

FACT SHEET ON THE FEDERAL GUIDANCE ON RACIAL PROFILING ***(Updated 12/9/14)***

Today, the U.S. Department of Justice released its revisions to the Guidance on Racial Profiling to Federal Law Enforcement. The Guidance contains important improvements, but significant work remains to realize the Attorney General's goal of eliminating racial policing "once and for all."

Below is a synopsis of the revisions.

Improvements from 2003 Guidance

- Adds to race and ethnicity as protected characteristics: religion, national origin, sexual orientation, gender or gender identity (collectively referred to here as "protected characteristics")
- Explicitly extends the Guidance to FBI intelligence activities
- Requires training on the Guidance
- Requires certain data collection¹

When Law Enforcement Can and Can't Engage in Profiling

Like the previous version, the 2014 Guidance sets out two standards for law enforcement to rely on protected characteristics:

- (1) routine or spontaneous law enforcement activities, such as ordinary traffic stops; and
- (2) all activities other than routine or spontaneous law enforcement activities.

For (1), federal law enforcement may not use protected characteristics to any degree, except as part of a specific suspect description.

For (2), there is a convoluted set of factors that federal law enforcement officers are expected to take into account to determine when they may use protected characteristics.

¹ It is encouraging that the Guidance requires training and data collection. However, the utility of that training remains to be seen, especially in light of the profound flaws in the Guidance itself. Similarly, data collection is a vital component to the prevention of prohibited profiling, but the requirement to track complaints "based on the Guidance" and conduct "data driven research projects" is too vague to provide meaningful assurance that useful data will be collected and analyzed.

The obvious permissible use of a protected characteristic is when there is a suspect description that includes protected characteristics. For example, a 30 year-old male of a particular race and a particular hair color driving a blue automobile was seen fleeing a bank robbery. (See pg. 3 of the Guidance.)

For non-routine and non-spontaneous law enforcement activities, the convoluted requirements for when a federal law enforcement officer may consider protected characteristics are (see pg. 4 of the Guidance):

- 1. The information must be relevant to one of the following:**
 - The locality
 - Time frame of the criminal activity

- 2. The information must be trustworthy, and**

- 3. The information concerning identifying listed characteristics must be tied to one of the following:**
 - A particular criminal incident
 - A particular criminal scheme
 - A particular criminal organization
 - A threat to national or homeland security
 - A violation of federal immigration law
 - A an authorized intelligence activity

This standard glaringly omits any reference to requiring the law enforcement officer to have evidence of criminal activity in order to rely on the protected characteristic. Examples of and the impact of this omission are described further below.

Under the Revised Guidance, Law Enforcement Could Continue to Engage in Profiling Based Upon Protected Characteristics in the Following Situations:

- **Infiltration of Mosques and Community Events:** Under the revised Guidance, an FBI agent or an informant can enter a mosque, Eid dinner, or other community event to observe, take notes, and collect information on the leadership, congregants and their speech, worship, and other activities – all without any evidence that criminal activity might be taking place in that house of worship or gathering.

- **Recruitment of Sources:** The revised Guidance allows federal law enforcement to target and recruit informants based solely upon their race, ethnicity or religion without any apparent connection to criminal activity. The Guidance requires only that the potential source have “access to information relevant” to an identified criminal incident, scheme, or organization, or an authorized intelligence activity, among other things, which is a standard so broad that it includes anyone with access to the

Internet or a library. (See pg. 8 of the Guidance.)

- **Massive Data-Gathering & Mapping of Racial, Ethnic, and Religious Communities:** The revised Guidance is also deeply flawed in its allowance of mapping communities based solely upon protected characteristics, without individualized suspicion of wrongdoing. Under the auspices of “[g]etting to know a community,” the FBI gathers massive amounts of data on where people of a particular race or ethnicity live, work, and pray, and their charitable giving activities. The FBI then maps these communities and First Amendment-protected activities in a pernicious form of profiling that associates criminal activity with an entire racial, ethnic or religious community. Doing so undermines public trust and should not have the blessing of the Justice Department. (See pg. 10 of the Guidance.)
- **Profiling by the NYPD and Other State and Local Law Enforcement:** The revised Guidance fails to require state and local law enforcement agencies to adopt the federal standard against profiling, except while that state or local law enforcement agent is participating in a federal task force, such as a federal joint terrorism or drug trafficking task force. Therefore, practices like the NYPD’s discriminatory Muslim spying program, controversial stop and frisk program, or other biased policing practices will not be directly affected by the revised Guidance.² (See pg. 1 of the Guidance.)
- **Profiling at the Airports and Border:** The revised Guidance is not applicable to screenings, inspections, and other protective activities related to border and air security. This means that Americans can continue to be singled out for enhanced screenings, questioning and searches at our airports and the border simply based on their race, ethnicity, religion, national origin or other protected characteristics. (See pg. 2, footnote 2 of the Guidance.)

² Regardless of whether the Justice Department has the power to unilaterally ban biased policing by state and local law enforcement, it could condition the receipt of DOJ funding, upon which virtually every law enforcement agency relies, on compliance with the Guidance.