agents in Charge

FROM: Michael A. Holt
Assistant Director, Programs

SUBJECT: ICE Implementation of DNA Sample Collection

On December 10, 2008, the U.S. Department of Justice (DOJ) published a final rule amending regulations on DNA-sample collection. Under this rule, effective January 9, 2009, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. On March 25, 2009, Secretary Napolitano directed each DHS Operational Component to create an implementation plan to ensure compliance with the DNA sample collection obligations. The implementation plan submitted by ICE called for a phased approach to comply with this rule.

As part of a phased approach, three Special Agent in Charge (SAC) offices received the necessary training and equipment to begin implementation of the DOJ rule once approval was granted by Secretary Napolitano. On April 26, 2010, concurrence was granted by DHS General Counsel to begin sampling in the pilot locations as soon as operationally feasible.

Phase I sampling will begin in SAC San Diego, SAC San Juan and SAC Saint Paul within the next 30 days and will be limited to individuals arrested by ICE Special Agents for a violation of federal or state criminal law. ICE will conduct this pilot program of sampling in these limited locations for at least six months before expanding the program to other offices. Until the program is expanded, only those agents assigned to offices designated as a DNA sampling pilot location will conduct sampling.

Phase II calls for a deliberate, phased, ICE Homeland Security Investigations (HSI) wide implementation, which will most effectively provide the opportunity to refine procedures, identify any unforeseen cost, identify funding and allow for sufficient training and adjustments as warranted. All costs associated with the DNA kits, to include shipping, are paid by the FBI Laboratory in Quantico, Virginia.

Please contact National Program Manager (b)(6), (b)(7)c Law Enforcement Systems, at (202) 732 (b)(6), (b)(7)c or via e-mail at (b)(6), (b)(7)c @dhs.gov with any immediate questions or concerns.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 22, 2010

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
Washington, DC 20530

Dear Attorney General Holder:

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the *Federal Register* a final rule entitled "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction."[1] The purpose of this letter is to consult with you regarding the Department of Homeland Security's (DHS) proposed exemptions from these requirements, as contemplated by the regulations.

On January 12, 2009, in connection with the implementation of this rule, former DHS Deputy Secretary Paul Schneider advised former Attorney General Michael Mukasey that commencement of DNA sample collection by DHS Components would be contingent on the provision of DNA sample collection kits by DOJ. Several months ago, DOJ staff informed the DHS Office of the General Counsel that the DNA sample collection kits had become available for use by DHS. Since then, our Department has been working to develop an implementation plan for DNA sample collection with respect to individuals arrested or aliens detained by our Department. During this time, Federal Bureau of Investigation (FBI) laboratory personnel and other DOJ officials have conducted several site visits at DHS facilities, and officials from DHS have held discussions with FBI and other DOJ staff regarding this process.

Due to the volume of individuals falling within the targeted class for DNA collection, implementation of this process poses severe organizational, resource, and financial challenges for this Department. The DNA processing of what DHS estimates may be close to a million aliens detained and individuals criminally arrested would severely strain the resources of the agency to perform its broader mission. Congress has not appropriated any additional funding to DHS for DNA sample collection or associated training costs for its law enforcement personnel, which underscores the financial burden DHS faces. Moreover, certain exceptions could help reduce the impact on privacy and civil liberties concerns. For these reasons, DOJ and DHS agreed to include certain exceptions in the December 2008 rule amending § 28.12(b)(1)-(3) of Title 28 of the Code of Federal Regulations. As set forth at § 28.12(b)(4), as revised by the rule, DNA collection from aliens not specified in subsection (b) may also be excepted from the collection requirement if I determine, after consultation with you, that collection of the sample from detained aliens is not feasible because of "operational exigencies or resource limitations."

[1] *See* 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).

I believe that taking DNA samples from the following classes of aliens meets this standard and would like the views of DOJ on excepting them:

1. Non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18.

   Rationale: DHS typically processes over 750,000 non-U.S. persons in administrative proceedings annually. Although DHS typically takes fingerprints in these instances, the collection of DNA samples from this class would create significant "operational exigencies" that would diminish the ability of this agency to accomplish its primary mission. For example, incorporating this activity into the U.S. Customs and Border Protection's (CBP) Border Patrol operations, which often take place at remote locations under harsh conditions and severe time constraints, would divert critical resources from border security and immigration enforcement. Implementation of the unfunded DNA sampling requirement for this class of persons would also further exacerbate the challenging resource limitations this Department already faces in conducting its mission.[2] DHS estimates significant costs for training, collecting, processing, and shipping samples, establishing a tracking system to eliminate redundant collections, implementing health and safety considerations and precautions, and establishing policies and procedures for chain of custody, individual refusal, logging, and tracking. For these reasons, DHS proposes to exclude this class of individuals from its DNA sample collection activities.

2. Non-U.S. persons currently within DHS custody, pending administrative removal proceedings.

   Rationale: At any given time, there are approximately 30,000 non-U.S. persons being detained pending administrative removal proceedings. These individuals are well-past the typical "booking" stage, and undertaking DNA sample collection from this group would pose substantial operational exigencies for DHS. Collecting DNA samples from this population would require diverting already limited U.S. Immigration and Customs Enforcement (ICE) resources, thus decreasing DHS's ability to deal with law enforcement matters with a nexus to the border. For the same reasons that DOJ has exempted the U.S. Marshals Service (USMS) from DNA collection requirements for persons in its custody when beyond the booking stage, DHS faces similar operational burdens. Moreover, because DHS deports aliens within an average of 29 days, this operational timeframe would challenge our ability to collect DNA samples. The alien detention system is presently undergoing a broad review, with significant changes expected over the coming months and years. Incorporating the DNA sample collection requirement for existing detainees would be an additional challenge to that process. In addition, because all resources associated with DHS detention and removal operations are

[2] Based on data obtained from relevant DHS Components, DHS estimates the cost of effectuating the DNA sampling requirements without the proposed exceptions to be approximately $35-40 million annually. If the proposed exceptions are approved, DHS estimates the annual cost to be approximately $2-3 million. While DHS expects to reprogram currently allocated resources in either case, DHS believes approval of the proposed exceptions would lessen the impact on the overall ability to achieve the DHS mission.

expected to be used in the context of the broader effort to streamline the existing processes, it would be difficult to isolate additional resources for the DNA sample collection requirement.

In addition to the above, pursuant to 28 C.F.R. § 28.12(b), you have discretion to permit additional "limitations or exceptions" to the DNA sampling requirements. For reasons described further below, I request that you exercise this discretion to except the following scenario from the collection requirement at this time:

1. All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.

   Rationale: In emergency or unforeseen circumstances, DHS resources are typically stretched very thin due to the numbers of individuals engaged in unlawful activity or others impacted by emergency circumstances. We expect that often it will not be operationally feasible for DHS to collect DNA samples in these types of scenarios without diverting resources needed to suppress or respond to any unlawful activities, unrest, or other unforeseen circumstances. DHS Component heads or I would make determinations to exercise this exception upon an assessment of the specific facts and circumstances of the incident or situation involved. I expect that DHS would rely on this exception only in extraordinary circumstances.

We intend to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training is needed in the initial stage of the broader DHS implementation of this process. In addition to the training requirement, for example, both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions. Finally, DHS intends to pursue discussions with the USMS to seek agreements by which the USMS would agree to undertake, in certain circumstances, DNA sample collection of arrestees on our behalf. Should satisfactory agreements not be reached, we may consider requesting additional exceptions to address these circumstances.

Thank you and your organization for your assistance in working through these implementation issues for this important program. If you or your staff desire additional consultations on these matters, we are available at your convenience. Should you need additional assistance, please contact Associate General Counsel (b)(6), (b)(7)c at (202) 447(b)(6), (b)(7)c Assistant General Counsel Ellen McClain at (202) 282(b)(6), (b)(7)c, or contact me at (202) 282(b)(6), (b)(7)c

Yours very truly,

Janet Napolitano

Office of Investigations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

JUL 10 2009

MEMORANDUM FOR: All Special Agents in Charge

FROM: Marcy M. Forman
Director, Office of Investigations

SUBJECT: ICE Implementation of DNA Sample Collection

On December 10, 2008, the Department of Justice (DOJ) published a final rule amending regulations on DNA sample collection. Under this rule, effective January 9, 2009, all Federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States."

In order to give U.S. Immigration and Customs Enforcement (ICE), the Department of Homeland Security (DHS), and DOJ/Federal Bureau of Investigation (FBI) time to resolve unforeseen problems and finalize procedures, ICE will conduct a pilot program of DNA sampling in limited locations, which will last a minimum of 6 months. It is anticipated that this pilot program will be implemented by the end of calendar year 2009. The pilot program will be expanded to include more field office locations as issues with contracts, labor unions, and more complicated booking processes are resolved.

Please direct any questions or concerns to National Program Manager (b)(6), (b)(7)c, Law Enforcement Systems, at (202) 732-(b)(6), (b)(7)c or via e-mail at (b)(6), (b)(7)c@dhs.gov.

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

§ 351.301. [Amended]

■ 2. Amend § 351.301 by removing and reserving paragraph (d)(5).

§ 351.414 [Amended]

■ 3. Amend § 351.414 by removing and reserving paragraphs (f) and (g).

Dated: November 24, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–29225 Filed 12–9–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF JUSTICE

28 CFR Part 28

RIN 1105–AB09; 1105–AB10; 1105–AB24

[OAG Docket Nos. 108, 109, 119; AG Order No. 3023–2008]

DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice by this publication is amending regulations relating to DNA-sample collection in the federal jurisdiction. This rule generally directs federal agencies to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States, subject to certain limitations and exceptions.

By this rule, the Department is also finalizing, without change, two related interim rules concerning the scope of qualifying federal offenses for purposes of DNA-sample collection and a requirement to preserve biological evidence in federal criminal cases in which defendants are under sentences of imprisonment.

DATES: *Effective Date:* This rule is effective January 9, 2009.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy, Main Justice Building, 950 Pennsylvania Ave., NW., Washington, DC 20530. Telephone: (202) 514–3273.

SUPPLEMENTARY INFORMATION:

This final rule finalizes a proposed rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105-AB24) (published April 18, 2008, at 73 FR 21083), which was designed to implement amendments made by section 1004 of the DNA Fingerprint Act of 2005, Public Law 109–162, and section 155 of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, to section 3 of the DNA Analysis Backlog Elimination Act of 2000, Public Law 106–546. These regulatory provisions direct agencies of the United States that arrest or detain individuals, or that supervise individuals facing charges, to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. Unless otherwise directed by the Attorney General, the collection of DNA samples may be limited to individuals from whom an agency collects fingerprints. The Attorney General also may approve other limitations or exceptions. Agencies collecting DNA samples are directed to furnish the samples to the Federal Bureau of Investigation (''FBI''), or to other agencies or entities as authorized by the Attorney General, for purposes of analysis and entry into the Combined DNA Index System.

The final rule also finalizes two interim rules. The first interim rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105-AB09) (published on January 31, 2005, at 70 FR 4763), implemented section 203(b) of the Justice for All Act of 2004, Public Law 108–405. That statutory provision expanded the class of offenses constituting qualifying federal offenses for purposes of DNA-sample collection to include all felonies (as well as certain misdemeanors), thereby permitting the collection of DNA samples from all convicted federal felons.

The second interim rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105-AB10) (published on April 28, 2005 at 70 FR 21951), implemented 18 U.S.C. 3600A. That statute requires the government to preserve biological evidence in federal criminal cases in which defendants are under sentences of imprisonment, subject to certain limitations and exceptions. Subsection (e) of the statute requires the Attorney General to promulgate regulations to implement and enforce the statute. The regulations issued for that purpose, which are finalized by this final rule, explain and interpret the evidence preservation requirement of 18 U.S.C. 3600A, and include provisions concerning sanctions for violations of that requirement.

Background

All 50 States authorize the collection and analysis of DNA samples from convicted state offenders, and enter resulting DNA profiles into the Combined DNA Index System (''CODIS''), which the FBI has established pursuant to 42 U.S.C. 14132. In addition to collecting DNA samples from convicted state offenders, several states authorize the collection of DNA samples from individuals they arrest.

This final rule addresses corresponding requirements and practices in the federal jurisdiction. The DNA Analysis Backlog Elimination Act of 2000 (the ''Act'') initially authorized DNA-sample collection by federal agencies only from persons convicted of certain ''qualifying'' federal, military, and District of Columbia offenses. Public Law 106–546 (2000). The Act also addressed the responsibility of the Federal Bureau of Prisons (''BOP'') and federal probation offices to collect DNA samples from convicted offenders in their custody or under their supervision, and the responsibility of the FBI to analyze and index DNA samples. On June 28, 2001, the Department of Justice published an interim rule, Regulations Under the DNA Analysis Backlog Elimination Act of 2000 (OAG 101I; RIN 1105–AA78), to implement these provisions. 66 FR 34363. The rule, in part, specified the qualifying federal offenses for which DNA samples could be collected and addressed responsibilities of BOP and the FBI under the Act.

After publication of the June 2001 interim rule, Congress enacted the USA PATRIOT Act, Public Law 107–56. Section 503 of that Act added three additional categories of qualifying federal offenses for purposes of DNA-sample collection: (1) Any offense listed in section 2332b(g)(5)(B) of title 18, United States Code; (2) any crime of violence (as defined in section 16 of title 18, United States Code); and (3) any attempt or conspiracy to commit any of the above offenses. The Department of Justice published a proposed rule, DNA Sampling of Federal Offenders Under the USA PATRIOT ACT of 2001 (OAG 105; RIN 1105–AA78) on March 11, 2003, to implement this expanded DNA-sample collection authority. 68 FR 11481. On December 29, 2003, the Department published a final rule, Regulations Under the DNA Analysis Backlog Elimination Act of 2000 (OAG 101; RIN 1105-AA78), implementing this authority. 68 FR 74855.

After publication of the December 2003 final rule, the DNA-sample collection categories again were expanded by section 203(b) of the Justice for All Act of 2004, Public Law 108–405. The Justice for All Act expanded the definition of qualifying federal offenses to include any felony, thereby permitting the collection of DNA samples from all convicted federal felons. The Department published an interim final rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105–AB09), implementing this reform on January 31, 2005. 70 FR 4763.

The Department is now finalizing without change the January 2005 interim rule implementing section 203(b) of the Justice for All Act.[1] The regulatory provisions adopted by that interim rule will not have much practical significance following the publication and effectiveness of this final rule, because this final rule—pursuant to subsequently enacted legislative authority as discussed below—extends the authorization of DNA-sample collection to substantially all persons convicted of federal crimes (as well as certain non-convict classes). Sample collection accordingly will no longer be limited to persons convicted of offenses in the felony and specified misdemeanor categories constituting ''qualifying'' federal offenses under the Justice for All Act provisions. Nevertheless, it is appropriate to retain the regulatory provisions determining specifically which federal crimes constitute ''qualifying'' federal offenses, 28 CFR 28.1–.2, because the statute contemplates such determination by the Attorney General, and because those provisions continue to define the statutory minimum for DNA-sample collection from persons convicted of federal crimes, independent of the exercise of the Attorney General's authority under later enactments to expand the DNA-sample collection categories by regulation.

In addition to extending the category of federal convicts subject to DNA-sample collection to include all felons, the Justice for All Act of 2004 enacted a post-conviction DNA testing remedy for the federal jurisdiction, appearing in 18 U.S.C. 3600, and related biological evidence preservation requirements for federal criminal cases, appearing in 18 U.S.C. 3600A. Subsection (e) of 18 U.S.C. 3600A directs the Attorney General to issue regulations to implement and enforce that section. The Department carried out this statutory requirement by publishing an interim rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105–AB10), on April 28, 2005. 70 FR 21951. The regulatory provisions adopted by that interim rule appear in 28 CFR 28.21–.28. This final rule is adopting those regulatory provisions as final without change. The preamble to the April 2005 interim rule, appearing at 70 FR 21951–56, provides explanation concerning the regulatory provisions that continues to apply to those provisions as finalized by this rule.

Section 1004 of the DNA Fingerprint Act of 2005 (''DNA Fingerprint Act''), Public Law 109–162, broadened the categories of persons subject to DNA-sample collection to authorize such collection from ''individuals who are arrested or from non-United States persons who are detained under the authority of the United States.'' Before publication of a rule implementing this new authority, the DNA-sample collection provisions were amended further by section 155 of the Adam Walsh Child Protection and Safety Act of 2006 (''Adam Walsh Act''), Public Law 109–248. The amendments made by that Act left the statute in its current form: ''The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.'' 42 U.S.C. 14135a(a)(1)(A). The statute also provides that the Attorney General may ''direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.'' *Id*. The Department published a proposed rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105-AB24) (April 18, 2008, at 73 FR 21083), to implement the DNA Fingerprint Act and Adam Walsh Act amendments and this rule also finalizes that April 2008 proposed rule.

Purposes

The purposes of the portions of this rule that finalize pre-existing interim rules are explained above and in the previously published preambles to those interim rules. The part of this rule that is new—expanding DNA-sample collection pursuant to the authority under 42 U.S.C. 14135a(a)(1)(A)—furthers important purposes reflecting the emergence of DNA identification technology and its uses in the criminal justice system.

DNA analysis provides a powerful tool for human identification. DNA samples collected from individuals or derived from crime scene evidence are analyzed to produce DNA profiles that are entered into CODIS. These DNA profiles, which embody information concerning 13 ''core loci,'' amount to ''genetic fingerprints'' that can be used to identify an individual uniquely, but do not disclose an individual's traits, disorders, or dispositions. *See United States* v. *Kincade*, 379 F.3d 813, 818–19 (9th Cir. 2004) (en banc); *Johnson* v. *Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006). Hence, collection of DNA samples and entry of the resulting profiles into CODIS allow the government to ''ascertain[] and record[] the identity of a person.'' *Jones* v. *Murray*, 962 F.2d 302, 306 (4th Cir. 1992). The design and legal rules governing the operation of CODIS reflect the system's function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes. *See* 42 U.S.C. 14132, 14133(b)–(c), 14135e.

The practical uses of the DNA profiles (''genetic fingerprints'') in CODIS are similar in general character to those of actual fingerprints, but the collection of DNA from individuals in the justice system offers important information that is not captured by taking fingerprints alone. Positive biometric identification, whether by means of fingerprints or by means of DNA profiles, facilitates the solution of crimes through database searches that match crime scene evidence to the biometric information that has been collected from individuals. Solving crimes by this means furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators. DNA analysis offers a critical

[1] The preamble explanation in the interim rule implementing section 203(b) of the Justice for All Act, at 70 FR 4764–66, continues to apply to its regulatory provisions as finalized by this rule. However, the following errata should be noted: (1) the reference to ''28.2(a)(1)'' in the final sentence of the second full paragraph in the middle column on 70 FR 4765 should be to ''28.2(b)(1)''; (2) the references to ''(b)(3)(A)'' in the third and fifth sentences of the first paragraph and the second sentence of the second paragraph in the right column on 70 FR 4765 should be to ''(b)(3)(i)''; (3) the references to ''(b)(3)(B)'' in the first and third sentences of the first full paragraph of the left column on 70 FR 4766 should be to ''(b)(3)(ii)''; (4) the reference to ''(b)(3)(I)'' in the third sentence of the second full paragraph of the left column on 70 FR 4766 should be to ''(b)(3)(ix)''.

complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprints but leave biological residues at the crime scene. Hence, there is a vast class of crimes that can be solved through DNA matching that could not be solved in any comparable manner (or could not be solved at all) if the biometric identification information collected from individuals were limited to fingerprints.

In addition, as with taking fingerprints, collecting DNA samples at the time of arrest or at another early stage in the criminal justice process can prevent and deter subsequent criminal conduct—a benefit that may be lost if law enforcement agencies wait until conviction to collect DNA. Indeed, recognition of the added value of early DNA-sample collection in solving and preventing murders, rapes, and other crimes was a specific motivation for the enactment of the legislation that this rule implements. *See* 151 Cong. Rec. S13756–58 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of the DNA Fingerprint Act) (explaining the value of including all arrestees in the DNA database). Moreover, in relation to aliens who are illegally present in the United States and detained pending removal, prompt DNA-sample collection could be essential to the detection and solution of crimes they may have committed or may commit in the United States. Since in most cases such aliens are not prosecuted for their immigration offenses, there is usually no later opportunity to collect a DNA sample premised on a criminal conviction. Hence, the individual's detention pending removal constitutes a unique opportunity to obtain this critical biometric information—and by that means to solve and hold the individual accountable for any crimes committed in the United States—before the individual's removal from the United States places him or her beyond the ready reach of the United States justice system.

As with fingerprints, the collection of DNA samples at or near the time of arrest also can serve purposes relating directly to the arrest and ensuing proceedings. For example, analysis and database matching of a DNA sample collected from an arrestee may show that the arrestee's DNA matches DNA found in crime scene evidence from a murder, rape, or other serious crime. Such information helps authorities to assess whether an individual may be released safely to the public pending trial and to establish appropriate conditions for his release, or to ensure proper security measures in case he is detained. It may help to detect violations of pretrial release conditions involving criminal conduct whose perpetrator can be identified through DNA matching and to deter such violations. The collection of a DNA sample may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint records are unavailable, incomplete, or inconclusive. Hence, conducted incident to arrest, DNA-sample collection offers a legitimate means to obtain valuable information regarding the arrestee. *See Anderson* v. *Virginia*, 650 S.E.2d 702, 706 (Va. 2006) (upholding a state statute authorizing DNA-sample collection from arrestees based on ''the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution'' (citation and quotation omitted)).

In sum, this rule implements new statutory authority that will further the government's legitimate interest in proper identification of persons ''lawfully confined to prison'' or ''arrested upon probable cause.'' *Jones*, 962 F.2d at 306. By expanding CODIS pursuant to statutory authority to include persons arrested, facing charges, or convicted, and non-United States persons detained, this rule will enhance the accuracy and efficacy of the United States criminal justice system.

Practical Implementation

The rule allows DNA samples generally to be collected, along with a subject's fingerprints, as part of the identification process. As discussed above, the uses of DNA for law enforcement identification purposes are similar in general character to the uses of fingerprints, and these uses will be greatly enhanced as a practical matter if DNA is collected regularly in addition to fingerprints. Law enforcement agencies routinely collect fingerprints from individuals whom they arrest. *See Anderson*, 650 S.E.2d at 706 (''Fingerprinting an arrested suspect has long been considered a part of the routine booking process.''); *Kincade*, 379 F.3d at 836 n.31 (''[E]veryday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence.'' (citation and quotation omitted)); *Jones*, 962 F.2d at 306 (noting ''universal approbation of 'booking' procedures * * * whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification''). In addition, agencies that detain non-United States persons (i.e., persons who are not U.S. citizens or lawful permanent residents),[2] such as the Department of Homeland Security (''DHS''), often collect fingerprints from such individuals.

Accordingly, the Attorney General is directing all agencies of the United States that arrest or detain individuals or supervise individuals facing charges to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States, pursuant to 42 U.S.C. 14135a(a)(1)(A), if the agencies take fingerprints from such individuals.

The Department recognizes, however, that there may be some circumstances in which agencies collect fingerprints but in which the collection of DNA samples would not be warranted or feasible. For example, in relation to non-arrestees, DHS will not be required to collect DNA samples from aliens who are fingerprinted in processing for lawful admission to the United States, or from aliens from whom DNA-sample collection is otherwise not feasible because of operational exigencies or resource limitations. If any agency believes that such circumstances exist within its sphere of operations, the agency should bring these circumstances to the attention of the Department, and exceptions to the DNA-sample collection requirement may be allowed with the approval of the Attorney General.

The Department also recognizes that some federal agencies exercising law enforcement authority do not collect fingerprints routinely from all individuals at a stage comparable to the arrest phase. For example, military personnel involved in court martial proceedings may not be fingerprinted because their fingerprints already are on file. In addition, persons facing federal charges in the District of Columbia may not be fingerprinted by any federal agency if they are fingerprinted by the Metropolitan Police Department. Nonetheless, the collection of DNA samples from such individuals serves

[2] Defining the scope of ''non-United States persons'' to mean persons who are not U.S. citizens or lawful permanent residents follows the common understanding of this term in other provisions of law. See, *e.g.*, 10 U.S.C. 2241 note, Public Law 108–7, div. M, § 111(e)(2)–(3), Feb. 20, 2003, 117 Stat. 536 (defining ''non-United States person'' as ''any person other than a United States person'' and ''United States person'' in the manner set forth in 50 U.S.C. 1801(i)); 50 U.S.C. 1801(i) (defining ''United States person,'' in relation to individuals, as ''a citizen of the United States * * * [or] an alien lawfully admitted for permanent residence'').

the same purposes, and is warranted to the same degree, as DNA-sample collection from other federal arrestees and defendants. Therefore, if directed by the Attorney General, certain agencies will be required to collect DNA samples from individuals from whom they would not otherwise collect fingerprints.

Agencies will be authorized to enter into agreements with other federal agencies, with state and local governments, and with private entities to carry out the required DNA-sample collection. Agencies that arrest, detain, or supervise individuals will not be required to duplicate DNA-sample collection if arrangements have been made to have the collection done by another authorized agency or entity, but will be responsible for ensuring that the DNA samples are collected and submitted for analysis and entry into CODIS. For example, an agency that arrests and fingerprints an individual and then transfers the individual to another agency (such as the United States Marshals Service) for detention cannot transfer responsibility for DNA-sample collection to the detention agency unless that agency agrees to assume responsibility for that function.

The Department of Justice understands that agencies will need to revise their current procedures in order to implement these new DNA-sample collection requirements. In addition, sample-collection kits will need to be distributed to the agencies and agency personnel will need to be trained in the proper collection techniques. Therefore, although the Attorney General is directing all agencies to implement DNA-sample collection by January 9, 2009, if sample-collection kits authorized by the Attorney General have not been made available to an agency in sufficient numbers to allow collection of DNA samples from all covered individuals, the Attorney General will grant an exception allowing the agency to limit its DNA-sample collection program to the extent necessary.

The collection of DNA samples by agencies will be performed in accordance with procedures and standards established by the Attorney General.

Under the pre-existing DNA-sample collection program for federal convicts, BOP and federal probation offices have taken blood samples for this purpose, utilizing sample-collection kits provided by the FBI. In earlier stages of the program, these samples generally were obtained through venipuncture (blood drawn from the arm), but currently the FBI provides kits that allow a blood sample to be collected by means of a finger prick. However, the states that collect DNA samples from arrestees typically do so by swabbing the inside of the person's mouth (''buccal swab''), and many states use the same method to collect DNA samples from convicts. Therefore, although even blood tests ''are a commonplace in these days of periodic physical examinations and experience with them teaches * * * that for most people the procedure involves virtually no risk, trauma, or pain,'' *Schmerber* v. *California*, 384 U.S. 757, 771 (1966) (footnote omitted), the rule permits and facilitates the use of buccal swabs to collect DNA samples.

Revisions to Existing Regulations

As set forth in the proposed rule, this final rule revises a section of the existing regulations, 28 CFR 28.12, to reflect the expansion of DNA-sample collection to include persons arrested, facing charges, or convicted, and non-United States persons detained under the authority of the United States.

Section 28.12, in paragraph (a), is revised to require BOP to collect DNA samples from all federal (including military) convicts in its custody, as well as from individuals convicted of qualifying District of Columbia offenses. The expansion of DNA-sample collection to include all federal or military convicts in BOP custody, whether or not they fall within the previously covered categories of persons convicted of qualifying federal or military offenses, is based on the Attorney General's authority under 42 U.S.C. 14135a(a)(1)(A). The requirement for BOP to collect samples from individuals convicted of qualifying District of Columbia offenses appears in 42 U.S.C. 14135b(a)(1).

A new paragraph (b) is inserted in section 28.12 to implement the new authority to collect DNA samples from federal arrestees, defendants, and detainees. As discussed above, agencies of the United States that arrest or detain individuals or supervise individuals facing charges will be required to collect DNA samples if they collect fingerprints from such individuals, subject to any limitations or exceptions the Attorney General may approve. This paragraph also specifies certain categories of aliens from whom DHS will not be required to collect DNA samples, even if DHS collects fingerprints. A new paragraph (c) is added that specifies a time frame for the implementation of the expanded DNA-sample collection program.

Current paragraph (c) is redesignated as paragraph (d) and is amended to reflect the expansion of the categories of individuals from whom DNA samples will be collected and the agencies that conduct DNA-sample collection. *See* 42 U.S.C. 14135a(a)(1)(A), 14135a(a)(4)(A). The current version of that paragraph refers only to the collection of DNA samples by BOP from persons convicted of qualifying offenses.

A new paragraph (e), replacing current paragraphs (b) and (d), provides in part that agencies required to collect DNA samples under the section may enter into agreements with other federal agencies, in addition to units of state or local governments or private entities, to carry out DNA-sample collection. The authority to make such arrangements with state and local governments and with private entities is explicit in 42 U.S.C. 14135a(a)(4)(B), and the Attorney General is delegating this authority to other federal agencies pursuant to 42 U.S.C. 14135a(a)(1)(A). The latter provision (42 U.S.C. 14135a(a)(1)(A)) also sufficiently supports allowing such arrangements between federal agencies, since it authorizes the Attorney General to delegate DNA-sample collection to any Department of Justice component and to any other federal agency that arrests or detains individuals or supervises individuals facing charges.

The new paragraph (e) also identifies three circumstances in which an agency need not collect a sample. The first is when arrangements have been made for some other agency or entity to collect the sample under that paragraph. The second is when CODIS already contains a DNA profile for the individual, an exception expressly authorized by 42 U.S.C. 14135a(a)(3). The third is when waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2), statutes that provide that BOP and the Department of Defense need not duplicate DNA-sample collection with respect to military offenders.

Current paragraph (e) is redesignated as paragraph (f) and is amended to require agencies subject to the rule to carry out DNA-sample collection utilizing buccal-swab collection kits provided by the Attorney General or other means authorized by the Attorney General. The samples then must be sent to the FBI, or to another agency or entity authorized by the Attorney General, for purposes of analysis and indexing in CODIS. This paragraph also is amended to require taking of another sample if the original sample is flawed and hence cannot be analyzed to derive a DNA profile that satisfies the requirements for entry into CODIS.

A new paragraph (g) is added to clarify that the authorization of DNA-sample collection under this rule

pursuant to the DNA Analysis Backlog Elimination Act does not limit DNA-sample collection by an agency pursuant to any other authority.

Summary of Comments

The Department received comments from members of the public and interested organizations concerning the two interim rules and the proposed rule that are being finalized by this rule. The comments received on the interim rule concerning biological evidence preservation, published at 70 FR 21951, will be summarized first. Following that, the comments received on the interim and proposed rules concerning the expansion of DNA-sample collection in the federal jurisdiction, published at 70 FR 4763 and 73 FR 21083, will be summarized jointly because the number of comments received on the earlier (interim) rule was relatively small and those comments generally overlapped in substance with the comments received on the later proposed rule.

Comments on the Interim Rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105–AB10)

This interim rule implemented the biological evidence preservation requirements of 18 U.S.C. 3600A. *See* 70 FR 21951.

One commenter proposed that this rule should be changed to stipulate that federal agencies cannot maintain or transfer biological evidence to other federal agencies unless existing privacy protections are maintained, and that access to biological material whose preservation is required by 18 U.S.C. 3600A should be limited to federal criminal justice agencies for purposes of post-conviction DNA testing to determine if a convict is actually innocent or identification of additional perpetrators where there is evidence of the existence of such persons.

The rule has not been changed on the basis of this comment because nothing in section 3600A or its implementing rule purports to repeal or limit any existing privacy protections, because there is no reason to discern any greater likelihood of misuse of biological evidence retained pursuant to section 3600A's requirements than of misuse of biological evidence that would be retained otherwise, because addition of such restrictions is not necessary to carry out the statutory directive to implement and enforce section 3600A, and because there is no apparent legal authority for the Department to prescribe such rules for federal agencies on a government-wide basis. Moreover, the policies reflected in the changes proposed by the commenter are too restrictive, because they could preclude using retained biological evidence for legitimate purposes, such as to establish guilt in a new trial if the offender's original conviction is reversed.

Another commenter expressed concern about the rule's provision in 28 CFR 28.22(b)(3) that section 3600A's biological evidence preservation requirement ceases to apply when a defendant is released under supervision following imprisonment. However, this limitation of scope is explicit in the statute, which requires preservation of biological evidence only in relation to a defendant who is ''under a sentence of imprisonment.'' 18 U.S.C. 3600A(a); *see* 70 FR 21952 (explaining in preamble to interim rule that this statutory language does not cover convicts released under supervision).

The same commenter also expressed concern about 28 CFR 28.23, which provides that the evidence that must be retained is limited to sexual assault forensic examination kits and semen, blood, saliva, hair, skin tissue, or other identified biological material. The specific concern expressed was that evidence not found to contain biological material might be found to contain such material on reanalysis at some later time. However, the requirement as stated in the regulation tracks the statutory requirement in section 3600A(a). The statute does not require retention of evidence in which biological material has not been identified based on the speculative possibility that re-examination at some future time might identify such material and the rule would not accurately reflect the statute if it so provided.

Another commenter expressed support for the rule, stating that the biological evidence preservation requirement would help to prove without dispute the guilt or innocence of persons convicted of crimes, and did not propose any changes.

Comments on the Interim Rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105–AB09), and on the Proposed Rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105–AB24)

Comments were received on the interim rule (published at 70 FR 4763) implementing the Justice for All Act's expansion of DNA-sample collection from federal convicts to include all felons, and the proposed rule (published at 73 FR 21083) expanding DNA-sample collection in the federal jurisdiction to include certain non-convict classes, including arrestees and non-U.S. person detainees as specified. The ensuing discussion summarizes the principal issues that were raised in comments received from various individuals or organizations, followed by a summary of comments received from some particular commenters that merit separate mention or discussion. The main matters raised in the comments are as follows:

Scope of Sample Collection

Some commenters objected to the scope of DNA-sample collection under the rule, such as by stating that DNA-sample collection should not be extended beyond convicts to arrestees, or that DNA-sample collection should be limited to individuals convicted of or implicated in particularly serious or violent crimes. Other commenters agreed with the approach of the rule, noting the public safety benefits of collecting DNA samples on a broader basis.

The rule has not been changed on the basis of comments in this category. Extending DNA-sample collection beyond convicts to other persons implicated in illegal activity is the central reform of the DNA Fingerprint Act that this rule implements. This extension generally brings DNA-sample collection into conformity with the practice regarding fingerprints, which are collected as part of routine booking procedure in connection with arrests, and it offers critical benefits that would be lost if DNA-sample collection were authorized only if and when an arrested person is convicted. The matter is further discussed above in connection with the purposes and practical implementation of this rule.

Some of the comments on this point objected to the extension of DNA-sample collection to arrestees on the ground that it would violate the presumption of innocence or result in innocent persons being included in the DNA database. This objection is essentially question-begging, presupposing that DNA-sample collection from an individual is not justifiable unless there has been an adjudication establishing the individual's commission of a criminal offense. That is not the rationale of DNA-sample collection under this rule and the legislative enactments it implements. Rather, the rule reflects a judgment that the implication of individuals in criminal activity to the extent of being arrested sufficiently supports the taking of certain identification information from such individuals. The same judgment is made

without difficulty with respect to other forms of biometric identification, including fingerprinting and photographing of arrestees, and the corresponding judgment is sound with respect to DNA identification information.

Some commenters believed that the rule's expansion of DNA-sample collection would adversely affect innocent persons in a different way, by supposedly increasing the risk of spurious matches resulting from an enlarged DNA database. The premise of this objection is mistaken. The technical design of the DNA identification system, including the number and selection of the core loci used in DNA identification, is sufficiently discriminating to foreclose a significant risk of coincidental matching of DNA profiles between different individuals that could result in an innocent person being mistakenly implicated in a crime he did not commit. Increasing the number of DNA profiles in CODIS accordingly does not create a risk to the innocent of the sort that concerns these commenters, just as the increase in the number of fingerprints in criminal justice databases does not create a significant risk of innocent persons being implicated in crimes because of coincidental congruences between their fingerprints and those of offenders.

Some commenters objected that extending DNA-sample collection to arrestees would disproportionally impact certain racial or ethnic groups. However, the rule is race-neutral, providing for the collection of DNA samples from arrestees on an evenhanded basis, regardless of their racial or ethnic background. The demographic proportions in the class of individuals from whom DNA samples are taken upon arrest will parallel the representation of different demographic groups in the general class of arrestees, just as the demographic proportions in the class of individuals from whom fingerprints are taken upon arrest parallels the representation of different demographic groups in the general class of arrestees. The resulting proportions in either case provide no reason to refrain from taking biometric information from arrestees, whose use for law enforcement identification purposes will help to protect individuals in all racial, ethnic, and other demographic groups from criminal victimization.

As noted above, some commenters opined that DNA-sample collection should be limited to cases involving individuals implicated in particularly serious or violent crimes. The uses of DNA identification include solving the most serious crimes, such as rape and murder, but also legitimately include solving other types of crimes in which the perpetrators leave identifiable biological residues at the crime scenes from which DNA can be recovered. Moreover, even if only the objectives of solving and preventing the most serious crimes were considered, the scope of sample collection provided in this rule would be justified, because the efficacy of the DNA identification system in solving such crimes depends in large measure on casting a broader net in sample collection. The issue of the scope of predicate offenses was before Congress during the consideration of the enactments that this rule implements and the legislative decision was against imposing any such limitation:

> [T]he Committee has made the salutary reforms * * * that expand the collection and indexing of DNA samples and information generally applicable, and has not confined the application of these reforms to cases involving violent felonies or some other limited class of offenses. The experience with DNA identification over the past fifteen years has provided overwhelming evidence that the efficacy of the DNA identification system in solving serious crimes depends upon casting a broader DNA sample collection net to produce well-populated DNA databases. For example, the DNA profile which solves a rape through database matching very frequently was not collected from the perpetrator based upon his prior conviction for a violent crime, but rather based upon his commission of some property offense that was not intrinsically violent. As a result of this experience, a great majority of the States, as well as the Federal jurisdiction, have adopted authorizations in recent years to collect DNA samples from all convicted felons—and in some cases additional misdemeanant categories as well—without limitation to violent offenses. * * * The principle is equally applicable to the collection of DNA samples from non-convicts, such as arrestees. By rejecting any limitation of the proposed reforms to cases involving violent felonies or other limited classes, the Committee has soundly maximized their value in solving rapes, murders, and other serious crimes.

151 Cong. Rec. S13758 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of the DNA Fingerprint Act, quoting the Justice Department's statement of views).

Finally, some commenters objected that the rule would result in the collection of DNA samples from persons arrested in the course of demonstrations or protests. However, the rule involves no targeting of anyone based on expressive activities or other constitutionally protected conduct. It is a neutral provision for the collection of an additional type of biometric information from arrestees, regardless of the context in which they are arrested. Persons arrested for criminal activities occurring in the context of demonstrations are subject to the normal incidents of arrest, including fingerprinting and photographing. There is no reason DNA-sample collection should be treated differently.

Constitutionality

Some commenters alleged that DNA-sample collection as authorized by the rule would violate the Fourth Amendment's prohibition of unreasonable searches and seizures or other constitutional provisions. Other commenters believed that the rule's requirements are consistent with the Constitution.

The constitutionality of collecting DNA samples from convicts on a categorical basis has been considered by numerous federal and state courts, which have reached the substantially unanimous conclusion that such collection is constitutional. With respect to the broader collection of DNA samples from arrestees, defendants, and non-U.S. person detainees as authorized by this rule, the Department of Justice has carefully considered the issue and has concluded that the rule fully comports with constitutional requirements. A number of the considerations supporting this conclusion are discussed above in the explanation of the purposes and practical implementation of this rule.

Privacy

Some commenters objected to the rule on the ground that DNA, in contrast to fingerprints, can potentially be used to derive sensitive information about individuals, such as information about genetic disorders, dispositions to medical conditions, and possibly behavioral predispositions. Some stated that this concern is aggravated by the retention of the DNA samples themselves (buccal swabs or blood samples) after the samples have been analyzed to derive the DNA profiles that are entered into CODIS.

The rule has not been changed on the basis of these comments because the concerns they raise were recognized, and these concerns were fully considered and addressed, in the design of the DNA identification system and the legal and administrative rules governing the system's operation. As discussed above in connection with the purposes of this rule, the DNA profiles retained in the system are sanitized ''genetic fingerprints'' that can be used to identify an individual uniquely, but do not disclose an individual's traits, disorders, or dispositions. The rules

governing the operation of CODIS reflect its function as a tool for law enforcement identification, and do not allow DNA information within the scope of the system to be used to derive information concerning sensitive genetic matters. *See* 42 U.S.C. 14132(b), 14133(b)–(c), 14135e.

The retention of DNA samples after DNA profiles have been derived does not compromise these protective measures, because the DNA samples are maintained in secure storage and are subject to essentially the same use restrictions and privacy protections as DNA profiles. *See* 42 U.S.C. 14132(b)(3), 14133(c)(2), 14135e. Moreover, retention of the samples has neither the purpose nor the effect of jeopardizing the privacy of individuals from whom the samples have been collected, but rather serves to protect valid individual and systemic interests. For example, in cases in which a search against CODIS obtains an apparent match between an individual's DNA profile in the system and the DNA of the perpetrator of a crime derived from crime scene evidence, the original sample taken from the individual is reanalyzed to ensure that the profile in the system is actually that of the identified individual before the match information is disclosed to investigators. This measure, which functions as a backstop protection to ensure that innocent persons are not mistakenly suspected or accused, could not be carried out if the DNA samples were destroyed.

Finally, some commenters objected to the retention of the DNA samples collected under the rule on the view that such retention could lead to ''familial searching.'' By ''familial searching'' the commenters apparently mean searches directed at finding DNA profiles in a database that do not match to the DNA found in crime scene evidence, but are sufficiently close (''partial matches'') to create a probability that the perpetrator is a relative of an identifiable individual in the DNA database. The current design of the DNA identification system does not encompass searches of this type against the national DNA index. Occasionally partial matches appear incidentally as a result of ordinary searches seeking exact matches, and in such cases the partial match information may be shared with investigators, for use as an investigative lead.

This rule makes no change in policies or practices relating to partial matches or searches therefor, nor does the concern raised by these commenters have any obvious relationship to the matters addressed in the rule. The question whether or to what extent partial match information may be sought or used is independent of the question whether DNA samples are to be collected only from convicts or from persons in certain non-convict classes as well. It is also independent of policy decisions regarding the retention or disposal of DNA samples. The concern raised by these commenters concerning the possibility of ''familial searching'' accordingly provides no logical basis for changing this rule.

Impact on Aliens

Some commenters objected to the rule insofar as it would result in the collection of DNA samples from non-U.S. persons arrested or detained for immigration law violations, and proposed various limitations to curtail or exclude such sample collection. Other commenters supported the application of the rule to collect DNA samples in these circumstances.

One concern raised by commenters critical of the rule was that collecting DNA samples from non-U.S. persons who are arrested or detained would result in resentment in immigrant communities. However, persons who are illegally present in the United States are subject to arrest or detention and removal from the country. When such persons are arrested or detained pending removal they are subject to the normal incidents of being taken into custody, including fingerprinting. The rule would only add the collection of another type of biometric information to the process, normally by taking a buccal swab. Some degree of resentment at the enforcement of the nation's immigration laws may be an unavoidable consequence of the removal from the United States of individuals illegally present, with whom others in immigrant communities may identify based on common origin or background. A minor addition to the associated booking procedure in connection with removal, as provided in this rule, should not change the situation materially. Moreover, even if some additional resentment concerning the enforcement of the immigration laws were to result, it would not be sufficient reason to refrain from implementing an advance in law enforcement identification methods that offers important benefits in increased safety against criminal victimization to all elements of the national community, including immigrant communities.

Some comments critical of the rule's reforms suggested a general exclusion of immigration violations as a basis for DNA-sample collection under the rule. However, the statute (42 U.S.C. 14135a(a)(1)(A)) permits DNA-sample collection from arrestees with no restriction, and authorizes DNA-sample collection from non-U.S. persons more broadly, allowing DNA samples to be collected from such persons on the basis of detention (even if they are not arrested). Generally excluding aliens apprehended for immigration violations from DNA-sample collection would create an arbitrary difference between such persons and persons arrested for non-immigration federal offenses, and would virtually nullify the broader statutory authorization to collect DNA samples from non-U.S. person detainees, since immigration law violations are the typical reason non-U.S. persons may be detained (beyond ordinary arrest situations for other sorts of crimes). There is no justification for such restriction in the statutory text, on the basis of legislative intent, or on grounds of policy. *See generally* 151 Cong. Rec. S13757 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl) (noting breadth of authorization to collect DNA samples in immigration contexts under DNA Fingerprint Act).

Some commenters urged more specifically that collection of DNA samples from non-U.S. persons based on detention should be stringently limited, such as by limiting such collection to aliens held under final orders of removal. For the reasons discussed below, the Department has not made such a change in the final rule.

A ground offered by the commenters in support of such restriction is that persons who are citizens or lawful permanent residents may be mistakenly identified as non-U.S. persons and subjected to removal proceedings. In rare cases, a person born abroad may be able to establish derivative U.S. citizenship based upon the naturalization of one or both of the person's parents while he or she was a minor. It is also true that a small number of lawful permanent resident aliens are placed in removal proceedings, for example, based on their having committed certain types of crimes or on their engaging in such conduct as alien smuggling or immigration fraud. Such aliens retain their permanent resident status—and hence remain U.S. persons—until the issuance of a final removal order. 8 CFR 1.1(p).

While the statute limits the authority to collect DNA samples from detainees (not arrested, facing charges, or convicted) to non-U.S. persons, it does not prescribe a particular quantum of proof or any adjudicatory process to establish non-U.S. person status. Even the proposal of some commenters to limit DNA-sample collection to aliens

held under final orders of removal could not definitively preclude all mistakes, given the possibility that some such orders reflect errors of law or fact. The Department of Homeland Security or any other agency detaining persons for immigration violations will be able to consider whether there is any available information tending to indicate that a detainee is a lawful permanent resident or a U.S. citizen. While lawful permanent residents who are detained pending removal proceedings are not subject to DNA-sample collection based on non-U.S. person status before their permanent resident status is terminated at the conclusion of the removal proceedings, that is not a reason to defer collection of DNA samples from the vast majority of detained aliens who are not permanent resident aliens.

In interpreting the statutory authorization to collect DNA samples from non-U.S. person detainees, it is most plausibly understood in parity with the earlier part of the statutory provision, which permits DNA-sample collection from arrestees. The purpose of the authorization relating to arrestees is to extend DNA-sample collection beyond persons whose commission of crimes has been established by the relevant adjudicatory process (criminal conviction). Rather, the quantum of information sufficient to warrant an arrest—probable cause that the individual has committed a crime—is deemed a sufficient basis for the collection of certain biometric information, including DNA. Similarly, under the later portion of the statutory provision concerning non-U.S. person detainees, the quantum of information sufficient to warrant the detention of an individual based on indicia of the individual's being a non-U.S. person subject to removal is a sufficient basis for the collection of such information.

Considering the matter at a practical level, the largest class of persons who may be affected by the rule are aliens apprehended near the southwest border who have entered the country illegally. In most cases such aliens do not dispute their status or the illegality of their presence in the United States, and accept prompt repatriation following brief detention without further proceedings. Hence, radically limiting the application of the statute's DNA-sample collection authorization for non-U.S. person detainees—for example, limiting it to aliens held under final orders of removal—would exclude most individuals to whom it was meant to apply.

A further relevant consideration is that aliens who are apprehended following illegal entry have likely committed crimes under the immigration laws for which they could be arrested. *See, e.g.*, 8 U.S.C. 1325(a), 1326. Most accept prompt repatriation and are not prosecuted, but a substantial number are prosecuted. Whether prosecution will be pursued is a matter of executive discretion, and the decision about that may not occur until some time after the alien's apprehension. Hence, whether an alien in such circumstances is regarded as an arrestee or a (non-arrested) detainee may be a matter of characterization, and the aptness of one description or the other may shift over time, depending on the disposition or decision of prosecutors concerning the handling of the case. There would be little sense in an understanding of the statute as limiting DNA-sample collection from individuals as non-U.S. person detainees to circumstances in which their non-U.S. person status has, for example, been finally established through an immigration adjudication, where the statute would clearly allow DNA-sample collection from the same individuals under far less stringent requirements as persons arrested on probable cause for immigration law violations.

Finally, some commenters criticized the rule as requiring the collection of DNA samples from lawful immigrants seeking admission to the country. This comment is simply wrong. The rule provides an express exception to the collection requirement under section 28.12(b)(1) for ''[a]liens lawfully in, or being processed for lawful admission to, the United States.''

Backlogs

Some commenters expressed the concern that the rule would increase backlogs of unanalyzed DNA samples. However, the Department of Justice is fully aware of the increased demand for DNA analysis that will result, and the Department has requested additional resources for the FBI Laboratory to increase analysis capacity in order to address the larger volume of samples that will be collected and will need to be analyzed. Moreover, even if backlogs are temporarily increased, the collected samples will be stored until they can be analyzed, and the DNA profiles ultimately derived thereby will be useful in solving crimes whenever they become available and are entered into CODIS. The concern expressed by some of these commenters that having a larger number of stored samples could hinder criminal investigations is also not well-founded. The existence of samples in storage does not impair the operation of CODIS with respect to DNA profiles that have already been entered into the system. Analysis of DNA samples collected from individuals can be prioritized in cases in which the circumstances suggest a particular probability that matches to DNA in crime scene evidence from other offenses will result, regardless of the number of stored samples awaiting analysis.

Use of Contractors

Some commenters asserted that the rule contemplates federal agencies contracting with third parties to collect and store DNA samples, which they believed would lead to abuse. The reference may be to section 28.12(e), which states that agencies required to collect DNA samples under the rule may enter into agreements with other federal agencies, ''with units of state or local governments, and with private entities to carry out the collection of DNA samples.'' However, the quoted language in the rule tracks statutory language that authorizes such agreements. *See* 42 U.S.C. 14135a(a)(4)(B) (authorizing agencies to ''enter into agreements with units of State or local government or with private entities to provide for the collection of [DNA] samples''). For example, under this language, federal probation offices have been permitted to contract with medical personnel to carry out DNA-sample collection, in the form of blood-sample collection, from offenders under their supervision. The use of contract personnel does not waive or modify the privacy and security requirements of the DNA identification system and the authorization for this purpose in the rule contemplates nothing essentially different from what has previously been allowed (and continues to be allowed) under the statutory provisions. There is no basis for some commenters' apparent perception of this aspect of the rule as a novel measure entailing some grave risk of abuse.

Likewise, there is no force to an objection raised by some commenters that the rule does not prohibit outsourcing of DNA samples collected under the rule to private laboratories for analysis. The Department of Justice is moving to increase the FBI Laboratory's capacity for DNA analysis to address the expected increase in DNA analysis workload resulting from this rule. If there is also use of private laboratories to carry out some of the required DNA analysis, it is no cause for concern. Outsourcing of DNA analysis to private laboratories has widely been used for many years in analyzing DNA samples collected from individuals, including as

part of the federal DNA analysis backlog elimination funding program administered by the Department's National Institute of Justice. Where private laboratories carry out such analysis, they are subject to the stringent quality assurance and proficiency requirements and standards that laboratories deriving DNA profiles for entry into CODIS must meet, and to the privacy and security requirements associated with CODIS. Nothing in this rule would modify or weaken these protections, if it were decided to outsource some DNA samples collected under the rule for analysis by private laboratories.

Expungement

Some commenters stated that the rule should be modified to provide for expungement of DNA information in certain circumstances, such as cases in which an arrestee from whom a DNA sample was collected is acquitted. The rule has not been modified to incorporate expungement provisions because expungement is provided for and governed by statutory provisions appearing in 42 U.S.C. 14132(d). Under the applicable statutory expungement procedure, the FBI expunges from the national DNA index the DNA information of a person included in the index on the basis of conviction for a qualifying federal offense if the FBI receives a certified copy of a final court order establishing that the conviction has been overturned. Likewise, the FBI expunges the DNA information of a person included in the index on the basis of an arrest under federal authority if it receives a certified copy of a final court order establishing that the charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period. *See* 42 U.S.C. 14132(d)(1)(A). By December 31, 2008, the FBI will publish instructions on its Web site describing the process by which an individual may seek expungement of his or her DNA records in accordance with 42 U.S.C. 14132(d)(1)(A).

Use of Reasonably Necessary Means

Some commenters objected to the authorization in section 28.12(d) for agencies to use reasonably necessary means to collect DNA samples from individuals covered by the rule who refuse to cooperate in the collection of the sample. This regulatory provision is based on the statutory authorization to use such reasonable means appearing in 42 U.S.C. 14135a(a)(4)(A). The comments on this point did not provide persuasive reasons to refrain from paralleling the statutory authorization in the regulation.

Granting of Exceptions

Some comments criticized the rule as not sufficiently specifying the circumstances in which the Attorney General will allow exceptions to the rule's DNA-sample collection requirement. The rule has not been changed on this point. The preamble discussion in this rule above adequately explains why some authority to allow exceptions is necessary, and the types of grounds (such as operational exigencies or resource constraints) on which exceptions may be permitted.

Comments From Senator Jon Kyl

Senator Jon Kyl, the legislative author of the DNA Fingerprint Act and the related Adam Walsh Act amendment, submitted comments stating that the rule properly implements the authority created by these laws. He stated that he did not recommend any change in the regulations because they are consistent with the clear meaning and spirit of the statutory authorization.

Senator Kyl responded in his comments to the privacy concerns raised by other commenters. This included providing detailed explanation why it would be practically impossible to divert the relevant DNA analysis laboratory processes for preparation of CODIS DNA profiles so as to extract and misuse genetically sensitive information. Finally, Senator Kyl responded to and rejected a range of comments and proposed changes in the rule that had been submitted by other commenters who were critical of the rule.

Comments From the Administrative Office of the United States Courts

Comments were submitted by the Administrative Office of the United States Courts asking that the Department consider modifying the rule to specify that covered ''agenc[ies] of the United States'' that will be required to collect DNA samples include only executive branch agencies. The rule has not been so changed because the suggested change would be an incorrect reading of the law. The federal probation offices have been responsible for collecting DNA samples from convicts under their supervision, as provided in 42 U.S.C. 14135a(a)(2). Against this background, it is not plausible that they were meant to play no corresponding role under the enactment expanding DNA-sample collection in the federal jurisdiction to certain non-convict classes. The laws relating to pretrial release in federal cases were amended by the DNA Fingerprint Act to make it a mandatory condition of pretrial release that a defendant cooperate in required DNA-sample collection. *See* 18 U.S.C. 3142(b), (c)(1)(A). This heightens the implausibility of an assumption that the federal probation and pretrial services offices were not meant to have any responsibility with respect to DNA-sample collection, which is a mandatory pretrial release condition. The expanded DNA-sample collection authorization in 42 U.S.C. 14135a(a)(1)(A) states that the Attorney General may ''authorize and direct any other agency of the United States that * * * supervises individuals facing charges'' to carry out the DNA-sample collection function. There is no plausibility to a reading of this statutory language as intended to exclude almost all of the federal agencies (the federal probation and pretrial services offices) that supervise individuals facing federal charges.

The comments of the Administrative Office of the U.S. Courts also suggested that the rule be modified to include procedures by which probation officers will be notified when a DNA sample has been collected by some other agency, so as to avoid duplicative sample collection. Other commenters in some instances similarly suggested that the rule specify procedures or mechanisms to avoid duplicative collection by multiple agencies. The Department of Justice intends to establish such mechanisms, but their design and operation can most readily be worked out in the implementation of this rule in cooperation with the affected agencies. Consequently, the rule has not been modified on this point.

Comments From the National Congress of American Indians

Comments received from the National Congress of American Indians expressed concern about the lack of consultation with tribal officials regarding the proposed rule. The comments noted that federal jurisdiction exists to prosecute major crimes committed in Indian country, and recommended that the applicability of the rule be contingent on the assent of particular tribes. Various other restrictions were also recommended similar to those proposed by other commenters critical of the rule, such as limiting DNA-sample collection to convicts, and requiring the destruction of DNA samples after the DNA profiles have been derived and entered into CODIS. The underlying concern reflected in these comments was that collected samples would be misused to derive sensitive genetic information and not properly limited to legitimate law enforcement purposes.

The Department of Justice is aware of the concerns regarding the obtaining of sensitive genetic information concerning Native Americans and misuse of such information. But these concerns are misplaced in relation to this rule, under which collected DNA samples and resulting DNA profiles are subject to the stringent privacy protections of CODIS, reinforced and secured through numerous design elements and governing laws and rules that limit the use of DNA information to proper law enforcement identification purposes. These matters are discussed and documented at length in earlier portions of this preamble and summary. Hence, limiting the application of the rule in relation to crimes committed in Indian country or through other restrictions would not further any purpose of protecting the privacy of Native Americans. Rather, it would only serve to limit the strength and efficacy of the DNA identification system in protecting all elements of the American public, including Native American communities, from rape, murder, and other crimes.

Comments From the New Hampshire Department of Safety

Comments submitted by the New Hampshire Department of Safety urged that the rule be modified to create an exception to DNA-sample collection based on detention for minor, nonviolent offenses, or that resulting DNA profiles in such cases not be entered into CODIS until after conviction. The comments stated that members of the New Hampshire Legislature had advised that there would be a move to prohibit New Hampshire from participating in CODIS if the rule were not restricted.

The preamble of this rule above explains the basis for the conclusion that collecting DNA samples from federal arrestees on the same footing as fingerprints is the approach most conducive to public safety and is not overly broad. Moreover, this rule affects only DNA-sample collection in the federal jurisdiction. It imposes nothing on New Hampshire or other states, which remain free to set their own DNA-sample collection policies. Withdrawal from CODIS by a state would harm its own people, denying them the benefits of the nationwide DNA identification system that has come to play a critical role in protecting the public from crime.

Comments From a Canadian Member of Parliament

A member of the Canadian Parliament submitted comments expressing concern about the rule, in relation to possible DNA-sample collection from Canadians lawfully visiting the United States. The comments appear to reflect misunderstandings concerning the provisions and intent of the rule. One limitation of the rule is that it generally equates the requirements for DNA-sample collection to those for fingerprinting. Hence, to the extent that Canadian visitors to the United States are exempt from fingerprinting, they would also be exempt from the DNA-sample collection requirement prescribed by the rule. More basically, the rule has an express exemption for aliens lawfully in, or being processed for lawful admission to, the United States. The rule's objectives in relation to non-U.S. persons generally concern those implicated in illegal activity (including immigration violations), and will not affect lawful Canadian visitors.

Other Comments

Beyond the recurrent and major comments discussed above, no other comments received on the rule provided any persuasive reason to reconsider or depart from the rule text as previously proposed. Hence, the Department of Justice has carefully considered all comments and has concluded that the rule should be finalized without modification.

Regulatory Certifications

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the collection, analysis, and indexing of DNA samples from certain individuals, and the preservation of biological evidence, by federal agencies. *See* 5 U.S.C. 605(b).

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b) (''The Principles of Regulation''). The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, § 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget. With respect to the expanded collection of DNA samples from certain individuals under this regulation, the cost of buccal swab kits is expected to be similar to the cost of finger-prick kits, which the FBI has provided in the existing program for the collection of DNA samples from federal convicts. Resulting per-sample analysis and storage costs also are expected to be similar. A finger-prick DNA-sample collection kit costs approximately $7.50, and it costs the FBI approximately $28.50 to analyze the DNA sample and $1.50 to store the sample (for a total of $37.50). When a match occurs, the FBI reanalyzes a DNA sample to confirm the match. The cost of such an analysis is approximately $37 per sample. The cost to the FBI to expunge a DNA record is approximately $100 per sample.

The individuals from whom DNA-sample collection is authorized under this rule, not covered by previous law and practice, generally fall into two broad categories: (1) Persons arrested for or charged with (but not yet convicted of) federal crimes, and (2) non-U.S. persons arrested or detained by DHS. According to the Department of Justice's 2004 Compendium of Federal Justice Statistics, over 140,000 suspects were arrested for federal offenses in fiscal year 2004. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, Compendium of Federal Justice Statistics, 2004, available at *http://ojp.usdoj.gov/bjs/abstract/cfjs04.htm*, at 1, 13, & 18. According to the DHS 2006 Yearbook of Immigration Statistics, 1,206,457 aliens were apprehended. *Id.* at 91. Based on these figures, the Department estimates that on an annual basis the number of individuals from whom DNA-sample collection is authorized under this rule will be approximately 1.2 million. The actual number of individuals from whom DNA samples are collected will be less to the extent that the Attorney General grants exceptions or the Secretary of Homeland Security exercises his discretion to limit DNA-sample collection in accordance with 28 CFR 28.12(b), and to the extent that individuals entering the system through arrest or detention previously have had DNA samples collected and repetitive collection is not required.

The Department estimates that more than 61,000 crimes have been solved or their investigation assisted by the use of DNA collected from individuals since the inception of CODIS. In addition, there have been over 13,000 forensic matches of DNA. Forensic matches occur when DNA evidence from one crime scene is matched to DNA evidence from another crime scene. As of August 2008, more than 6.2 million offenders and 233,000 forensic profiles are contained in the database.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 28

Crime, Information, Law enforcement, Prisoners, Prisons, Probation and parole, Records.

■ Accordingly, for the reasons stated in the interim rules published at 70 FR 4763 on January 31, 2005, and at 70 FR 21951 on April 28, 2005, and for the reasons stated in the preamble to this rule, the amendments set forth in those interim rules are adopted as final without change; and for the reasons stated in the preamble, part 28 of 28 CFR Chapter I is further amended to read as follows:

PART 28—DNA IDENTIFICATION SYSTEM

■ 1. The authority citation for part 28 is revised to read as follows:

Authority: 28 U.S.C. 509, 510; 42 U.S.C. 14132, 14135a, 14135b; 10 U.S.C. 1565; 18 U.S.C. 3600A; Public Law 106–546, 114 Stat. 2726; Public Law 107–56, 115 Stat. 272; Public Law 108–405, 118 Stat. 2260; Public Law 109–162, 119 Stat. 2960; Public Law 109–248, 120 Stat. 587.

■ 2. Section 28.12 is revised to read as follows:

§ 28.12 Collection of DNA samples.

(a) The Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of—

(1) A Federal offense (including any offense under the Uniform Code of Military Justice); or

(2) A qualifying District of Columbia offense, as determined under section 4(d) of Public Law 106–546.

(b) Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. For purposes of this paragraph, ''non-United States persons'' means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p). Unless otherwise directed by the Attorney General, the collection of DNA samples under this paragraph may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The DNA-sample collection requirements for the Department of Homeland Security in relation to non-arrestees do not include, except to the extent provided by the Secretary of Homeland Security, collecting DNA samples from:

(1) Aliens lawfully in, or being processed for lawful admission to, the United States;

(2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;

(3) Aliens held in connection with maritime interdiction; or

(4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.

(c) The DNA-sample collection requirements under this section shall be implemented by each agency by January 9, 2009.

(d) Each individual described in paragraph (a) or (b) of this section shall cooperate in the collection of a DNA sample from that individual. Agencies required to collect DNA samples under this section may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) or (b) of this section who refuses to cooperate in the collection of the sample.

(e) Agencies required to collect DNA samples under this section may enter into agreements with other agencies described in paragraph (a) or (b) of this section, with units of state or local governments, and with private entities to carry out the collection of DNA samples. An agency may, but need not, collect a DNA sample from an individual if—

(1) Another agency or entity has collected, or will collect, a DNA sample from that individual pursuant to an agreement under this paragraph;

(2) The Combined DNA Index System already contains a DNA analysis with respect to that individual; or

(3) Waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2).

(f) Each agency required to collect DNA samples under this section shall—

(1) Carry out DNA-sample collection utilizing sample-collection kits provided or other means authorized by the Attorney General, including approved methods of blood draws or buccal swabs;

(2) Furnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System; and

(3) Repeat DNA-sample collection from an individual who remains or becomes again subject to the agency's jurisdiction or control if informed that a sample collected from the individual does not satisfy the requirements for analysis or for entry of the results of the analysis into the Combined DNA Index System.

(g) The authorization of DNA-sample collection by this section pursuant to Public Law 106–546 does not limit DNA-sample collection by any agency pursuant to any other authority.

Dated: December 4, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–29248 Filed 12–9–08; 8:45 am]

BILLING CODE 4410–19–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 924

[MS–018–FOR; Docket No. OSM–2008–0017]

Mississippi Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Mississippi regulatory program (Mississippi program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Mississippi proposed revisions to its regulations and statute regarding ''valid existing rights'' as they pertain to designation of lands as unsuitable for surface coal mining operations. Mississippi intends to revise its program to be consistent with SMCRA.

DATES: *Effective Date:* December 10, 2008.

FOR FURTHER INFORMATION CONTACT: Sherry Wilson, Director, Birmingham Field Office. Telephone: (205) 290–7282. E-mail: *swilson@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Mississippi Program
II. Submission of the Amendment
III. OSM's Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Mississippi Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior approved the Mississippi program on September 4, 1980. You can find background information on the Mississippi program, including the Secretary's findings and the disposition of comments, in the September 4, 1980, **Federal Register** (45 FR 58520). You can find later actions on the Mississippi program at 30 CFR 924.10, 924.15, 924.16, and 924.17.

II. Submission of the Amendment

By letter dated April 5, 2006 (Administrative Record No. MS–0402), Mississippi sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Mississippi sent the amendment at its own initiative.

We announced receipt of the proposed amendment in the May 24, 2006, **Federal Register** (71 FR 29867). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. No one requested a public hearing or meeting. The public comment period closed on June 23, 2006.

During our review of the amendment, we identified concerns about Mississippi's use of the term ''Valid Rights'' in its statute while the Federal regulations and statute uses the term ''Valid Existing Rights.'' We notified Mississippi of these concerns by letter dated August 17, 2006 (Administrative Record No. MS–0414).

By letter dated May 30, 2008 (Administrative Record No. MS–0416–02), Mississippi provided explanatory information concerning the meaning of the terms ''valid rights'' and ''valid existing rights'' as used in the State statutes and regulations. By e-mail dated July 23, 2008 (Administrative Record No. MS–0416–03), Mississippi sent us a revised copy of its regulations.

Based upon Mississippi's explanatory information and revisions to its amendment, we reopened the public comment period in the August 26, 2008, **Federal Register** (73 FR 50263). No one requested a public hearing or meeting. The public comment period closed on September 10, 2008.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

A. Changes to the Mississippi Code Annotated Section 53–9–71(4)

Mississippi proposed to revise section 53–9–71(4) to provide that after July 1, 1979, and subject to valid rights, no surface coal mining operations shall be permitted on certain lands. Those certain lands are specified in section 53–9–71(4) of the Mississippi statute.

The Federal counterpart statute to Mississippi's above statute is found at section 522(e) of SMCRA. Section 522(e) prohibits or restricts surface coal mining operations on certain lands, ''subject to valid existing rights,'' after the date of SMCRA's enactment (August 3, 1977), including, among other areas, units of the National Park System, Federal lands in national forests, and buffer zones for public parks, public roads, occupied dwellings, and cemeteries. The Act provides that these prohibitions and restrictions do not apply to operations in existence or under a permit on the date of enactment.

Mississippi's statute prohibits or restricts coal mining operations on the same lands as its Federal counterpart. It makes these prohibitions or restrictions subject to Valid Rights. We received a letter dated May 30, 2008 (Administrative Record No. MS–0416–02), from the General Counsel for the Mississippi Department of Environmental Quality stating that it was his opinion that the term ''valid rights'' as used in § 53–9–71(4) means ''valid existing rights'' as used in the State regulations and SMCRA. In addition, these prohibitions and restrictions do not apply to operations in existence or under a permit on the date of enactment of the State statute. Because rights that would exist under the Federal statute would also exist under the Mississippi statute, we find that Mississippi's proposed statute is no less stringent than the Federal statute.

B. Changes to the Mississippi Surface Coal Mining Regulations (MSCMR)

Mississippi proposed to revise its regulations in order to reconcile them with the State's above proposed statute revision. In this statute, Mississippi uses the term ''valid rights.'' Mississippi clarified that the term ''valid rights'' as used in the State statute means the same as its term ''valid existing rights'' as used in the State regulations at MSCMR Section 105. Following are the regulations that Mississippi proposed to add or revise:

MSCMR Section 105. Definitions

Mississippi proposed to add a definition for ''valid rights'' to read as follows:

Valid Rights—as used in § 53–9–71(4) of the Act means Valid Existing Rights.

MSCMR Section 1101. Authority

Mississippi proposed to revise this section to read as follows:

Executive Summary
For Director Office of Investigations **May 7, 2010**

ICE IMPLEMENTATION OF DNA SAMPLE COLLECTION

The enclosed memorandum provides insight into the Law Enforcement Support and Information Management Division's implementation plan of the DOJ mandate requiring ICE to begin DNA sampling of all arrestees. The implementation plan calls for sampling to begin in limited locations for a time period of at least six months prior to expanding the program to other OI offices.

Sampling will be conducted under the following conditions:

- The individual being sampled has been arrested by an ICE Special Agent for a violation of state or federal law.
- The Special Agent conducting the sampling has been trained and is assigned to an office under the SAC San Diego, SAC San Juan or SAC Saint Paul.
- The individual being sampled is compliant.

The memorandum provides notice to the SAC offices not participating in the pilot program that sampling could be expanded OI wide six months after the initiation of the DNA sampling pilot program.

Please direct any questions or comments to Unit Chief (b)(6), (b)(7)c at (202) 732-(b)(6), (b)(7)c or via e-mail at (b)(6), (b)(7)c @dhs.gov.

Federal Law Requiring DNA Sampling

Pursuant to 42 United States Code (U.S.C.) § 14135a(a)(1)(A) and 28 Code of Federal Regulations (CFR) § 28.12, The Department of Homeland Security and other Federal law enforcement agencies are authorized and directed to collect DNA samples from individuals who are arrested, facing charges, or convicted and from non-United States persons who are detained under Federal authority.

It is a Federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample, and cooperation in such collection is a mandatory condition of pretrial release. (See 42 U.S.C. § 14135a(a)(5); 18 U.S.C. § 3142(b), (c)(1)(A).)

The Department of Justice has approved the cheek swab as the approved method for extracting a DNA sample. This procedure is painless and in most cases can be completed in just a few minutes. Two foam applicators will be placed in your mouth in order to absorb the necessary amount of saliva required to capture your DNA. The sample will then be submitted to the FBI laboratory in Quantico, Virginia for processing.

Office of Policy

U.S. Department of Homeland Security
500 12th St, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

June 28, 2010

MEMORANDUM FOR: Daniel H. Ragsdale
Executive Associate Director
Management and Administration

FROM: Susan Cullen Dunbar
Assistant Director

SUBJECT: ICE Homeland Security Investigations DNA Sampling Pilot Program

Purpose:

This memorandum updates the Executive Associate Director for Management and Administration on ICE's planned initial implementation of a U.S. Department of Justice (DOJ) regulation on DNA sample collection. Homeland Security Investigations (HSI) is beginning a pilot program in three locations.

Background:

On December 10, 2008, DOJ published a final rule in the *Federal Register*[1] amending regulations on DNA-sample collection to require all federal law enforcement agencies to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States," subject to certain limitations and exceptions.[2] First, DNA sample collection may be limited to individuals from whom the agency already collects fingerprints, unless otherwise directed by the Attorney General. Second, the regulation provides several exceptions from sample collection, including "[o]ther aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations."[3]

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[1] "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction." See 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).
[2] Non-U.S. persons include "persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p)." 28 CFR § 28.12(b).
[3] 73 Fed. Reg. at 74938.

On January 12, 2009, former Department of Homeland Security (DHS) Deputy Secretary Paul Schneider advised former Attorney General Michael Mukasey that DHS's implementation of the rule was not feasible due to resource limitations and operational exigencies. In March 2009, Secretary Napolitano directed each DHS operational component to create an implementation plan to begin DNA sample collection. ICE submitted its plan calling for a phased approach to implementation in July 2009.

On March 22, 2010, Secretary Napolitano wrote to Attorney General Holder requesting exemptions for DHS from sampling non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18, and non-U.S. persons currently within DHS custody, pending administrative removal proceedings. Secretary Napolitano also requested that the Attorney General exempt DHS from collecting DNA samples from all persons detained or arrested in the event of emergency or unforeseen circumstances or conditions. There has been no formal response from DOJ, although the DHS Office of General Counsel (OGC) and DOJ have had further discussions.

Discussion:

CC: Beth Gibson

Attachment

U.S. Immigration and Customs Enforcement

Public Affairs Guidance

June 22, 2010
Contact: ICE Public Affairs
202-732-4242

HSI Collection of DNA Samples

BACKGROUND:
In January 2009, a U.S. Department of Justice (DOJ) regulation, pursuant to 42 U.S.C § 14135a(a)(1)(A), went into effect amending regulations on DNA sample collection by federal law enforcement agencies. Under this rule, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges or convicted, and from non-United States persons who are detained under the authority of the United States." In March 2009, Secretary Napolitano directed each Department of Homeland Security (DHS) operational component to create an implementation plan to ensure compliance with the DOJ regulation.

ICE is the first component within DHS to comply with DOJ's rule and will begin a phased approached for implementation of the DNA sampling process. Homeland Security Investigation (HSI) special agents in three Special Agent in Charge (SAC) offices - SAC San Diego, SAC San Juan and SAC St. Paul - have received the necessary training and equipment to collect DNA samples. During the initial implementation, samples will be collected only from individuals arrested on federal or state criminal violations by an HSI special agent. All DNA samples will involve two swabs of the cheek inside the mouth.

Individuals arrested by an HSI special agent on state or federal criminal charges are required to give a DNA sample. It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. Furthermore, cooperation with the collection of a sample is a mandatory condition of pretrial release. Any DNA sample collected will be sent immediately to the Federal Bureau of Investigation's crime lab for analysis. ICE will not retain any DNA samples.

TALKING POINTS:
- The collection of a DNA sample from an individual arrested by an HSI special agent on a criminal charge brings the agency in compliance with DOJ requirements on DNA sample collection by federal law enforcement agencies.
- ICE is the first DHS component to begin implementing DNA sampling.
- Special agents in the SAC offices in San Diego, San Juan and St. Paul have been trained to collect DNA samples from those arrested on federal or state criminal charges.

- It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. All DNA samples will involve two swabs of the cheek inside the mouth.

- All DNA samples collected by HSI special agents will be sent immediately to the Federal Bureau of Investigation's (FBI) crime lab for analysis. ICE will not retain any DNA samples.

Q and A's:

Why is ICE collecting DNS samples?
Federal law enforcement agencies are required to take DNA samples from certain individuals pursuant to 42 U.S.C § 14135a(a)(1)(A). ICE is the first agency within DHS to comply with this requirement.

When will ICE begin collecting the DNA samples?
Collection of the DNA samples will begin in the three designated SAC offices – San Diego, San Juan and St. Paul – within 30 days of June 15, 2010. Agents in these three offices have received the necessary training and equipment to begin implementing the collection of DNA samples.

Is the individual who has been arrested on a state or federal criminal charge required to give a DNA sample?
Yes. 42 U.S.C § 14135a(a)(5) establishes criminal penalties to be imposed against an individual from whom DNA sample collection is authorized, but who refuses to cooperate in the collection of a sample. 18 U.S.C § 3142(b) and (c)(1)(A) mandates that cooperation in the DNA sample collection process is a condition of pretrial release.

Will all HSI special agents be required to collect DNA samples?
Yes, but not at this time. This is a pilot program that currently involves three HSI SAC offices. The pilot program is expected to continue at least until the end of 2010 at these locations before expansion to any other SAC office is considered.

Will Enforcement and Removal Operations (ERO) law enforcement personnel be required to collect DNA samples?
Yes, but not at this time. Currently, only three HSI SAC offices are involved in this pilot program. No ERO offices are involved in DNA sample collection at this time.

Will DNA samples be taken from individuals in ICE custody for administrative immigration violations?
At this time, HSI special agents will only obtain DNA samples from criminal arrestees. DHS and DOJ are currently in the process of determining additional categories of individuals from whom DNA samples will be taken.

When will more SAC offices be required to collect DNA samples?
Because ICE is taking a phased approach to complying with the DNA collection requirement, the first phase will be evaluated in six month so that adjustments to the process can be made. No specific timeline is available for an HSI- or ICE-wide implementation.

Who pays for the DNA collection?
All costs associated with collecting DNA samples, including the kits and shipping costs to the FBI crime lab, are paid by the FBI.

Why is the collection of DNA beneficial?
When ICE collects a DNA sample, it is added to the FBI crime lab's repository of DNA samples. Because DNA can be used to link suspects and criminal evidence, the gathering and sharing of this genetic information can be a valuable investigative tool within the law enforcement community.

ICE

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.

Deputy Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 12, 2009

The Honorable Michael Mukasey
Attorney General of the United States
Washington, D.C. 20530

Dear Attorney General Mukasey:

On December 10, 2008, the U.S. Department of Justice (DOJ) published a final rule "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction" implementing provisions of section 1004 of the *DNA Fingerprint Act of 2005*, P.L. 109-162, and section 115 of the *Adam Walsh Child Protection and Safety Act of 2006*, P.L. 109-248 (Adam Walsh Act). Under this rule, effective January 9, 2009, agencies that arrest or detain individuals, or that supervise individuals facing charges, are directed to collect DNA samples from such individuals and from non-United States persons[1] who are detained under the authority of the United States. The Department of Homeland Security (DHS) has a number of Components that will be directly affected by this rule, including, but not limited to, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the U.S. Coast Guard, the U.S. Secret Service, and the Transportation Security Administration.

Under the final rule, however, DHS is not required to collect DNA samples from:

1. Aliens lawfully in, or being processed for lawful admission to, the United States;
2. Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; and
3. Aliens held in connection with maritime interdiction.

See 28 C.F.R. § 28.12(b). Further, the final rule excepts DHS from collecting DNA samples from "other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations." Id. at § 28.12(b)(4).

DOJ has agreed to provide affected agencies with the DNA sample collection kits necessary for agencies to collect the DNA samples required under the final rule. However, at this time we are advised that DOJ does not have a sufficient number of kits nor funding to obtain the kits necessary to meet the DNA sample collection requirements of the final rule. Therefore, I have determined that the collection of DNA samples by DHS from any categories of persons, including aliens added by the final rule, is not feasible at this time due to resource limitations and

[1] For purposes of 28 C.F.R.§ 28.12(b), "non-United States persons" means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 C.F.R. § 1.1(p).

operational exigencies. Once DOJ notifies DHS that it has secured appropriate funding and an adequate supply of DNA collection kits for DHS to meet the requirements of this final rule, DHS will submit an implementation plan and timeline to DOJ and identify any additional resource or operational limitations in accordance with 28 C.F.R. § 28.12(b)(4) at that time.

DOJ's Office of Legal Policy has advised DHS's Office of the General Counsel that DHS may satisfy the consultation requirement under § 28.12(b)(4) by letter. Please have your staff contact Ellen Y. McClain, Assistant General Counsel for Enforcement, at (202) 282(b)(6), (b)(7)c, if you wish to discuss this further.

Sincerely,

Paul A. Schneider

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 25, 2009

MEMORANDUM FOR: DHS Operational Component Heads

FROM: Janet Napolitano

SUBJECT: Implementation of DNA Sample Collection Rule

This memorandum directs each Department of Homeland Security (DHS) Operational Component to create an implementation plan that identifies any processes or procedures that will be modified or created to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12, and to provide the plan to the points of contact listed below not later than April 16, 2009.

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the Federal Register a final rule entitled "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction." See 73 Federal Register 74932. The rule, which implements the requirements of § 1004 of the *DNA Fingerprint Act of 2005*, P.L. 109-162, and § 155 of the *Adam Walsh Child Protection and Safety Act of 2006*, P.L. 109-248 (Adam Walsh Act), is codified at 28 C.F.R. § 28.12. The rule took effect on January 9, 2009.

In connection with the implementation of this rule, the DHS Deputy Secretary advised the Attorney General in writing on January 12, 2009 that commencement of the DNA sample collection by DHS Operational Components would be contingent on the provision of DNA sample collection kits by DOJ. DOJ has since informed the DHS Office of General Counsel that the DNA sample collection kits are available for use by DHS Operational Components.

The rule allows DNA samples to be collected, along with a subject's fingerprints, as part of the law enforcement identification process for individuals who are arrested, facing charges, or convicted, and from non-United States persons[1] who are detained under the authority of the United States, subject to certain limitations and exceptions. Specifically, the rule exempts the collection of DNA samples from the following classes of persons:

1. Aliens lawfully in, or being processed for lawful admission to, the United States;
2. Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings; and
3. Aliens held in connection with maritime interdiction.

[1] For purposes of 28 C.F.R.§ 28.12(b), "non-United States persons" means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 C.F.R. § 1.1(p).

See 28 C.F.R. § 28.12(b). Further, the collection of DNA samples is not required from "other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible ***because of operational exigencies or resource limitations***." Id. at § 28.12(b)(4) (emphasis added).

ACTION REQUIRED

This Department is required to institute or modify relevant procedures to enable the collection of DNA samples from individuals described in the rule once DOJ has provided the collection kits. Once obtained, Operational Components must furnish the samples to the Federal Bureau of Investigation for the purposes of analysis and entry into the Combined DNA Index System.

I hereby direct each DHS Operational Component to create an implementation plan that identifies any processes or procedures that will be modified or created in order to ensure compliance with the DNA sample collection obligations set forth in 28 C.F.R. § 28.12. At a minimum, each implementation plan should identify 1) a timetable for implementation of these requirements; 2) an estimate of any costs associated with implementation; 3) a proposed training program for impacted law enforcement personnel and other staff; 4) any interagency agreements that would be contemplated as part of the DNA sample collection process, as described in 28 C.F.R. § 28.12(c); and 5) any activities or programs to which DNA sample collection requirements will not be applicable based on one or more of the exemptions set forth in 28 C.F.R. § 28.12(b).

Pursuant to 28 C.F.R. § 28.12(b)(4), the Department may consult with the Attorney General to seek an exemption from the rule for any other activities or programs for which DNA sample collection is "not feasible because of operational exigencies or resource limitations." Accordingly, please provide in writing a list of such activities or programs for which your component seeks an exemption along with sufficient background information and analysis in anticipation of consultation with DOJ.

Please provide the implementation plan and any requests for exemptions (and supporting materials) described by this memo no later than April 16, 2009 to the DHS Office of the General Counsel, Operations and Enforcement Law Division. For any additional questions regarding this matter, please contact Ellen McClain, Assistant General Counsel (Enforcement) at (202) 282-(b)(6), (b)(7)c.

Cost Estimate: January 2008

Estimated Costs of DNA Sampling on Existing and Forecast Populations

DNA Collection Population Forecast	FY09	FY10
Office of Detention and Removal (DRO) Total Apprehensions*	**355,759**	**398,966**
Criminal Alien Program (CAP)	165,785	196,365
Fugitive Operations (FugOps)	21,283	23,442
Office of Border Patrol (OBP)	78,368	78,987
Office of Field Operations (OFO)	12,353	12,339
Office of State and Local Coordination (OSLC 287(g))	40,063	47,463
DRO Other	33,188	35,709
Other	4,719	4,661
Office of Investigations (OI) Apprehensions*	**29,555**	**31,379**
Federal Protective Service (FPS) Arrests with Fingerprinting**	**3,433**	**3,433**
FPS Estimated Cases per Year	34,334	34,334
Estimated Percent Involving Arrest with Fingerprinting	10%	10%
Total Estimated ICE Apprehensions	**388,747**	**433,778**
Current Population in ICE Detention as of 9/11/08***	**34,708**	**n/a**
Total Estimated ICE DNA Collection Population	**423,455**	**433,778**

Cost Estimate Breakdown†					FY09	FY10
Cost Driver	**Units/Sample**	**Unit of Measure**	**Rate**		**Total**	**Total**
Collection of DNA Buccal Sample	0.50	Man Hour	$ 64.00	$	13,550,572.80	13,880,908.80
Cost of Chain of Custody Forms	1.00	Kit	$ 10.00	$	4,234,554.00	4,337,784.00
Cost of Communications	0.25	Man Hour	$ 64.00	$	6,775,286.40	6,940,454.40
Cost of Shipping Samples	1.00	Flat	$ 20.00	$	8,469,108.00	8,675,568.00
		Primary DNA Collection Cost for FY		**$**	**33,029,521.20**	**33,834,715.20**
		Estimated DNA Collection Cost Per Sample		$	78.00	78.00
		Secondary DNA Collection Cost for FY‡		**$**	**660,590.42**	**676,694.30**
		Estimated DNA Collection Cost Per Person		$	79.56	79.56
		Estimated DNA Collection Cost for FY Apprehensions		$	30,928,743.14	34,511,409.50
		Estimated DNA Collection Cost for Current Population in ICE Detention		$	2,761,368.48	n/a
		Total Estimated DNA Collection Costs for FY		**$**	**33,690,111.62**	**34,511,409.50**

Notes

* Estimate provided by DRO

** Rough estimate provided by FPS. The percentage of cases involving arrest was unknown but speculated to be anywhere from 1% - 10%. This estimate uses the high end of that range.

*** The current population in ICE Detention is not listed for FY10 because it only needs to be sampled once; thereafter, ICE will only sample incoming persons.

† Estimated costs for DNA collection do not include startup costs associated with training, rollout, changes to facilities, specialized equipment, or resources dedicated to shipping/transportation activities. The estimate also does not include the cost of the collection kits nor costs associated with DNA analysis and entry of the profile into CODIS as DOJ/FBI will assume these costs.

‡ Secondary samples may be required when the original sample is deemed insufficient, degraded, or flawed. We assume a 2% occurance rate for secondary collections and that the cost of a secondary sample is the same as for a primary sample.

Working Group on Expanding the Biometric Age Range

March 1, 2011

Purpose of the Working Group

- This working group is to support a possible change in DHS Policy concerning the collection of biometrics from individuals entering at the U.S. ports of entry. Such a change would impact US-VISIT, CBP, and DHS Policy.
- This working group will only make such a recommendation if there is sufficient interest to do so.
- The purpose of such a change would be to ensure biometric collection at the ports of entry fully supports or compliments other existing or planned biometric uses.
- This working group does not seek to change the operations or policies of other agencies.

US-VISIT

Known Mission Needs

Some agencies are already operating biometric collection under 14 or over 79 and could benefit from expanded collection at the ports of entry.

- At certain consular posts in Mexico, the Department of State is collecting biometrics under 14 years.
- CBP is planning to collect biometrics from children under 14 for their Global Enrollment System trusted traveler program.

-p7 DOS has been since 1998

US-VISIT

Working Group on Expanding the Biometric Age Range

March 1, 2011

Review of Authorities

(b)(6), (b)(7)c DHS OGC/NPPD/US-VISIT

Homeland Security

Regulations for Biometrics Upon Entry

- **8 C.F.R. § 214.1 – Requirements for admission**
  - Admission "conditioned on compliance with any inspection requirement in § 235.1(f)"
- **8 C.F.R. § 235.1 – Scope of inspection**
  - (f)(1)(ii): DHS Secretary may require any non-exempt alien "to provide fingerprints, photograph(s) or other specified biometric identifiers" to determine admissibility
  - (f)(1)(iv)(A): "Aliens younger than 14 or older than 79 on [the] date of admission" are exempt

Homeland Security

Relevant Rulemaking

- **January 5, 2004 Interim final rule**
  - Aliens to submit biometrics on entry at air and sea ports
- **August 31, 2004 Interim rule**
  - Expanded to Visa Waiver Program participants
  - Expanded to certain land border ports - 50 most highly trafficked
- **December 19, 2008 Final rule** DHS Rule
  - Further expanded alien populations subject to US-VISIT - inc LPRs

Homeland Security

Two Categories of Statutory Authority

- **Specific statutes requiring (biometric) entry/exit**
  - Immigration and Naturalization Service Data Management Improvement Act (DMIA) of 2000
  - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001
  - Enhanced Border Security and Visa Entry Reform Act (EBSVERA) of 2002

- **Other statutes regulating admission/travel of aliens**
  - INA § 214 – Admission of nonimmigrants
  - INA § 215 – Travel control of citizens and aliens
  - INA § 235 – Inspection by immigration officers

Mandate for Entry/Exit

- **Section 2 of the DMIA of 2000** - amended IIRIRA; biometrics not mentioned
  - Entry/exit system must integrate all arrival/departure data
- **Section 414 of the USA PATRIOT Act of 2001**
  - Develop and certify biometric technology standard
- **Section 302 of the EBSVERA of 2002**
  - Entry/exit system must use biometric standards certified pursuant to the USA PATRIOT Act

- IRPA?
- 9/11 recs implemented } post-dated regulations

Homeland Security

Regulating Admission/Travel of Aliens

- **INA § 214 – Admission of nonimmigrants**
  - Admission of aliens "under such conditions as the Attorney General may by regulations prescribe"
- **INA § 215 – Travel control of citizens and aliens**
  - Aliens must enter/depart subject to "rules, regulations and orders" prescribed by the President
  - E.O. 13323: Functions for noncitizens assigned to S1
- **INA § 235 – Inspection by immigration officers**
  - Broad authority to inspect aliens

Homeland Security

INA 261 – dim I mandate 19-79 age range

6/1/11 DHS Biometrics Work Group

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5/2 Biometrics Meeting

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(b)(6), (b)(7)(C) USCIS

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3/1/11 US-VISIT

Age Range Work Group

- Amend 8 CFR 235.1(f)(1)(iv)(A)

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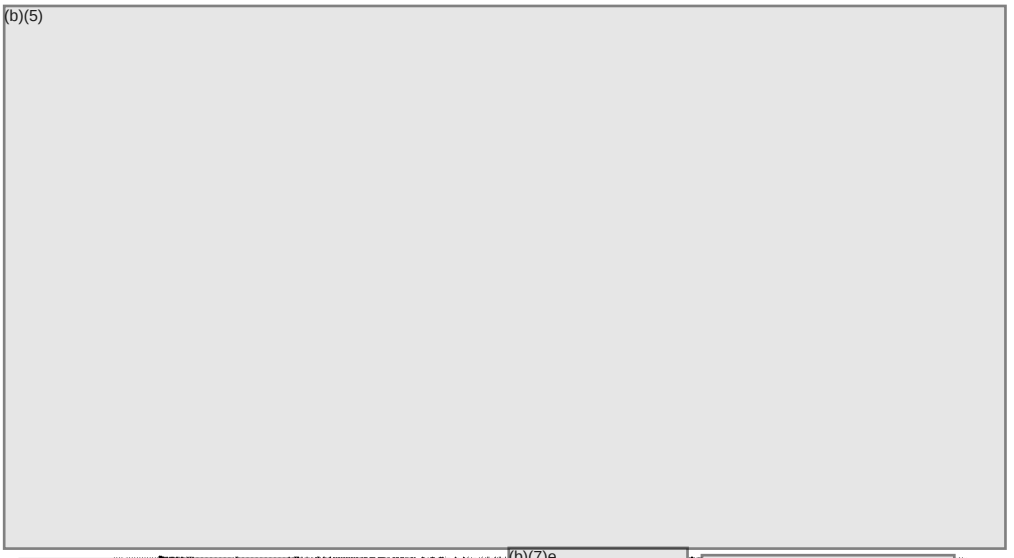

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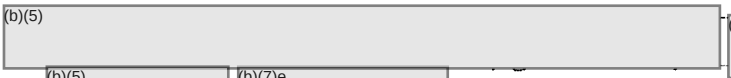

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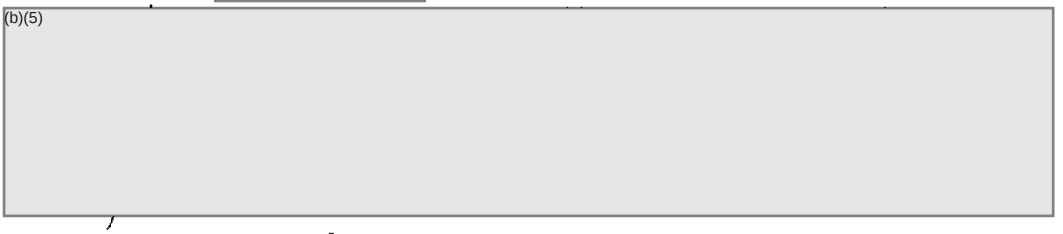

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Office of Policy

U.S. Department of Homeland Security
500 12th St. SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: Ellen McClain
Assistant General Counsel (Enforcement)
Office of the General Counsel
Department of Homeland Security

THROUGH: Susan M. Cullen
Director, ICE Policy

FROM: Sarah B. Dorsey
Senior Policy Advisor

SUBJECT: Implementation of DOJ Final Rule "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction"

Purpose

To respond to the Secretary's request that U.S. Immigration and Customs Enforcement (ICE) provide an implementation plan for the Department of Justice's (DOJ) Final Rule on DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction.[1]

Background

On December 10, 2008, DOJ published a final rule amending regulations on DNA-sample collection. Under this rule, effective January 9, 2009, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons[2] who are detained under the authority of the United States."[3] On January 12, 2009, then Deputy Secretary of the Department of Homeland Security (DHS), Paul A. Schneider, wrote to the Attorney General that DHS's implementation of the rule was not feasible due to resource limitations and operational exigencies.

[1] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932 (Dec. 10, 2008).
[2] The term "non-U.S. persons" includes "persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p)." 28 CFR § 28.12(b).
[3] 28 CFR § 28.12(b).

program and its costs, it is premature to conclusively determine "operational exigencies or resource limitations." However, three possible exemptions are discussed below.

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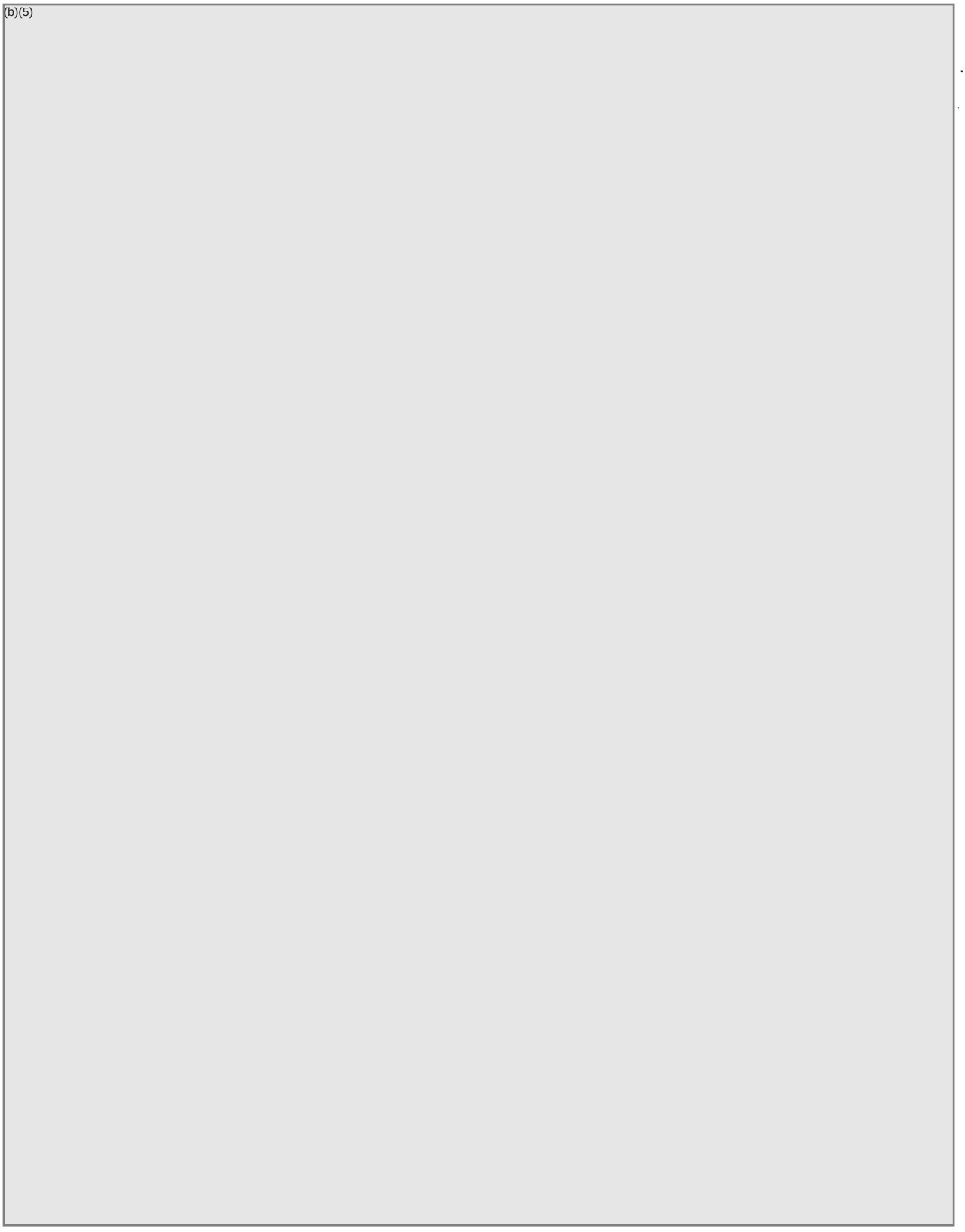

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CC: Beth Gibson

Attachment

(b)(5)

U.S. Immigration and Customs Enforcement

Public Affairs Guidance

June 22, 2010
Contact: ICE Public Affairs
202-732-4242

HSI Collection of DNA Samples

BACKGROUND:
In January 2009, a U.S. Department of Justice (DOJ) regulation, pursuant to 42 U.S.C § 14135a(a)(1)(A), went into effect amending regulations on DNA sample collection by federal law enforcement agencies. Under this rule, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges or convicted, and from non-United States persons who are detained under the authority of the United States." In March 2009, Secretary Napolitano directed each Department of Homeland Security (DHS) operational component to create an implementation plan to ensure compliance with the DOJ regulation.

ICE is the first component within DHS to comply with DOJ's rule and will begin a phased approached for implementation of the DNA sampling process. Homeland Security Investigation (HSI) special agents in three Special Agent in Charge (SAC) offices - SAC San Diego, SAC San Juan and SAC St. Paul - have received the necessary training and equipment to collect DNA samples. During the initial implementation, samples will be collected only from individuals arrested on federal or state criminal violations by an HSI special agent. All DNA samples will involve two swabs of the cheek inside the mouth.

Individuals arrested by an HSI special agent on state or federal criminal charges are required to give a DNA sample. It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. Furthermore, cooperation with the collection of a sample is a mandatory condition of pretrial release. Any DNA sample collected will be sent immediately to the Federal Bureau of Investigation's crime lab for analysis. ICE will not retain any DNA samples.

TALKING POINTS:
- The collection of a DNA sample from an individual arrested by an HSI special agent on a criminal charge brings the agency in compliance with DOJ requirements on DNA sample collection by federal law enforcement agencies.
- ICE is the first DHS component to begin implementing DNA sampling.
- Special agents in the SAC offices in San Diego, San Juan and St. Paul have been trained to collect DNA samples from those arrested on federal or state criminal charges.

- It is a federal offense for an individual from whom DNA sample collection is authorized to refuse to cooperate in the collection of a sample. All DNA samples will involve two swabs of the cheek inside the mouth.

- All DNA samples collected by HSI special agents will be sent immediately to the Federal Bureau of Investigation's (FBI) crime lab for analysis. ICE will not retain any DNA samples.

Q and A's:

Why is ICE collecting DNS samples?
Federal law enforcement agencies are required to take DNA samples from certain individuals pursuant to 42 U.S.C § 14135a(a)(1)(A). ICE is the first agency within DHS to comply with this requirement.

When will ICE begin collecting the DNA samples?
Collection of the DNA samples will begin in the three designated SAC offices – San Diego, San Juan and St. Paul – within 30 days of June 15, 2010. Agents in these three offices have received the necessary training and equipment to begin implementing the collection of DNA samples.

Is the individual who has been arrested on a state or federal criminal charge required to give a DNA sample?
Yes. 42 U.S.C § 14135a(a)(5) establishes criminal penalties to be imposed against an individual from whom DNA sample collection is authorized, but who refuses to cooperate in the collection of a sample. 18 U.S.C § 3142(b) and (c)(1)(A) mandates that cooperation in the DNA sample collection process is a condition of pretrial release.

Will all HSI special agents be required to collect DNA samples?
Yes, but not at this time. This is a pilot program that currently involves three HSI SAC offices. The pilot program is expected to continue at least until the end of 2010 at these locations before expansion to any other SAC office is considered.

Will Enforcement and Removal Operations (ERO) law enforcement personnel be required to collect DNA samples?
Yes, but not at this time. Currently, only three HSI SAC offices are involved in this pilot program. No ERO offices are involved in DNA sample collection at this time.

Will DNA samples be taken from individuals in ICE custody for administrative immigration violations?
At this time, HSI special agents will only obtain DNA samples from criminal arrestees. DHS and DOJ are currently in the process of determining additional categories of individuals from whom DNA samples will be taken.

When will more SAC offices be required to collect DNA samples?
Because ICE is taking a phased approach to complying with the DNA collection requirement, the first phase will be evaluated in six month so that adjustments to the process can be made. No specific timeline is available for an HSI- or ICE-wide implementation.

Who pays for the DNA collection?
All costs associated with collecting DNA samples, including the kits and shipping costs to the FBI crime lab, are paid by the FBI.

Why is the collection of DNA beneficial?
When ICE collects a DNA sample, it is added to the FBI crime lab's repository of DNA samples. Because DNA can be used to link suspects and criminal evidence, the gathering and sharing of this genetic information can be a valuable investigative tool within the law enforcement community.

ICE

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.

Homeland Security Investigations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

JUN 15 2010

MEMORANDUM FOR: All Special Agents in Charge

FROM: Michael A. Holt
Assistant Director, Programs

SUBJECT: ICE Implementation of DNA Sample Collection

On December 10, 2008, the U.S. Department of Justice (DOJ) published a final rule amending regulations on DNA-sample collection. Under this rule, effective January 9, 2009, all federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. On March 25, 2009, Secretary Napolitano directed each DHS Operational Component to create an implementation plan to ensure compliance with the DNA sample collection obligations. The implementation plan submitted by ICE called for a phased approach to comply with this rule.

As part of a phased approach, three Special Agent in Charge (SAC) offices received the necessary training and equipment to begin implementation of the DOJ rule once approval was granted by Secretary Napolitano. On April 26, 2010, concurrence was granted by DHS General Counsel to begin sampling in the pilot locations as soon as operationally feasible.

Phase I sampling will begin in SAC San Diego, SAC San Juan and SAC Saint Paul within the next 30 days and will be limited to individuals arrested by ICE Special Agents for a violation of federal or state criminal law. ICE will conduct this pilot program of sampling in these limited locations for at least six months before expanding the program to other offices. Until the program is expanded, only those agents assigned to offices designated as a DNA sampling pilot location will conduct sampling.

Phase II calls for a deliberate, phased, ICE Homeland Security Investigations (HSI) wide implementation, which will most effectively provide the opportunity to refine procedures, identify any unforeseen cost, identify funding and allow for sufficient training and adjustments as warranted. All costs associated with the DNA kits, to include shipping, are paid by the FBI Laboratory in Quantico, Virginia.

Please contact National Program Manager (b)(6), (b)(7)c Law Enforcement Systems, at (202) 732 (b)(6), (b)(7)c or via e-mail at (b)(6), (b)(7)c @dhs.gov with any immediate questions or concerns.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 22, 2010

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
Washington, DC 20530

Dear Attorney General Holder:

On December 10, 2008, the U.S. Department of Justice (DOJ) published in the *Federal Register* a final rule entitled "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction."[1] The purpose of this letter is to consult with you regarding the Department of Homeland Security's (DHS) proposed exemptions from these requirements, as contemplated by the regulations.

On January 12, 2009, in connection with the implementation of this rule, former DHS Deputy Secretary Paul Schneider advised former Attorney General Michael Mukasey that commencement of DNA sample collection by DHS Components would be contingent on the provision of DNA sample collection kits by DOJ. Several months ago, DOJ staff informed the DHS Office of the General Counsel that the DNA sample collection kits had become available for use by DHS. Since then, our Department has been working to develop an implementation plan for DNA sample collection with respect to individuals arrested or aliens detained by our Department. During this time, Federal Bureau of Investigation (FBI) laboratory personnel and other DOJ officials have conducted several site visits at DHS facilities, and officials from DHS have held discussions with FBI and other DOJ staff regarding this process.

Due to the volume of individuals falling within the targeted class for DNA collection, implementation of this process poses severe organizational, resource, and financial challenges for this Department. The DNA processing of what DHS estimates may be close to a million aliens detained and individuals criminally arrested would severely strain the resources of the agency to perform its broader mission. Congress has not appropriated any additional funding to DHS for DNA sample collection or associated training costs for its law enforcement personnel, which underscores the financial burden DHS faces. Moreover, certain exceptions could help reduce the impact on privacy and civil liberties concerns. For these reasons, DOJ and DHS agreed to include certain exceptions in the December 2008 rule amending § 28.12(b)(1)-(3) of Title 28 of the Code of Federal Regulations. As set forth at § 28.12(b)(4), as revised by the rule, DNA collection from aliens not specified in subsection (b) may also be excepted from the collection requirement if I determine, after consultation with you, that collection of the sample from detained aliens is not feasible because of "operational exigencies or resource limitations."

[1] *See* 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).

I believe that taking DNA samples from the following classes of aliens meets this standard and would like the views of DOJ on excepting them:

1. Non-U.S. persons detained for processing under administrative proceedings (not facing criminal charges), including juveniles under the age of 18.

   Rationale: DHS typically processes over 750,000 non-U.S. persons in administrative proceedings annually. Although DHS typically takes fingerprints in these instances, the collection of DNA samples from this class would create significant "operational exigencies" that would diminish the ability of this agency to accomplish its primary mission. For example, incorporating this activity into the U.S. Customs and Border Protection's (CBP) Border Patrol operations, which often take place at remote locations under harsh conditions and severe time constraints, would divert critical resources from border security and immigration enforcement. Implementation of the unfunded DNA sampling requirement for this class of persons would also further exacerbate the challenging resource limitations this Department already faces in conducting its mission.[2] DHS estimates significant costs for training, collecting, processing, and shipping samples, establishing a tracking system to eliminate redundant collections, implementing health and safety considerations and precautions, and establishing policies and procedures for chain of custody, individual refusal, logging, and tracking. For these reasons, DHS proposes to exclude this class of individuals from its DNA sample collection activities.

2. Non-U.S. persons currently within DHS custody, pending administrative removal proceedings.

   Rationale: At any given time, there are approximately 30,000 non-U.S. persons being detained pending administrative removal proceedings. These individuals are well-past the typical "booking" stage, and undertaking DNA sample collection from this group would pose substantial operational exigencies for DHS. Collecting DNA samples from this population would require diverting already limited U.S. Immigration and Customs Enforcement (ICE) resources, thus decreasing DHS's ability to deal with law enforcement matters with a nexus to the border. For the same reasons that DOJ has exempted the U.S. Marshals Service (USMS) from DNA collection requirements for persons in its custody when beyond the booking stage, DHS faces similar operational burdens. Moreover, because DHS deports aliens within an average of 29 days, this operational timeframe would challenge our ability to collect DNA samples. The alien detention system is presently undergoing a broad review, with significant changes expected over the coming months and years. Incorporating the DNA sample collection requirement for existing detainees would be an additional challenge to that process. In addition, because all resources associated with DHS detention and removal operations are

[2] Based on data obtained from relevant DHS Components, DHS estimates the cost of effectuating the DNA sampling requirements without the proposed exceptions to be approximately $35-40 million annually. If the proposed exceptions are approved, DHS estimates the annual cost to be approximately $2-3 million. While DHS expects to reprogram currently allocated resources in either case, DHS believes approval of the proposed exceptions would lessen the impact on the overall ability to achieve the DHS mission.

expected to be used in the context of the broader effort to streamline the existing processes, it would be difficult to isolate additional resources for the DNA sample collection requirement.

In addition to the above, pursuant to 28 C.F.R. § 28.12(b), you have discretion to permit additional "limitations or exceptions" to the DNA sampling requirements. For reasons described further below, I request that you exercise this discretion to except the following scenario from the collection requirement at this time:

1. All persons, alien or otherwise, detained or arrested by DHS in the event of emergency or unforeseen circumstances or conditions, including mass migrations, natural or man-made disasters, medical emergencies, and other operational emergencies.

   Rationale: In emergency or unforeseen circumstances, DHS resources are typically stretched very thin due to the numbers of individuals engaged in unlawful activity or others impacted by emergency circumstances. We expect that often it will not be operationally feasible for DHS to collect DNA samples in these types of scenarios without diverting resources needed to suppress or respond to any unlawful activities, unrest, or other unforeseen circumstances. DHS Component heads or I would make determinations to exercise this exception upon an assessment of the specific facts and circumstances of the incident or situation involved. I expect that DHS would rely on this exception only in extraordinary circumstances.

We intend to phase-in implementation over the next year, with certain DHS Components to begin the process more quickly than others. DHS wishes to pursue further discussions with DOJ regarding training options for DHS law enforcement officers and agents, as training is needed in the initial stage of the broader DHS implementation of this process. In addition to the training requirement, for example, both ICE and CBP must negotiate with their unions to bargain on impact and implementation due to this proposed change in working conditions. Finally, DHS intends to pursue discussions with the USMS to seek agreements by which the USMS would agree to undertake, in certain circumstances, DNA sample collection of arrestees on our behalf. Should satisfactory agreements not be reached, we may consider requesting additional exceptions to address these circumstances.

Thank you and your organization for your assistance in working through these implementation issues for this important program. If you or your staff desire additional consultations on these matters, we are available at your convenience. Should you need additional assistance, please contact Associate General Counsel (b)(6), (b)(7)c at (202) 447(b)(6), (b)(7)c Assistant General Counsel Ellen McClain at (202) 282(b)(6), (b)(7)c, or contact me at (202) 282(b)(6), (b)(7)c

Yours very truly,

Janet Napolitano

Office of Investigations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

JUL 10 2009

MEMORANDUM FOR: All Special Agents in Charge

FROM: Marcy M. Forman
Director, Office of Investigations

SUBJECT: ICE Implementation of DNA Sample Collection

On December 10, 2008, the Department of Justice (DOJ) published a final rule amending regulations on DNA sample collection. Under this rule, effective January 9, 2009, all Federal law enforcement agencies are required to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States."

In order to give U.S. Immigration and Customs Enforcement (ICE), the Department of Homeland Security (DHS), and DOJ/Federal Bureau of Investigation (FBI) time to resolve unforeseen problems and finalize procedures, ICE will conduct a pilot program of DNA sampling in limited locations, which will last a minimum of 6 months. It is anticipated that this pilot program will be implemented by the end of calendar year 2009. The pilot program will be expanded to include more field office locations as issues with contracts, labor unions, and more complicated booking processes are resolved.

Please direct any questions or concerns to National Program Manager (b)(6), (b)(7)c, Law Enforcement Systems, at (202) 732-(b)(6), (b)(7)c or via e-mail at (b)(6), (b)(7)c@dhs.gov.

7/18/11 DHS DNA Sampling Mtg

(b)(6), (b)(7)(C)

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DOJ - has training available

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(b)(5)

7/18/11 DNA Sampling Meeting - ICE

Dec 10, 2008 - DOJ published final rule on DNA-Sample Collection

Jan 12, 2009 - former DHS Dep Sec Paul Schneider advised former AG Michael Mukasey (b)(5)

(b)(5)

March 2009 - S1 directed components to create an implementation plan to begin sample collection

July 2009 - ICE submitted its plan calling for phased implementation

Oct/Nov 2009 - 3 HSI offices (San Diego, San Juan, Saint Paul) began preparing to sample ~~criminal~~ individuals arrested for violation of federal or state criminal law

~~Apr~~ March 22, 2010 - S1 wrote to AG Holder requesting exemptions for DHS

April 26 2010 - DHS OGC concurred w/ ICE HSI pilot program

June 15, 2010 - HSI Assistant Director Michael Holt notified SACs that DNA sampling in the

pilot locations would begin ~~Monday~~ w/30 days

(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

(b)(5)

(b)(5)

(b)(6), (b)(7)(C)

- HSI - web based training w/ certificate

(b)(5)

(b)(6), (b)(7)(C)

(b)(5)

(b)(5)

POLICY

USMS Directives

PRISONER OPERATIONS

9.1 Prisoner Custody

A. **Proponent:** Prisoner Operations Division (POD), 202-307-5100, Fax 202-305-9434

B. **Purpose:** The United States Marshals Service (USMS) is directed by the Department of Justice (DOJ) to collect deoxyribonucleic acid (DNA) samples from all individuals arrested by the USMS as a result of a Class I Warrant, as defined by the Investigative Operations Division (IOD); or, any individual arrested by an agency with which the USMS has entered into a Memorandum of Understanding/Agreement (MOU/MOA) in which the USMS has agreed to process (fingerprint and photograph) their arrests.

C. **Authority:** The Director's authority to issue written directives is derived from 28 USC 561(g) and 28 CFR 0.111. Specifically, 42 USC 14135a and 28 CFR 28 establish the USMS authority to collect DNA samples from all persons arrested by the USMS.

D. **Policy:** The United States Code, 42 USC 14135a, directs agencies of the United States that arrest or detain individuals, or that supervise individuals facing charges, to collect DNA samples from those individuals who are arrested, facing charges, or convicted, as well as from non-United States persons who are detained, under the authority of the United States. Under 28 CFR 28.12, unless otherwise directed by the Attorney General, the required scope of DNA sample collection is limited to individuals from whom an agency collects fingerprints. The Attorney General can also approve other limitations or exceptions. Agencies collecting DNA samples are directed to furnish the samples to the Federal Bureau of Investigation (FBI) Laboratory.

E. **Procedures:**

1. **Responsibility:**

   a. The USMS will ensure that DNA samples are obtained from all USMS arrestees taken into custody on USMS Class I warrants. Those samples will then be submitted to the FBI. This requirement does not include individuals apprehended in conjunction with state and local arrests who will not be prosecuted in United States District Court. (See USMS Policy Directive 8.1, *Administration of Warrants and Related Criminal Investigations*.)

   b. The USMS is required to collect and submit DNA samples from state/local inmates who are temporarily being held in custody by the USMS through a Writ Ad Pros.

   c. The USMS will collect and submit DNA for all state and local arrestees who are brought before a United States District Court to face federal charges and who are not sponsored by a federal law enforcement agency.

   d. Criminal Summons: The USMS will collect and submit DNA samples from any prisoner that is summonsed by a United States District Court for the purpose of facing federal charges regardless of which federal law enforcement agency is the investigative agency.

   e. Bureau of Indian Affairs (BIA): When the BIA makes an arrest and turns over custody of the detainee directly to the USMS for the purpose of a federal prosecution, the USMS will collect and submit DNA.

2. **Exemptions:** When federal prisoners are received from the custody of the United States Federal Bureau of Prisons (BOP), and considered to be in the temporary custody of the USMS (i.e., Writs, Attorney Special Requests, etc.), the USMS is not required to collect a DNA sample.

3. **Memorandums of Understanding/Agreements**:

   a. No USMS district may enter into a written agreement with another agency (federal, state, or local) or private organization to collect and/or submit DNA samples for that agency without receiving prior approval from POD.

   b. POD will seek concurrence from the Office of General Counsel (OGC) prior to approving any MOU/MOA. MOUs/MOAs will only be approved in extraordinary circumstances.

   c. District management, upon receiving prior authorization from POD, may direct district personnel to collect and submit DNA samples from individuals arrested by other agencies on a case-by-case basis.

4. **District of Columbia (D.C.):**

   a. District of Columbia/Superior Court (DC/SC): Generally, USMS personnel will not be required to collect or submit DNA samples from criminal defendants in DC/SC. DNA will be collected and submitted by D.C. Department of Corrections personnel as directed by D.C. code.

   b. District of Columbia District Court (D/DC): The USMS is responsible for collecting and submitting DNA samples from individuals arrested by the Metropolitan Police Department who have not had their cases adopted by any other federal agency, but will be prosecuted in D/DC.

5. **Juveniles:** DNA samples will be taken from juveniles in those cases where fingerprints are taken pursuant to USMS Policy Directive 9.1, *Cellblock Operations/Processing Juveniles*.

6. **Collection and Submission of DNA samples:** USMS personnel will use the sample collection kits provided by the FBI and adhere to the proper collection techniques as provided by POD training in conjunction with the FBI Laboratories Division.
   USMS personnel will package each DNA sample taken according to the instructions included in the sample kit and mail it to the address included in the sample kit.

7. **Refusal to submit to DNA sample collection:**

   a. Any individual who refuses to cooperate in the collection of DNA should be advised that he/she faces criminal liability based on the refusal and that cooperation in DNA sample collection is a mandatory condition of pretrial release. (See 42 USC 14135a; 18 USC 3142.)

   b. USMS personnel are authorized as prescribed by USMS General Policy Directive 2.1, *Use of Nonlethal Force*, to use such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who is unwilling to submit to DNA collection.

F. **Definitions:**

DNA: Deoxyribonucleic acid (DNA) is a nucleic acid that contains the genetic instructions used in the development and functioning of all known living organisms and some viruses.

G. **Cancellation:** This is a new section added to Policy Directive 9.1.

H. **Authorization and Date of Approval:**

By Order of: **Effective Date:**

/S/ 9/29/2009
John F. Clark
Director
U.S. Marshals Service

Office of Policy

U.S. Department of Homeland Security
500 12th St, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

June 28, 2010

MEMORANDUM FOR: Daniel H. Ragsdale
Executive Associate Director
Management and Administration

FROM: Susan Cullen Dunbar
Assistant Director

SUBJECT: ICE Homeland Security Investigations DNA Sampling Pilot Program

Purpose:

This memorandum updates the Executive Associate Director for Management and Administration on ICE's planned initial implementation of a U.S. Department of Justice (DOJ) regulation on DNA sample collection. Homeland Security Investigations (HSI) is beginning a pilot program in three locations.

Background:

On December 10, 2008, DOJ published a final rule in the *Federal Register*[1] amending regulations on DNA-sample collection to require all federal law enforcement agencies to take DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States," subject to certain limitations and exceptions.[2] First, DNA sample collection may be limited to individuals from whom the agency already collects fingerprints, unless otherwise directed by the Attorney General. Second, the regulation provides several exceptions from sample collection, including "[o]ther aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations."[3]

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[1] "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction." See 73 Fed. Reg. 74932. The rule, which took effect on January 9, 2009, implements the requirements of § 1004 of the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, and § 155 of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (both codified at 42 U.S.C. § 14135a (2000)).
[2] Non-U.S. persons include "persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p)." 28 CFR § 28.12(b).
[3] 73 Fed. Reg. at 74938.

Questions from FPS

(b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Wednesday, January 07, 2009 8:39 PM
To: Dorsey, Sarah B
Subject: Re: Implementation of DOJ DNA sample collection regulation

Sarah:

Friday is fine. Just need a time. After 1000 is better for me.

I reviewed emails, draft letter and 28 CFR. DRO makes some excellent points that have a nexus to FPS with the exception of alien, illegal/undocumented aliens.

(b)(5)

Just some thoughts and questions.

Thanks. Look forward to speaking with you and the group..

Sent from my BlackBerry Wireless Handheld

From: Dorsey, Sarah B
To: Dorsey, Sarah B (b)(6), (b)(7)(C)
Cc: (b)(6), (b)(7)(C)
Sent: Wed Jan 07 18:36:55 2009
Subject: RE: Implementation of DOJ DNA sample collection regulation

It looks like tomorrow morning will be difficult. How about Friday morning?

One alternative would be for me to just to send out a tasking requesting written input on this, which we'll have to do shortly in any event, but I was hoping we'd get a chance to talk about issues first. If Friday doesn't work, we'll probably do that and then try to catch up with anyone individually who has any questions.

Thanks for your help.

From: Dorsey, Sarah B (b)(6), (b)(7)(C)
Sent: Wednesday, January 07, 2009 9:42 AM
To: (b)(6), (b)(7)(C)
Cc: (b)(6), (b)(7)(C)
Subject: Implementation of DOJ DNA sample collection regulation

Good morning, gentlemen. I am writing because your names were provided as POCs for OI and FPS regarding the implementation of the recent DOJ regulation on DNA collection. I've included the contact info from the response to request for POCs at the end of this e-mail for everyone's reference. I've also included as cc's those who have been involved from OPLA (b)(6), (b)(7)(C)) and DRO ((b)(6), (b)(7)(C)) as well as an additional staffer from my office ((b)(6), (b)(7)(C)).

I have attached a few documents on this topic. The first is the regulation itself (pdf file FR 12-10-08). Next is a document containing OI's edits to a draft letter from S1 to AG Mukasey regarding DHS' implementation of this reg (Word file OI edits mukasey draft response). That letter is due to go out this week. I've also attached an e-mail message from (b)(6), (b)(7)(C) reporting a conversation she had with (b)(6), (b)(7)(C) in DHS OGC about that letter and implementation generally.

(b)(6), (b)(7)(C) and I met earlier this week to talk about DRO implementation issues, as those were most in mind when the regulation was in the drafting process long before its publication. The final document attached above is (b)(6), (b)(7)(C) summary e-mail note of some of those discussions. While those primarily relate to DRO (though not exclusively), we had in mind that we definitely need to sweep in OI and FPS issues as ICE considers its implementation, so are glad to have you as POCs for those discussions.

The way forward is that the S1 letter to the AG notes that implementation is not going to begin this Friday, January 9, the effective date of the regulation. However, ICE needs to be sure its issues are identified and represented as the department prepares to move forward. We will need to develop an ICE issue paper on rather short turnaround. Our office will take the lead in drafting that, but will need and much appreciate your expertise on the issues relevant to your areas of responsibility.

Since not all of you are located here at PCN, I was thinking it would make sense to try to set up a conference call, hopefully for tomorrow morning, after you've had a chance to read these materials and think about how the implementation of DNA testing could affect your particular areas in OI and FPS. Please let me know as soon as possible of your availability. I'm looking forward to working with you on this.

Sarah B. Dorsey
Senior Policy Advisor
ICE Office of Policy
1200 D Street, S.W.
Washington, D.C. 20536
tel. +1 202.732.(b)(6), (b)(7)(C)

OI provides the following individuals as POCs for this tasking:

Division I:

(b)(6), (b)(7)(C)
Program Manager
Compliance Enforcement Unit
National Security Investigations Division
(703) 235-(b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

Division II

(b)(6), (b)(7)(C)
Acting Section Chief
National Gangs Unit

Financial, Narcotics and Public Safety Division
(202) 732-(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)

Division III

(b)(6), (b)(7)(C)
Program Manager
Worksite Enforcement Unit
Critical Infrastructure Protection and Fraud
(703) 603-(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)

Division IV

(b)(6), (b)(7)(C)
Supervisory Forensic Document Examiner
Forensic Document Laboratory
Investigative Services Division
(703) 285-(b)(6), (b)(7)(C) or
(202) 903-(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)
Special Agent (b)(6), (b)(7)(C) will be the POC for FPS.

(b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:38 PM
To: Dorsey, Sarah B
Cc: (b)(6), (b)(7)(C)
Subject: DNA Collection regulation
Follow Up Flag: Follow up
Flag Status: Red

Sarah,

The following is my understanding of the outcome of our meeting on this topic this morning.

1.) DRO would recommend (b)(5)
(b)(5)

2.) Before we can assess the cost and timeline for implementing the regulation, we'll need answers to the following questions:

(b)(5)

3.) (b)(5)

4.) (b)(5)

5.) Given these requirements, it is evident that DRO will not be able to implement these regulations for at least of period of 90 days, or longer depending on how DOJ responds to the questions raised above.

Please advise whether you need additional information from DRO.

(b)(6), (b)(7)(C)
Chief, Office of Policy and Communications
ICE Detention and Removal Operations
Department of Homeland Security
(202) 732 (b)(6), (b)(7)(C)

Dorsey, Sarah B

From: (b)(6), (b)(7)(C)
Sent: Tuesday, January 06, 2009 10:34 AM
To: Dorsey, Sarah B; (b)(6), (b)(7)(C)
Cc: (b)(6), (b)(7)(C)
Subject: RE: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548

Hi All –
I just got off the phone with (b)(6), (b)(7)(C) from OGC. She advised that this letter is intended to do two things: (1) (b)(5) (b)(5) and (2) (b)(5) (b)(5) The implementation plan and timeline is meant to do three things, at the least: (b)(5) (b)(5)

Our specific concerns can and should be addressed in the implementation plan that we send to DOJ. For example, (b)(5) (b)(5) (b)(6), (b)(7)(C) stressed that (b)(5)

Given this discussion with (b)(6), (b)(7)(C) I think (b)(5) (b)(5) (b)(6), (b)(7)(C), (b)(5)

Thanks!
(b)(6), (b)(7)(C)

**** Please note new desk number ****
(b)(6), (b)(7)(C)
ELD/OPLA/ICE
Desk: **202.73** (b)(6), (b)(7)(C)
Cell: 202.321

From: Dorsey, Sarah B [mailto:sarah.dorsey@dhs.gov]
Sent: Tuesday, January 06, 2009 9:01 AM
To: (b)(6), (b)(7)(C)
Cc:
Subject: RE: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548

Thanks, (b)(6), (b)(7)(C) I am glad there's something getting out from the Dep't before the 1/9 effective date -- our issues on implementation remain, however, and we'll have to coordinate with OGC if they're the lead negotiators with DOJ.

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 6:44 PM
To: (b)(6), (b)(7)(C) Dorsey, Sarah B
Cc: (b)(6), (b)(7)(C)
Subject: Re: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548

I'll give Ellen a call tomorrow to discuss.

(b)(6), (b)(7)(C)
202-73(b)(6), (b)(7)(C) / 202-32(b)(6), (b)(7)(C) (c)
Sent from my BlackBerry Wireless Device .....

From: (b)(6), (b)(7)(C)
To: 'Dorsey, Sarah B'
Cc: (b)(6), (b)(7)(C)
Sent: Mon Jan 05 18:33:26 2009
Subject: FW: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548
Sarah,

Are we having a little coordination problem here? This looks like it came from OGC. It's fine as far as it goes, but it's no where near as detailed as our discussion this morning. I wonder where this leaves us.

(b)(6), (b)(7)(C), (b)(5)

(b)(6), (b)(7)(C)
Chief, Office of Policy and Communications
ICE Detention and Removal Operations
Department of Homeland Security
(202) 73(b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 6:24 PM
To: (b)(6), (b)(7)(C)
Subject: FW: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548
Importance: High

Joe is this as a result of today's meeting?

(b)(6), (b)(7)(C) Special Assistant
Detention Management Division
Immigration and Customs Enforcement
Potomac Center North
500 12th St. SW Washington, DC
202-73(b)(6), (b)(7)(C) 202-49(b)(6), (b)(7)(C)

From: DRO Taskings
Sent: Monday, January 05, 2009 4:33 PM

To: (b)(6), (b)(7)(C)
Cc: DRO Taskings
Subject: FW: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548
Importance: High

Assigned Unit (s): CAD/DMD

From (Requesting Office): DHS

Task Due Date: **10 am, January 6, 2009**

Instructions: Please review and comment on the letter to the Attorney General regarding implementation of Department of Justice DNA-Sample Collection and Biological Evidence Preservation Rule. Also review and comment on the signed memo regarding the same.

Thank You.

(b)(6), (b)(7)(C)
DRO Taskings
Detention and Removal Operations
Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW| Washington, DC 20536 | 202-73(b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 3:19 PM
To: DRO Taskings; (b)(6), (b)(7)(C)
Subject: New task from HQEXOPS: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm. FolderID 33548
Importance: High

Please do not reply to this e-mail. It is from an unmonitored system account. All action should occur within OESIMS.

To: OI, DRO (with FYI to NIRU)

From: (b)(6), (b)(7)(C) - DHS

Task Due Date: On or before January 6, 2009, 12pm, via OPStasking.

Instructions:

Please review and comment on the letter to the Attorney General regarding implementation of Department of Justice DNA-Sample Collection and Biological Evidence Preservation Rule. Also review and comment on the signed memo regarding the same.

Background:

Apologize for short turn around – was originally due today COB. Contacted DHS for an extension, which they granted until tomorrow. I sent another message requesting a deadline of Tuesday COB or Wed 12pm – however an OAS cleared response will need to be sent by Wed COB at the very latest.

Please note that all materials that are to be given to DAS (b)(6), (b)(7)(C) OAS must first be signed/cleared by either the component director or deputy director.

Tasking Program Office POC Information:

(b)(6), (b)(7)(C)

Thank you,

(b)(6), (b)(7)(C)

Immigration and Customs Enforcement
Special Assistant
Office of the Executive Secretary
and Information Management
(202) 73 (b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)

Original Message:

From: (b)(6), (b)(7)(C)
Sent: Saturday, January 03, 2009 1:37 PM
To: OPStasking
Subject: To Ops For Tasking to ICE POs: For Your Review and Concurrence: Response to Attny Gen Mukasey re Rule Implementation of DNA Sampling and Biological Evidence Preservation

Ops, The original task came from (b)(6), (b)(7)(C) **Chief of Staff/OAG and the ExecSec POC is** (b)(6), (b)(7)(C) **however, you will probably need to contact OAG to determine who is best able to respond to any queries.**

Note: Be sure to clean up subject line before tasking out and double check my entries below as there may be other offices who should be tasked. (b)(6), (b)(7)(C)

To Assigned Program Office(s): OI/DRO

From (Requesting Office): DHS/OAG

Task Due Date: Jan 5,

Instructions:

Review and Clear the Mukasey Draft Response and the Signed Cover Memo

(Note: The Rule Implementation is provided as background information)

Background Information:

Letter to the Attorney General regarding implementation of Department of Justice DNA-Sample Collection and Biological Evidence Preservation Rule.

Tasking Program Office POC Information:

This message is part of an automated workflow, please do not change the text in the subject line when responding or forwarding the message.

Folder Subject: Review and Comment on Letter to A/G Re: Implementation of DoJ DNA-Sample Collection & Biological Evidence Preservation Rule - WF 807933; Due January 6, 2008, 12pm.
Folder Originator: (b)(6), (b)(7)(C)
Due Date: 1/6/2009 12:00:00 PM
Workflow ID: d716fac5-19fe-48ff-a6b0-4442cd016876
Folder Location: (b)(7)e
Task ID: 169362
Workflow Task ID: c0df30ee-ac74-4cf4-a52e-5068eb6c9510
Assignment ID: 0554eda8-126f-4611-92f3-e2fcd7f2bc6c

Dorsey, Sarah B

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 5:48 PM
To: (b)(6), (b)(7)(C)
Subject: FW: Juveniles & DNA Rule

All – Thanks to Lade for sending this DRO policy along on the fingerprint issue.

*** Please note new desk number ****

(b)(6), (b)(7)(C)
ELD/OPLA/ICE
Desk: **202.7** (b)(6), (b)(7)(C)
Cell: 202.32

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 5:44 PM
To: (b)(6), (b)(7)(C)
Subject: RE: Juveniles & DNA Rule

(b)(6), (b)(7)(C)

As we discussed and to further explain, here is the reference to ICE policy on fingerprinting for children 14 and **older**

You can also access the information on DRO's website if you want to see the entire manual.

Chapter 34 of the Detention and Removal Operations Policy and procedure Manual

34.3 Who is Fingerprinted?

The INS Servicewide Fingerprint Policy found in *Special Agent's Field Manual* **Appendix 16-3**, prescribes Service fingerprint requirements that encompass who is fingerprinted, what finger is to be utilized for single-prints, who takes the fingerprints, disposition and storage of fingerprints, and disposition of criminal charges/immigration benefits.

Form FD-249 is used to fingerprint every alien 14 years of age or older who has been:

(a) taken into custody with or without a warrant of arrest per 8 CFR section **287**;

(b) served with a Notice to Appear in removal proceedings;

(c) found to have willfully violated status as a crewman, or taken into custody for deportation as a crewman under section **252(b)** of the Act;

(d) removed from the United States under any provision of the Act (expedited removal, administrative removal, judicial removal, reinstated removal, or removal pursuant to an order of an immigration judge);

(e) arrested by the Service and presented for prosecution for a criminal offense;

(f) found inadmissible or has applied for admission or otherwise encountered at a Port-of-Entry and identified as mala fide, where a supervisor deems appropriate;

The INS requires applicants and petitioners age 14 to 79 for certain immigration benefits to be fingerprinted by an authorized fingerprint site via Form FD-258, Applicant Fingerprint Card, for the purpose of conducting FBI criminal background checks.

Regards,

(b)(6), (b)(7)(C)

(O) 202.73 (b)(6), (b)(7)(C) *(BB) 202.27* (b)(6), (b)(7)(C)
Associate Legal Advisor ELD OPLA US-ICE DHS
ζ♦ Detailed to DRO/JFRMU ζ♦(O) 202.7 (b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 5:20 PM
To: (b)(6), (b)(7)(C)
Cc:
Subject: FW: Juveniles & DNA Rule
Importance: High

All,

(b)(6), (b)(7)(C) has all previous inquiries forwarded to JFRMU and a mutual determined response was developed. According to our SME's, this information has previously been forwarded. (b)(6), (b)(7)(C) can you chime in on this?

Thanks,

(b)(6), (b)(7)(C)
(A)Chief
Juvenile Family Residential Management Unit
ICE/DRO
202-73 (b)(6), (b)(7)(C)
512-84

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:39 PM
To: Dorsey, Sarah B; (b)(6), (b)(7)(C)
Cc: (b)(6), (b)(7)(C)
Subject: Re: Juveniles & DNA Rule

(b)(5)

From: Dorsey, Sarah B
To: (b)(6), (b)(7)(C)
Cc:
Sent: Mon Jan 05 13:02:23 2009
Subject: RE: Juveniles & DNA Rule
Thanks, (b)(6), (b)(7)(C) -- I knew we could count on you!

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:00 PM
To: (b)(6), (b)(7)(C)
Cc:
Subject: RE: Juveniles & DNA Rule

(b)(5), (b)(7)e

**** Please note new desk number ****
(b)(6), (b)(7)(C)
ELD/OPLA/ICE
Desk: **202.73** (b)(6), (b)(7)(C)
Cell: 202.32 (b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 3:31 PM
To: (b)(6), (b)(7)(C) Dorsey, Sarah B
Cc: (b)(6), (b)(7)(C)
Subject: Juveniles & DNA Rule

Hi - In following up on a few of the issues we discussed this morning, I have spoken with one of my colleagues, (b)(6), (b)(7)(C) on the the fingerprinting/collection of DNA for juveniles. (b)(6), (b)(7)(C) advises (b)(5)

(b)(5)

(b)(5), (b)(7)e

(b)(6), (b)(7)(C) - please jump in if you have anything to add. If anyone has any further thoughts, please jump in as well. I'll let you know when I hear back from OI on their policies.

Still waiting to hear back from DHS on the chain of custody issue. I'd also like to discuss the LPR issues with them again, just to make sure we're all on the same page. Will keep you posted!

Thanks!
(b)(6), (b)(7)(C)

** ***Please note new address and desk number*** **
(b)(6), (b)(7)(C)
Enforcement Law Division / Office of the Principal Legal Advisor / U.S. Immigration & Customs Enforcement
500 12th St., SW, 9th Floor / Washington, DC 20024
Desk: **202.73**(b)(6), (b)(7)(C) Cell: 202.32(b)(6), (b)(7)(C)
(b)(6), (b)(7)(C)

Dorsey, Sarah B

From: Dorsey, Sarah B (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:12 PM
To: (b)(6), (b)(7)(C)
Subject: FW: Juveniles & DNA Rule

Among the issues we're considering regarding implementation of the DOJ DNA reg is whom exactly ICE would sample. (b)(5)
(b)(5)
(b)(5) See below for some more info -- we'll keep you posted on this as it develops.

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:06 PM
To: (b)(6), (b)(7)(C); Dorsey, Sarah B; (b)(6), (b)(7)(C)
Subject: RE: Juveniles & DNA Rule

(b)(6), (b)(7)(C)

See what you can find out from JFRMU on this question. Thanks.

(b)(6), (b)(7)(C)
Chief, Office of Policy and Communications
ICE Detention and Removal Operations
Department of Homeland Security
(202) 73(b)(6), (b)(7)(C)

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:04 PM
To: Dorsey, Sarah B; (b)(6), (b)(7)(C)
Subject: RE: Juveniles & DNA Rule

(b)(5)

***** Please note new desk number *****
(b)(6), (b)(7)(C)
ELD/OPLA/ICE
Desk: **202.73**(b)(6), (b)(7)(C)
Cell: 202.321

From: Dorsey, Sarah B
Sent: Monday, January 05, 2009 4:02 PM
To: (b)(6), (b)(7)(C)
Cc:
Subject: RE: Juveniles & DNA Rule

Thanks, (b)(6), (b)(7)(C) -- I knew we could count on you!

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 4:00 PM
To: (b)(6), (b)(7)(C) Dorsey, Sarah B
Cc:
Subject: RE: Juveniles & DNA Rule

(b)(5)

***** Please note new desk number *****

(b)(6), (b)(7)(C)
ELD/OPLA/ICE
Desk: **202.73** (b)(6), (b)(7)(C)
Cell: 202.321

From: (b)(6), (b)(7)(C)
Sent: Monday, January 05, 2009 3:31 PM
To: (b)(6), (b)(7)(C) Dorsey, Sarah B
Cc:
Subject: Juveniles & DNA Rule

(b)(6), (b)(7)(C), (b)(5)

Thanks!
(b)(6), (b)(7)(C)

***** Please note new address and desk number *****

(b)(6), (b)(7)(C)
Enforcement Law Division / Office of the Principal Legal Advisor / U.S. Immigration & Customs Enforcement
500 12th St., SW, 9th Floor / Washington, DC 20024
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(b)(6), (b)(7)(C)

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Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 2, 2009

MEMORANDUM FOR: Secretary Michael Chertoff

FROM: (b)(6), (b)(7)(C)
Chief of Staff to the General Counsel
Office of the General Counsel

SUBJECT: Letter to the Attorney General regarding implementation of Department of Justice DNA-Sample Collection and Biological Evidence Preservation Rule

Provided for your approval and signature is a letter the Attorney General on the initial implementation of the Department of Justice (DOJ) rule: DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932 (Dec. 10, 2008).

This letter memorializes discussions between the Department and DOJ on implementing a DOJ rule implementing statutory requirements. The statutes and rule require that federal agencies collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States, subject to certain limitations and exceptions.

We have coordinated the discussions with DOJ with the law enforcement components of the Department. My point of Contact on this action is Ellen Y. McClain, Assistant General Counsel for Enforcement.

This letter should be signed and forwarded to DOJ prior to January 9, 2009, the effective date of the rule.

Recommendation:

(b)(5)

Attachment

Executive Secretariat Clearance:

(b)(6), (b)(7)(C)

Date

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Mukasey:

On December 10, 2008, the U.S. Department of Justice (DOJ) published a final rule "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction" implementing provisions of section 1004 of the *DNA Fingerprint Act of 2005*, P.L. 109-162, and section 115 of the *Adam Walsh Child Protection and Safety Act of 2006*, P.L. 109-248 (Adam Walsh Act). Under this rule, effective January 9, 2009, agencies that arrest or detain individuals, or that supervise individuals facing charges, are directed to collect DNA samples from such individuals and from non-U.S. persons who are detained under the authority of the United States. The Department of Homeland Security (DHS) has a number of Components which will be directly affected by this rule, including, but not limited to, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, the U.S. Coast Guard, the U.S. Secret Service, and the Transportation Security Administration.

Under the final rule, however, DHS is not required to collect DNA samples from:

1. Aliens lawfully in, or being processed for lawful admission to, the United States;
2. Aliens held at a port of entry during consideration of admissibility and not subject to further detention facilities; and
3. Aliens held in connection with maritime interdiction.

See 28 C.F.R. § 28.12(b). Further, the final rule excepts DHS from collecting DNA samples from "other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations." Id. (4).

DOJ has agreed to provide affected agencies with the DNA sample collection kits necessary for agencies to collect the DNA samples required under the final rule but at this time does not have a sufficient number of kits nor funding to obtain the kits necessary to meet the DNA sample collection requirements of the final rule. I have determined, therefore, that the collection of DNA samples by DHS from any categories of aliens subject to the *DNA Fingerprint Act of 2005*, the Adam Walsh Act, and this final rule is not feasible at this time due to resource limitations

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and operational exigencies. Once DOJ notifies DHS that it has secured appropriate funding and an adequate supply of DNA collection kits for DHS to meet the requirements of this final rule, DHS will submit an implementation plan and timeline to DOJ and identify any additional resource or operational limitations requiring exception under 28 C.F.R. § 28.12(b)(4) from the requirements of the rule at that time.

DOJ's Office of Legal Policy has advised DHS's Office of the General Counsel that DHS may satisfy the consultation requirement under § 28.12(b)(4) by letter. Please have your staff contact Ellen Y. McClain, Assistant General Counsel for Enforcement, if you wish to discuss this further.

Sincerely,

Michael Chertoff

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