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June 16, 2015

Via Electronic Mail

Ms. Kimberly Walton

Assistant Administrator

Office of Civil Rights and Liberties, Ombudsman, and Traveler Engagement

Transportation Security Administration

601 12th Street

Arlington, VA 20598-6009

Re: Training Scenarios on Discriminatory Profiling for TSA Guidance

Dear Ms. Walton:

On behalf of The Leadership Conference on Civil and Human Rights and the undersigned organizations, we offer the scenarios below for inclusion in all future Transportation Security Administration (TSA) guidance relating to the use of profiling in TSA screening activities. These scenarios will be useful in training TSA personnel on how to avoid impermissible conduct. We believe TSA can craft a guidance that advances its mission while preserving the rights of individual travelers. However, this is only possible if TSA explicitly rejects discriminatory profiling. With the recently leaked findings from a Department of Homeland Security Inspector General report detailing TSA's failure to identify weapons or other contraband in 95 percent of tests conducted in airports across the country, it is clear that TSA must reassess how it is training its personnel. Rejecting invidious profiling is an integral step in that process.

It is our understanding that TSA is continuing to assess how the Department of Justice's December 2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity ("the Revised Guidance") applies to its activities and plans to update its own guidance and training materials. As it engages in this process, we feel it is important to provide TSA with a concrete definition of discriminatory profiling as well as several scenarios depicting the inappropriate use of individual characteristics.

We emphasize that these scenarios should not be construed as defining the full scope of our concerns regarding discriminatory profiling, nor should they distract from our longstanding objections to TSA programs and policies that encourage or incorporate invidious profiling, as well as our concerns about the lack of a comprehensive auditing mechanism to guard against profiling. In particular, we – along with government auditors, members of Congress, and independent experts – have

repeatedly warned that TSA's behavior detection programs not only lack a basis in science but also lead to racial and religious profiling. We are deeply concerned that the behavioral indicators that TSA considers indicative of "mal-intent" include normal, everyday conduct that can, and does, serve as a pretext for disparate treatment of members of minority communities. For example, according to a leaked document, one of those indicators is "face pale from recent shaving of beard"—a troubling sign that Muslims are a prime focus of TSA's behavior detection activities.

Similarly, we remain concerned that the government's watch-listing system disproportionately and unjustifiably targets minority communities, particularly Arab and Muslim communities. The result is that members of those communities are more likely to be subjected to heightened airport screening or barred from flying altogether. Such disparate treatment not only undermines cherished constitutional rights, but also reinforces the perception among TSA officers and the flying public that members of minority racial and religious communities should be treated with suspicion. These outcomes are at odds with TSA's responsibility to ensure that its screening functions are implemented in a fair and equitable manner.

"Discriminatory profiling" refers to:

the practice of a law enforcement agent or agency relying, to any degree, on race, gender, ethnicity, national origin, religion, sexual orientation, or gender identity in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, gender, ethnicity, national origin, religion, sexual orientation, or gender identity to an identified criminal incident or scheme.

The following scenarios are designed to help ensure TSA personnel and agents do not engage in discriminatory profiling. TSA personnel should not refer persons to additional and/or secondary screening in these circumstances absent reason(s) to do so independent of the individuals' protected characteristics.

Training Scenarios

Religious Attire

A Sikh male, who wears a turban in accordance with his religious beliefs, clears a body scanner without setting off an alarm. The TSO at the checkpoint asks him to step aside, and says, "Sir, we need to pat down your turban." The Sikh traveler offers to pat down his own turban, consistent with TSA policy, and submit to a hand-swab test to screen for non-metallic items. The test results come back negative, and the Sikh traveler asks, "Why am I always set aside for secondary screening?" The TSO responds, "Everyone with a turban gets secondary screening." Over the course of that day, the TSO encounters several other Sikh travelers wearing turbans of different shapes and sizes and asks all of them to go through the same process.

The TSO in this scenario acted impermissibly. According to TSA policy, all persons wearing head coverings are subject to the possibility of additional security screening if the security officer cannot reasonably determine that the head area is free of a detectable threat item. Stereotypical beliefs about people who wear religious head coverings never provide a reasonable basis to subject them to disparate screening. Religious head coverings do not pose any greater threat than other articles of clothing and should not automatically be subjected to additional screening.

National Origin

A young, male, U.S. citizen of perceived Arab descent clears a body scanner at the airport without setting off any alarms. The TSO has no reason to think that the young man has said or done anything that is a security threat. Nor is the young man a national of, or traveling to, any country, other than the U.S., which would require heightened security measures due to an ongoing threat assessment. However, the TSO at the checkpoint asks the young man to step aside for extra screening, based solely on the man's perceived Arab ethnicity and the assumption that all Arabs are nationals of countries that are current geopolitical threats, and therefore a security risk. When the young man asks why he was selected for additional screening, the TSO responds, "It's a random selection." However, throughout the day, the TSO continues to pull aside all young men he perceives to be non-U.S. citizens because of their perceived South Asian/Arab descent.

The TSO in this scenario acted impermissibly. Stereotypical beliefs based on perceived ethnicity and nationality, without more, should not be a reason to subject individuals to disparate screening practices.

Behavior Detection

A TSA behavior detection officer scans passengers in an airport screening area for what TSA considers signs of deception or "mal-intent." On average, he spends more time scrutinizing passengers who appear to be Muslim, or of Arab or Middle Eastern descent, than other passengers.

The officer's additional scrutiny of these minority community members is impermissible. It lacks any valid, security-related basis and makes it more likely that the officer will refer those individuals for additional screening. To the extent that the TSA engages in behavior detection activities—which, as explained above, the undersigned organizations object to fundamentally—it must do so without engaging in discriminatory profiling.

A behavior detection officer scans a Caucasian man in an airport screening area and notes several behaviors that TSA considers suspicious or indicative of "mal-intent." The officer thinks that it is a close call whether or not he should refer the man for additional screening, but he ultimately allows the man to proceed through security normally. Later, the officer observes a man of apparent Arab ethnicity exhibiting similar behavior, presenting a similarly close call. The officer refers the second man for secondary screening.



The officer's decision to refer the second man for secondary screening amounted to discriminatory profiling. In making decisions about similar conduct, the officer treated the Arab man differently, subjecting him to an adverse action where he had taken no action regarding the Caucasian man. Decisions regarding referrals for secondary screening must be consistent for similar conduct.

We provide the preceding examples of impermissible use of certain characteristics in TSA enforcement activities as a prelude to working together to achieve strong protections against impermissible profiling by TSA personnel. We look forward to continuing this dialogue in order to ensure that TSA is meeting its stated goals, without prioritizing expedience and efficiency over equality and justice. Aside from these scenarios, we look forward to discussing definitional issues surrounding terms such as "nationality" and "national origin;" what TSA does and does not consider an "adverse" action based on a listed characteristic; as well as TSA's plans for data collection and monitoring of profiling.

Thank you for your consideration. If you have questions, please feel free to contact Sakira Cook, Counsel, The Leadership Conference on Civil and Human Rights, at 202-263-2894 or cook@civilrights.org or Rajdeep Singh, Director of Law and Policy, Sikh Coalition, at 202-747-4944 or rajdeep@sikhcoalition.org.

Sincerely,

ACLU
Arab-American Anti-Discrimination Committee
Council on American-Islamic Relations
The Leadership Conference on Civil and Human Rights
Muslim Advocates
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
South Asian Americans Leading Together(SAALT)

cc. Megan H. Mack, DHS Officer for Civil Rights and Civil Liberties
Serena Hoy, Senior Advisor to the Deputy Secretary, DHS
Mary Giovagnoli, Deputy Assistant Secretary for Immigration Policy, DHS
Jonathan Meyer, Deputy General Counsel, DHS
Felicia Escobar, Special Assistant to the President for Immigration Policy, Domestic Policy Council
Roy L. Austin, Jr., Deputy Assistant to the President; Director, White House Office of Urban Affairs, Justice, and Opportunity