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

Dear Attorney General Mukasey:

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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.

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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).

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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.

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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.

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Sincerely,

Michael Chertoff

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