

IMPLEMENTATION OF RECOMMENDATIONS:

Federal Support for Local Law Enforcement Acquisition

October 1, 2015

In May 2015, a Federal inter-agency Working Group, established by Executive Order 13688 and co-chaired by the Departments of Justice, Homeland Security, and Defense with members from several other Federal agencies, delivered a report to the President entitled, “Recommendations Pursuant to Executive Order 13688: Federal Support for Local Law Enforcement Equipment Acquisition” (Report).¹ The Report, among other things, established consistent Federal Government-wide controlled and prohibited equipment lists, harmonized procedures across Federal agencies governing the provision of controlled equipment to law enforcement agencies (LEAs), and established policy and training requirements for LEAs that acquire controlled equipment from the Federal Government. As the title and content of the Report make clear, the recommendations were designed to support LEAs in – not prevent them from –acquiring necessary equipment and using that equipment appropriately to protect and serve their communities and promote officer safety.

Since delivering the Report to the President, Federal agencies have taken key steps specified in the Report to ensure that its recommendations will take effect at the beginning of Fiscal Year 2016.² These include the formation of a Permanent Federal Interagency Law Enforcement Equipment Working Group (Working Group)³ to support oversight and policy development functions for controlled equipment programs (see below) and engagement with relevant stakeholders through multiple meetings and the receipt of written comments to obtain feedback on implementation approaches. The Working Group will continue this type of interaction throughout FY16 and beyond.⁴

This Implementation Update (Update) describes the progress made on significant issues and policy decisions related to the Report. Federal agencies should ensure that applicants for controlled equipment are aware of all the requirements contained in the Report as well as in this Update. It should be noted that, for any inconsistencies, the directives described in this Update supersede the Report. Both documents are publicly available on the website of DOJ’s Office of Justice Programs, Bureau of Justice Assistance (www.bja.gov) as well as through other Federal agency guidance and communication materials. Applicants with questions about the Report’s recommendations should contact the Federal equipment program from which they are requesting controlled or other equipment.

¹ https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf

² Report, p. 5.

³ Report, p. 32, Recommendation 5.1.

⁴ Report, pp. 5, 35.

GENERAL ISSUES

TRANSITION PERIOD. The Working Group will implement a six-month transition period to allow law enforcement agencies to perform their duties to the fullest extent while working to comply with new training and policy requirements. The transition period provides LEAs the opportunity to examine their policies and training programs and make adjustments so they are in compliance with the Report's recommendations. During the transition period, LEAs will be permitted to apply for and acquire controlled equipment by certifying that they will be in compliance with the appropriate policies, training, and other requirements by April 1, 2016. LEAs will not be able to use any controlled equipment they receive during this six-month period, except for training purposes, until they have certified that the appropriate policies and training are in place.

TRIBAL. The Report stated that “[b]efore the recommendations are implemented with respect to Tribal LEAs, the Working Group will ensure that the specific requirements triggered by potential changes to Federal programs affecting sovereign tribes, including appropriate Tribal consultation, are met.”⁵ The Working Group has initiated the process of Tribal consultation and engagement in cooperation with DOJ's Office of Tribal Justice. This process has included contacting key tribes to solicit their initial input, developing a framing paper, and arranging to participate in Tribal convenings, including the conferences of the National Congress of American Indians and the International Association of Chiefs of Police. The Working Group also will solicit written comments from Tribal Governments and Law Enforcement and, after review, will make appropriate changes to the Report's recommendations.

EQUIPMENT LISTS

RECALL OF PROHIBITED EQUIPMENT.⁶ Equipment in LEA inventories acquired through Federal equipment programs that are now on the Prohibited Equipment List will be recalled during the first six months of Fiscal Year 2016. This applies only to prohibited equipment acquired by LEAs through the Department of Defense, which is the only Federal agency that has the authority to recall. DOD will provide guidance and assistance to LEAs, especially on how to return large prohibited equipment. Those LEAs returning tracked armored vehicles will receive priority for equivalent wheeled vehicles as long as the relevant controlled equipment requirements are met.

EQUIPMENT DEFINITIONS.⁷ In general, if an LEA has a question as to whether equipment is prohibited or controlled, it should contact the Federal agency to which it is applying. For DOD, equipment that is either controlled or prohibited will be identified by the National Stock Number (NSN). For DHS, equipment that is either controlled or prohibited will be identified on the Approved Equipment List (AEL).

⁵ Report, p. 10, n. 13.

⁶ Report, p. 13, n. 22.

⁷ Report, p. 12, n. 20.

MODIFICATIONS. LEAs may not modify equipment acquired using Federal resources that would cause it to be considered prohibited equipment, or, absent specific approval from the Federal agency and adherence to all relevant requirements, controlled equipment.

POLICIES, TRAINING, AND PROTOCOLS FOR CONTROLLED EQUIPMENT

MODEL POLICIES AND DEFINITION OF POLICY GUIDELINES.⁸ DOJ has provided funding to a group led by the International Association of Chiefs of Police (IACP), in partnership with the National Tactical Officers Association and the Commission on Accreditation for Law Enforcement Agencies, to provide more detailed definitions for the General Policing and Specific Controlled Equipment Standards and to develop model policies. The IACP-led group has consulted a number of subject matter experts during this process and has produced the detailed definitions, which the Working Group has accepted.⁹ Each Federal agency-member of the Working Group will ensure that applicants are made aware of the detailed definitions, as well as the other recommendations in the Report and Update, through normal agency guidance and processes. The model policies will be available at the end of Calendar Year 2015.

RESPONSIBILITY OF ACQUIRING LEA. LEAs are responsible for ensuring that whoever uses controlled equipment acquired by the LEA through Federal resources adheres to the LEA's relevant policies or the regional sharing agreement, regardless of whether the user is employed by that LEA.

ACQUISITION PROCESS FOR CONTROLLED EQUIPMENT

CIVILIAN GOVERNING BODY REVIEW.¹⁰ The Working Group has amended this requirement for LEAs where the chief executive is popularly elected (e.g., Sheriffs). Such LEAs must provide official written notice to – but are not required to obtain approval from – their civilian governing body at least 30 days in advance of any application to acquire controlled equipment from the Federal Government. This change takes into account the fact that popularly-elected heads of LEAs are directly accountable to their community-constituency.

“REASONABLE OPPORTUNITY” FOR CIVILIAN GOVERNING BODY REVIEW.¹¹ A reasonable opportunity for a civilian governing body to review an LEA's application for controlled equipment is 30 days. Thus, an LEA in its application must certify that (1) the civilian governing body explicitly approved of or concurred in the LEA's acquisition of the controlled equipment listed in the application, or (2) it provided formal written notice to the civilian governing body at least 30 days prior to the submission of the application of its intent to acquire the specified controlled equipment and has not received disapproval or non-concurrence.

⁸ *Report*, p. 20.

⁹ *Appendix*.

¹⁰ *Report*, p. 28, Recommendation 3.1.

¹¹ *Id.*

CAMPUS LAW ENFORCEMENT AT INSTITUTIONS OF HIGHER EDUCATION (IHEs). The Working Group has clarified the requirements for Campus LEAs operating in Institutions of Higher Learning. First, the Campus LEA's civilian governing body – which is the IHE's Board of Governors or an equivalent body – must explicitly approve the acquisition of controlled equipment, and such approval must be evidenced in the Campus LEA's application to the Federal equipment program. In other words, silence or inaction by the Campus LEA's civilian governing body does not constitute evidence of approval, and the "reasonable opportunity to review" standard does not apply to Campus LEA applications. Second, Campus LEAs must certify that their policies and training include specific provisions on using equipment in a way that does not chill speech, is not disruptive to the educational environment, and does not foster a hostile climate among students. Third, Campus LEAs must remove the militaristic appearance of any controlled equipment vehicles they acquire (if allowed by the Federal program) by, for example, painting them a different color. The U.S. Department will advise the Permanent Working Group about the specific criteria appropriate for the detailed justification that apply to Campus LEAs.

QUARTERLY SAMPLE AND REVIEW OF APPLICATION STANDARDS. In an ongoing effort toward uniformity of the standards and processes to assess the adequacy of each application, including the detailed justification, the Permanent Working Group will meet quarterly to review a sample of applications from each Federal agency to determine the factors and the weight given to each element that were considered in approving or disapproving an application. The continued engagement and inter-agency coordination will lead toward a more dependable, standardized process throughout the Federal equipment programs.¹²

EFFECT OF FINDINGS OF CIVIL RIGHTS VIOLATIONS. As the Report indicates, LEAs are required to state in their application to acquire controlled equipment "whether they have been found to be in violation of a Federal civil rights statute or programmatic term during the past three (3) years and, if so, whether any disposition was reached or corrective actions were taken."¹³ Accordingly, LEAs must disclose any finding by a Federal court or a Federal government agency, including an agency's Office of Civil Rights or the Civil Rights Division of the U.S. Department of Justice, that the LEA has violated a Federal civil rights law with respect to its policing functions. LEAs must also disclose any admissions of liability they have made regarding violations of Federal civil rights law in their policing functions. Federal agencies should obtain as much information as possible about the violation, which, along with any effort the LEA has taken to cure the violation, will be considered in determining whether the LEA should acquire controlled equipment.

CAMOUFLAGE UNIFORMS.¹⁴ Federal agencies must ensure that LEA applicants are aware that Federally-acquired camouflage-patterned uniforms are authorized to be worn only in environments where they actually camouflage the wearer, as opposed to, for example, cities, towns, and other urban or populous areas. Implementing this requirement can be accomplished

¹² Report, p. 27.

¹³ Report, p. 26.

¹⁴ Report, p. 13.

through changes to Memoranda of Understanding/Agreement, Federal agency guidance, or the application form.

TRANSFER / SALE OF CONTROLLED EQUIPMENT

TRANSFER / SALE OF CONTROLLED EQUIPMENT TO NON-LEAs. Recommendation 4.2 limits the type of equipment that LEAs can transfer or sell to non-LEAs to fixed-wing aircrafts, rotary-wing aircrafts, and command and control vehicles.¹⁵ The Working Group has added a fourth category of vehicles to this list – Tactical Vehicles, such as HMMWVs, which are not armored vehicles. Consistent with the Report, any equipment in these four categories must be stripped of law enforcement insignias and markings prior to transferring or selling the equipment; sensitive or potentially dangerous components must also be removed. The LEA also must notify and receive approval for the sale from the Federal agency through which it acquired the controlled equipment.

OVERSIGHT, COMPLIANCE, AND IMPLEMENTATION

PERMANENT WORKING GROUP.¹⁶ As stated above, a Permanent Working Group has been established and has met regularly since the Report was delivered to the President to plan for the implementation of the recommendations. The Working Group has held three meetings with law enforcement stakeholders and two meetings with civil rights and civil liberties groups to discuss their implementation questions and concerns. Additionally, Federal agencies have conducted briefings for their respective State Coordinators and Administrative Agencies who are key partners in implementing the recommendations.

Beginning in October 2015, the Working Group will meet quarterly to review implementation efforts, address concerns and questions from applicants, provide and review information for the interagency database (see below), and continue to harmonize the standards for Federal equipment programs. Additionally, the Working Group is planning to hold a July 2016 annual review of the implementation of the Report's recommendations, including an assessment of whether equipment categories should be added or deleted from the prohibited or controlled equipment lists. This review will include engagements with stakeholders from the law enforcement, civil rights and civil liberties, and other interested communities.

DATABASE.¹⁷ The Working Group has established the criteria for an interagency database that will be managed by the Bureau of Justice Assistance at DOJ and will be staffed by a dedicated contractor. The Database will include information on applicant-LEAs; the controlled equipment they acquired; whether any controlled equipment was transferred, sold, or otherwise disposed; and whether the LEA has been found to be in violation of any programmatic rule or statute, including civil rights violations, that would raise concerns of suitability for acquiring controlled

¹⁵ Report, p. 31.

¹⁶ Report, pp. 33-34, Recommendation 5.1.

¹⁷ Report, p. 33.

equipment. This information will be collected quarterly in advance of the regular Working Group meetings.

COORDINATION OF OFFICES OF CIVIL RIGHTS AND RELEVANT MOUs.¹⁸ In October 2015, the Federal Coordination and Compliance Section (FCS) of DOJ’s Civil Rights Division will begin meeting with Federal Offices of Civil Rights (OCRs) to begin planning ongoing training and coordination consistent with the recommendations of the report. FCS is charged under Executive Order 12250 with coordinating the enforcement of the nondiscrimination provisions in various civil rights laws, including Title VI of the Civil Rights Act of 1964. FCS will train OCRs on how to respond to complaints received from the community, initiate compliance reviews, and request relevant data. FCS also will work with agency OCRs on coordinating compliance reviews to avoid duplicating efforts and ensuring that a large representative sample of LEAs are reviewed.

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¹⁸ *Report*, p. 34.