

APPENDIX E



Civil Liberties Impact Assessment
for the

DATE

Contact Point

Reviewing Official

Officer for Civil Rights and Civil Liberties
(202) XXX- XXXX

Introduction

[Include a summary of the program being reviewed. Include a statement of the statutory and/or regulatory authority for this program.]

Potential Civil Liberties Impacts

Impact on Particular Groups or Individuals

1. *Is the program intended to have a direct impact on certain racial or ethnic groups? Even if it is not, might the program have an effect on certain racial or ethnic groups that might reasonably be perceived to be intentional?* If a program singles out one or more racial, ethnic, or national origin groups, *or is intended to do so*, the program must satisfy stringent Constitutional requirements. *See Loving v. Virginia*, 388 U.S. 1 (1967) (strict scrutiny standard of review applies where government action classifies individuals on the basis of race). If the program indirectly or unintentionally impacts upon minorities, the Constitutional standards for evaluating it are much less stringent, *requiring only a lawful, rational basis for the program, but the impact on minorities* should still be considered. *See Washington v. Davis*, 426 U.S. 299 (1976) (applying a rational basis standard of review to government regulation with disparate impact on minorities); *see also Pers. Adminr. v. Feeney*, 442 U.S. 256 (1979) (intentional discrimination, not merely discriminatory effect, is required to trigger heightened review).
2. *Would the program further the Constitutional principle of race-neutral government action, or would it encourage or depend upon a government official categorizing people by race?* Generally, an agency creating a program that singles out one or more racial or ethnic groups must show that it has narrowly tailored its program to further a compelling government interest. When the government treats certain categories of people differently than other categories, it generally must do so according to categories other than race or ethnicity (such as geography or socioeconomic status). *See, e.g., Adarand Const., Inc. v. Pena*, 515 U.S. 200, 235 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).
3. *How would the program affect people with disabilities?* Certain regulatory programs may work a greater hardship on persons with disabilities. If this possibility is anticipated with respect to a particular regulation, we should ask whether this aspect of the proposed rule is justified and whether the hardship can be ameliorated in the implementation of the rule. *Cf. Rehabilitation Act of 1973*, 29 U.S.C. § 794 (prohibiting discrimination on the basis of disability in programs conducted by federal agencies).
4. *How would the program affect those attempting to exercise a particular religion?* Programs identifying particular religious beliefs must be assessed strictly under the First Amendment. Generally-applicable rules that do not refer to any particular religion, but which may have an adverse effect on religious adherents'

exercise of their religion, will be assessed under a less onerous constitutional test, *see Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), but federal statutes may require a heightened justification for even generally-applicable rules. *See O’Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (discussing applicability of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, to internal operations of the federal government). *Cf.* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (providing protection for the exercise of religion by institutionalized persons). Agencies should consider whether their programs affect the exercise of religion and whether the agency could make reasonable accommodations to avoid a negative effect.

5. *How would the program affect people with limited English language proficiency?* Title VI of the Civil Rights Act of 1964 prohibits discrimination based on national origin by recipients of federal funds. Department of Justice regulations interpret this to mean that these recipients must take reasonable steps to provide persons with limited English proficiency meaningful access to programs and services. Executive Order No. 13,166 requires the executive agencies of the federal government to meet the same standard in their own programs.

Influence of Government

6. *Would the program increase the authority, control, or influence of the federal government in its relationship with private citizens? Specifically:*
 - A. *Would the program require or authorize the federal government to collect more information about private citizens?* The collection of data on law-abiding citizens reduces their control over personal information and thereby reduces their liberty. The agency should consider whether it has a sound basis for concluding that collection of the additional information is necessary to effectively carry out an important agency function. If the agency expects that obtaining the information will be beneficial, but cannot foresee with certainty whether the expected benefits will materialize, the agency could consider adding sunset provisions or provisions that commit the agency to a periodic reassessment of the benefits associated with the information collection.
 - B. *Would the program require or authorize the federal government to centralize the collection of information that was previously dispersed?* While federal, state, and local government agencies collect a great deal of information on American citizens, limited permanent residents, and non-U.S. citizens, it is currently dispersed in many places, both in paper records and in databases. While it is important in many circumstances for the Department to organize the collection of data, it is also important to recognize that the federal government’s centralization of information is generally met with public suspicion even when the centralized collection of information meets all legal requirements (e.g., CAPPS II and Total

Information Awareness). Centralizing information into organized government databases also increases the risk that the information collected will be used for a purpose other than that for which it was collected (commonly referred to as, “mission creep”). It also compounds the risk that compilations of information could be accessed by unauthorized persons. For these reasons, regulatory analysis of such programs should include a discussion of the civil liberties impact of centralization as opposed to a decentralized, federated or distributed approach to data collection. *See United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (“Plainly there is a vast difference [in terms of personal privacy] between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”).

7. *Would the program increase the authority, control, or influence of the federal government in its relationship with state or local governments?* The Constitution creates a delicate balance between federal and state governments, which helps to prevent the accumulation of excessive power in either the States or our National Government. These structural constraints on government protect our civil liberties. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.”) (quotation marks and citation omitted); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (“The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective ‘counterpoise’ to the power of the Federal Government.”). When authority is dispersed between the various levels of government, it is less likely that a single agency can accumulate unhealthy power over our individual lives. *See also* Exec. Order No. 13,132 (1999) (“The people of the States created the national government and delegated to it enumerated governmental powers. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.”).
8. *Would the program increase the authority, control, or influence of the federal government in its relationship with the private sector?* A robust private sector also serves as a check to the authority of the government. Associations of individuals in the private sector allow for the free flow of ideas and programs that can advance the interests of individuals. The gradual layering of regulations stifles this creativity. *See* 2 Alexis de Tocqueville, *Democracy in America* 319 (Phillips Bradley ed., Vintage Books 1990) (1840) (describing what a despotic government would look like in a democratic society, and stating that such a government would “cover[] the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. . . . Such a power does not destroy, but it prevents existence; it does not tyrannize, but

it compresses, enervates, extinguishes, and stupefies a people, till [the] nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd”).

9. *Would the program require or authorize the federal government to share information about private citizens with third parties outside the federal government? If so, the legal authorities permitting the information to be shared need to be identified.*
10. *Does the program include an intelligence or surveillance component? Will the program be governed by the provisions of Executive Order 12333 and/or the National Security Act of 1947?*

Notice and Redress

11. *Does the public receive notice of the program, and have the ability to file comments on it?*
12. *Are procedures available for redress of alleged violations of civil rights and civil liberties? If so, how will the public be informed of these redress procedures? Do the redress procedures provide for data corrections to be sent to all entities with which the information has been shared?*

Alternatives

13. *Is the program the least burdensome alternative with respect to civil liberties? Could the agency formulate other alternatives to accomplish the same goal while minimizing the impacts on civil liberties? Executive Order No. 12,866 (1993), amended by Exec. Order No. 13,258 (2002), requires agencies to identify and assess alternative forms of regulation.*
14. *Could the agency alter the proposed regulatory plan to enhance civil liberties? This may involve removing established regulatory burdens when those burdens have not produced significant benefits. For example, if an agency seeks to improve security by employing a new surveillance technique where a different surveillance technique is currently in place, the agency should consider discontinuing the first surveillance technique rather than simply adding the new to the old.*
15. *Will any impositions on liberty created by the program be voluntarily incurred?*
16. *Is any imposition on civil rights and civil liberties equally distributed, randomly distributed, or focused on identifiable groups?*
17. *Is any imposition on civil rights and civil liberties brief or extended?*

Safeguards

18. *Would effective implementation of the program be dependent, in whole or in part, on government employees having a heightened awareness of Constitutional rights, federal laws or regulations, or Departmental policies as they carry out their duties? If so, the promulgating agency should consider the need to increase or strengthen training with regard to the protection of civil rights and civil liberties.*
19. *Would the program increase or decrease the discretion of those employees or agents implementing the regulation? It is possible that an increase in discretionary authority could provide the means for obscuring improper enforcement motives at times. On the other hand, additional discretionary authority may allow for special consideration in some circumstances to ease the regulatory burden on disadvantaged individuals or groups.*
20. *Does the program have embedded legal counsel or ready access to legal counsel? The active involvement of the Office of General Counsel will assist programs to avoid violations of law.*
21. *Are reports to Congress, or Congressionally-mandated audits, required, and if so are they one-time or periodic in nature? Congressional oversight provides another level of oversight for a program.*

Other Rights

22. *Could the program limit protected political or religious expression? Could the program implicitly chill open discourse or a person's ability to express their beliefs in writing that does not threaten or amount to shouting fire in a theater? There are numerous other civil liberties recognized in our founding documents and supported by legislation, regulations, court decisions and policy. While these may be less likely to be placed in jeopardy by DHS programs, they nonetheless deserve mention here and should not escape the attention of program leadership. The interpretation of rights inherent in the First Amendment, such as free speech, freedom of the press, right to assemble, and the right to petition, is mostly settled. Yet, in the realm of security policy, the application of these rights requires careful scrutiny.*
23. *Could the program lead to some restriction on property ownership, such as real, personal or intellectual property, firearms, or would it grant an unfair advantage to a particular business entity? Will the program have an impact on voting rights? Does the program take the least restrictive approach possible to regulating travel, including the travel of United States citizens? Does the program take away a freedom without affording proper due process? Other liberties that a program should be evaluated against include: the right to keep and bear arms, due process rights, private property rights, rights of the accused, voting rights, the right to travel, and the presumption of innocence.*

Conclusion

Responsible Officials _____, _____

Program Manager:

Approval Signature Page

Officer for Civil Rights and Civil Liberties
Department of Homeland Security