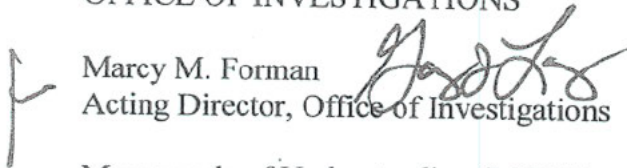




## U.S. Immigration and Customs Enforcement

AUG 13 2004

MEMORANDUM FOR: ASSISTANT DIRECTORS  
DEPUTY ASSISTANT DIRECTORS  
SPECIAL AGENTS IN CHARGE  
OFFICE OF INVESTIGATIONS

FROM:  Marcy M. Forman  
Acting Director, Office of Investigations

SUBJECT: Memoranda of Understanding (MOUs) and Memoranda of Agreement (MOAs)

The attached memorandum from the Acting Director of Operations dated July 26, 2004, and the Department of Homeland Security (DHS) Management Directive (MD) 0450.1 on MOUs and MOAs set policy and provide ICE-wide and Department-wide guidance on this issue. Please review both documents carefully and ensure that you and your staff comply with all provisions therein.

Section 6.B.1.b) of MD 0450.1 provides the format to be used and the basic information all MOUs and MOAs must contain.

Section 6.B.1.c) states that "prior to signing any MOU or MOA, the person signing for DHS must ensure that the Office of General Counsel has reviewed the document for legal sufficiency and approved it." Therefore, please ensure that all your draft MOUs and MOAs have been reviewed and approved for legal sufficiency by your local Counsel's office.

Please note that the memorandum from the Acting Director of Operations states that "all MOUs and MOAs must be submitted for review to the Director of Operations." As a result, please send all your draft MOUs and MOAs (after they have been concurred by Counsel) to **(b)(6) (7)(C)**, Chief, Planning and Policy Unit, Mission Support Division, who will ensure that these documents are reviewed and concurred at Headquarters by Office of Investigations (OI) management and by the Acting Director of Operations, as well as by any other ICE Office, as appropriate.

As you know, ICE and OI are in the process of discussing and negotiating MOUs, MOAs, or other agreements with a broad range of partners, such as the Federal Bureau of Investigation, the

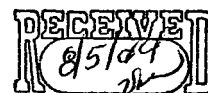
Drug Enforcement Administration, the U.S. Coast Guard, and DHS components, such as the U.S. Customs and Border Protection and the U.S. Citizenship and Immigration Services. Since these negotiations are in some cases at delicate points and involve sensitive issues, it is essential to ensure that all MOUs and MOAs are both consistent with, and reflect, ICE's and OI's positions, and comply with DHS MD 0450.1 and the July 26, 2004 memorandum from the Acting Director of Operations. The same is true of all MOUs and MOAs that Special Agents in Charge might wish to negotiate with local counterparts.

If you have any questions, please contact me or have a member of your staff contact Ms. (b)(6) (7)(C) at (202) 307- (b)(6) (7)(C)

Attachment




**U.S. Immigration  
and Customs  
Enforcement**



**JUL 26 2004**

**MEMORANDUM FOR:** Division Directors

**FROM:** John Clark   
Acting Director of Operations

**SUBJECT:** Memoranda of Understanding (MOUs) and Memoranda of Agreement (MOAs).

**Purpose:**

To ensure uniformity in the drafting of MOUs and MOAs and coordination with the Director of Operations and the Office of the Principal Legal Advisor.

**Background**

The various components comprising the Immigration and Customs Enforcement (ICE) often utilize MOUs and MOAs as documents to govern plans, actions, and responsibilities of different parties joined together to accomplish a common goal(s). The various components have historically drafted MOUs and MOAs in different ways, both within each component and between each other.

**Discussion**

Management Directive (MD) 0450.1 establishes the Department of Homeland Security (DHS) policy for MOUs and MOAs. MD 0450.1 details the specific provisions and format that must be included in all MOUs and MOAs, and is the standard to be followed whenever drafting them. Every ICE MOU and MOA must be consistent with the ICE mission and be authorized by federal law, regulations and funding constraints. Of particular importance is the fact that neither the DHS nor any person in the DHS may agree to indemnify any other party absent specific federal statutory authorization. An agreement to indemnify is an agreement to assume financial, legal, or other liabilities on behalf of that other party. Contact the General counsel's office for assistance if any prospective party to an MOU or MOA request or demand that the DHS agree to an indemnification clause.

Any questions or concerns regarding this directive should be addressed to the General Counsel's office. Further, all MOUs and MOAs must be submitted for review to the Director of Operations. Please ensure that all employees within your respective components are aware of the coordination requirements and of MD 0450.1, and utilize it as a reference when drafting all MOUs and MOAs.

# MEMORANDA OF UNDERSTANDING (MOU) AND MEMORANDA OF AGREEMENT (MOA)

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## Purpose

This directive establishes the Department of Homeland Security (DHS) policy for Memoranda of Understanding (MOU's) and Memoranda of Agreement (MOA's).

## Scope

This directive applies to all DHS organizational elements.

## 3. Authorities

The Homeland Security Act of 2002, codified in Title 6, US Code.

## 4. Definitions

- A. **Memorandum of Understanding (MOU):** A document that describes very broad concepts of mutual understanding, goals and plans shared by the parties.
- B. **Memorandum of Agreement (MOA):** A document describing in detail the specific responsibilities of, and actions to be taken by, each of the parties so that their goals may be accomplished. A MOA may also indicate the goals of the parties, to help explain their actions and responsibilities.
- C. **Parties:** The parties to a MOU/MOA covered by this instruction are the DHS and one or more governmental or private entities.
- D. **Designated DHS Official:** Senior DHS officials as designated by the Secretary, Deputy Secretary or Under Secretaries.

## 5. Responsibilities

- A. **All Under Secretaries and Designated DHS Officials:** when exercising any authority vested in them by law or delegated by the Secretary, shall be responsible for complying with this instruction when drafting or signing an MOU or MOA.
- B. **The General Counsel:** shall be responsible for providing legal review of all MOUs and MOAs drafted to ensure compliance with applicable laws, rules and

regulations. This responsibility may be further delegated by the General Counsel

## 6. Policy & Procedures

### A *Policy:*

1. Every DHS MOU and MOA must be consistent with the DHS mission and be authorized by federal law, regulations and funding constraints. Additionally, the existence of a MOU or MOA does not eliminate or diminish the need for additional contracts, documents, or agreements to execute the activities contemplated by the parties. Neither this directive nor any MOU/MOA can be used as the sole authority or means to acquire or procure goods or services, exchange funds or property, or transfer or assign personnel. Although the MOU/MOA can address those issues and indicate the goals and intent of the parties, all DHS personnel must comply fully with pertinent contracting and procurement regulations.

2. **PROHIBITED INDEMNIFICATION AGREEMENTS OR CLAUSES.** An agreement to indemnify is an agreement to assume financial, legal, or other liabilities on behalf of that other party. Neither the DHS nor any person in the DHS may agree to indemnify any other party absent specific federal statutory authorization. Federal law, 31 U.S.C. 341(a)(1)(A) and 1341(a)(1)(B), commonly referred to as the Anti-Deficiency Act, prohibits all officers and employees of the United States from making or authorizing expenditures or obligations exceeding appropriated funding and from obligating payment of money before it is appropriated. A typical indemnification clause violates both provisions of that Act because it potentially obligates the federal government (or DHS) to pay an unspecified, unlimited, and unappropriated amount of money should someone else's property be lost, damaged or destroyed, some person be injured or killed, or other parties to the MOU/MOA incur legal liabilities or expenses. Should any prospective party to a MOU/MOA request or demand that the DHS agree to an indemnification clause, contact the General Counsel's office for assistance.

### B *Procedures:*

1. Each employee drafting or signing an MOU/MOA should comply with the following procedures:

a) **NEGOTIATIONS.** When negotiating with another party, the DHS official involved should clearly indicate that he or she cannot commit the DHS until the position advanced has been approved by the Office of General Counsel for legal sufficiency and other policy offices, as appropriate.

b) **FORMAT.** Enclosure (1) is the format for a two-party MOU/MOA used when the MOU/MOA originates with the DHS. The wording of the agreement may be appropriately changed to reflect multiple parties. Enclosure (1) may also be tailored to accommodate the subject matter of

the agreement and needs of the parties, or to conform to an applicable law, regulation or directive. If a party other than the DHS originates the MOU/MOA, the format may differ from enclosure (1). However, every MOU/MOA in which the DHS is a party should include the following basic information:

1. **Parties.** The parties to be bound by the agreement must be identified.
2. **Authority.** The legal authority for the agreement must be cited. Federal law, applicable DHS Rules, Regulations or other directives are referenced.
3. **Purpose.** The purpose or reason for entering the agreement must be stated.
4. **Responsibilities.** A description of the duties and responsibilities of the parties must be provided. The description should be as specific and detailed as necessary. Extreme details may be provided in an appendix rather than the body of the MOU/MOA.
5. **Reporting and Documentation.** The MOU/MOA must specify whether follow-up reports or documentation of actions taken are required and state how often and to whom they are to be submitted.
6. **Points of Contact.** Points of Contact for all parties are provided, including names, office symbols, addresses and phone numbers. Fax numbers, e-mail and Internet addresses should also be provided if available.
7. **Modification.** A provision stating how to modify or amend the agreement is included. Modifications can be formal (written) or informal (oral). They can be approved by the Points of Contact, by the signatories, or other appropriate individuals. While it is often appropriate for those at the working level to make modifications, either orally or in writing, modifications that change central provisions of the agreement should normally be made in writing and agreed to by the individuals who originally approved the MOU/MOA or their successors.
8. **Effective Date.** The date the MOU/MOA becomes effective must be stated. This may be a specified date after the MOU/MOA is signed by all parties or it may be the date the last party signs the agreement.
9. **Termination.** The MOU/MOA must contain several provisions regarding termination. The document will indicate that it

will terminate on a certain date, upon the accomplishment of its purpose, or upon agreement of the parties. The MOU/MOA will also contain a provision indicating whether the duration of the agreement may be extended and, if so, the extension mechanism (e.g. by written agreement of the parties). Finally, the agreement will indicate whether a party may terminate the agreement early (usually by written notice to the other parties).

c) **APPROVING OFFICIAL.** The DHS is a party to the agreement, not the person signing for the DHS. Therefore, that person must have the authority to sign the MOU/MOA and commit the DHS. In determining who that official is, refer to the statute, regulation or directive authorizing DHS participation in the MOU/MOA. Other sources of authority are the DHS Delegations of Authority. Also, prior to signing any MOU or MOA, the person signing for DHS must ensure that Office of General Counsel has reviewed the document for legal sufficiency and approved it. If the head of another Department or Agency is signing the agreement for another party, the agreement must be coordinated with the Office of the Secretary of Homeland Security. Even if the authority to sign a MOU/MOA has been delegated to a lower level, if a higher-level official is signing for another party, it may be appropriate to elevate the signing of the MOU/MOA within DHS as a matter of protocol.

d) **CLEARANCE.** Clearance of a proposed MOU/MOA can be either consecutive or concurrent. Early coordination and communication with interested offices, and the use of e-mail for reviewing and editing a draft MOU/MOA is encouraged. Prior to submitting a MOU/MOA to the approval authority for signature, the originating office shall ensure that the MOU/MOA does not conflict with any preexisting agreements. The originating office shall also ensure that all interested program offices and the General Counsel has reviewed the MOU/MOA

C **Questions or Concerns Regarding the Process:** Any questions or concerns regarding this directive should be addressed to the General Counsel.

MEMORANDUM OF UNDERSTANDING/AGREEMENT BETWEEN THE  
DEPARTMENT OF HOMELAND SECURITY AND \_\_\_\_\_  
REGARDING \_\_\_\_\_

1. PARTIES. The parties to this Agreement are the Department of Homeland Security (DHS) and \_\_\_\_\_

2. AUTHORITY. This Agreement is authorized under the provisions of [list all applicable statutory and regulatory authority].

3. PURPOSE. The purpose of this Agreement is to set forth terms by which \_\_\_\_\_ and \_\_\_\_\_ will provide [services, personnel, equipment] in order to [summarize what the MOU/MOA is intended to accomplish.]

4 RESPONSIBILITIES

DHS

- a.
- b.
- c.

[Describe what the DHS will do. Include a paragraph indicating whether the DHS is required to submit status/progress reports, and, if so, how often.]

Other Party. [Describe the other party's responsibilities as discussed above.]

5. POINTS OF CONTACT. [Identify the POCs for the DHS and the other party, including office symbol, address and phone number (fax number and e-mail or internet addresses can also be included).]

6. OTHER PROVISIONS. Nothing in this Agreement is intended to conflict with current law or regulation or the directives of the DHS or [other party]. If a term of this agreement is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this agreement shall remain in full force and effect.

7. EFFECTIVE DATE. The terms of this agreement will become effective on . . . [insert the effect date].

8. MODIFICATION. This agreement may be modified upon the mutual [written] consent of the parties.



9. TERMINATION. The terms of this agreement, as modified with the consent of both parties, will remain in effect until [date, completion of project, or upon agreement of parties.] The agreement may be extended by mutual written agreement of the parties. Either party upon [number] days written notice to the other party may terminate this agreement.

APPROVED BY

[Give the name and position of the official signing and dating for the DHS. If known, give the name and position of the official signing and dating for the other party.]

\_\_\_\_\_

(date)

\_\_\_\_\_

(date)