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**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE WASHINGTON NATIONAL GUARD
COUNTERDRUG PROGRAM
AND
DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
HOMELAND SECURITY INVESTIGATIONS - SEATTLE**

1. PURPOSE: This memorandum sets forth policies, procedures and guidelines agreed to by the Washington National Guard, Counterdrug Program (hereinafter "National Guard") and Immigration and Customs Enforcement, Homeland Security Investigations, HSI Seattle, (hereinafter "the Agency") governing National Guard cooperation and support of the Agency's drug law enforcement operations in the State of Washington pursuant to 32 U.S.C. 112 and other applicable federal and state statutes. It is understood among the parties to this agreement that Agency requests for National Guard assistance may include multi-agency, federal, state and local cooperative law enforcement efforts.

2. AUTHORITY:

A. National Guard Regulation 500-2/ANGI 10-801

B. Washington National Guard Counterdrug State Plan

C. Respective Legal Reviews

D. The Agency is authorized to enter into this agreement pursuant to 6 U.S.C. § 112(b)(2). The Agency is a federal law enforcement agency with enforcement authorities, including but not limited to, under the provisions of 19 U.S.C. § 1589a; 8 U.S.C. § 1357; 21 U.S.C. § 873; 8 U.S.C. § 1103(c); 18 U.S.C. § 981(e); and 19 U.S.C. § 1616a.

3. PLANNED DEPLOYMENT OF PERSONNEL AND EQUIPMENT:

A. Personnel:

(1) Request for Support: As the National Guard is not a law enforcement agency (LEA); any involvement of the National Guard in support of drug law enforcement must be in response to an Agency request for support.

(2) Support Role: It is clearly understood by both parties to this agreement that National Guard personnel are not sworn police officers and those personnel who are assigned to work with the Agency are assigned in a support role.

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(3) Individual Memorandum of Understanding (IMOU): This document governs the use of specific National Guard personnel, will be maintained at the National Guard Operations office, and is available upon request. The agreement must be approved and signed by The Adjutant General (TAG), Counter Drug Coordinator (CDC), and the supported Agency before support is provided.

B. Equipment:

(1) On occasions, the parties may agree that certain National Guard equipment not available through any other source is necessary to accomplish the Agency's mission. National Guard equipment used in support of counterdrug operations will remain under the control of trained/licensed National Guard personnel, unless applicable loan documents have been completed and signed. All safety requirements for each piece of equipment will be followed. The loan of National Guard equipment to the Agency will be in accordance with NGR 500-2/ANGI 10-801 (7-10) and other applicable regulations to include 10 USC 2667, 32 USC 112, AR 700-131, AFMAN 23-110 and DoD1225.6.

(2) All loans of equipment will be documented in writing with at least the following information:

- a. Full description of the item(s)
- b. Condition of the item(s) at the time of the loan
- c. Length of time of the loan
- d. Location to which the item is to be returned

(3) Both parties to this agreement agree to contact the other party as soon as possible to report any damage caused to loaned equipment.

(4) Both the Agency, and the National Guard, as part of the United States Government, are bound by federal laws including the FTCA and the Anti-Deficiency Act, 31 U.S.C. § 1341. Both parties are "self-insured" under the FTCA, which provides the United States may be sued for damage to or loss of property, personal injury, or death caused by the negligent or wrongful acts or omissions of employees while those employees are acting within the scope of their offices. The United States is liable to the same extent an individual would be in like circumstances. The FTCA substitutes the United States as the defendant in such a suit and the United States—not the individual employee—bears any resulting liability.

4. REPORTING:

A. National Guard personnel will provide their headquarters statistical results for inclusion in required reports/records; results include quantity and value of seized drugs and or real

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property.

B. National Guard personnel will provide a weekly report to the National Guard Operations office summarizing their work production for inclusion in required reports/records/databases. This report will not include any case specific information.

C. The National Guard will maintain compliance with Intelligence Oversight and Operational Security on all reporting in accordance with NGR 500-2/ANGI 10-801.

D. Information provided to the National Guard by the Agency will not be released to non DOD sources without the consent of the National Guard and the Agency.

5. COMMAND AND CONTROL:

A. National Guard personnel will be under the command and control of appropriate military authority. Personnel may be recalled for a mission of higher priority, necessary military training or deployments.

B. National Guard personnel will be under the direct supervision of the supported agency for all assigned duties. National Guard members will also maintain a military chain of command through the National Guard. The military chain of command will take precedence at all times and will handle all personnel management processes.

6. SCOPE OF OPERATION:

A. The National Guard will provide support to local, state and federal LEAs operating in a variety of approved mission areas.

(1) Personnel engaged in counterdrug support activities for which federal funding is provided by (Title 32) 32 USC Sec 502(F) and 32 USC 112 must be acting in support of LEAs or Community Based Organizations (CBOs, as defined in NGR 500-2) where a valid counterdrug nexus exists.

(2) Approved missions that may be provided to the Agency will be IAW NGR 500-2 / ANGI 10-801 (2-7) and the Washington National Guard State Plan.

B. Arrest, Searches, Digital Forensics, Surveillance and Evidence:

(1) As a matter of National Guard Bureau policy, National Guard personnel will not make arrests. National Guard members have only the arrest powers of ordinary citizens; they may make arrests or conduct searches to the extent authorized by state law only when exigent circumstances arise.

a. In accordance with state law, National Guard personnel may use an appropriate level of force to prevent the loss or destruction of evidence or to prevent the escape of

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a suspect already in custody. National Guard members will not be placed in a position where it is likely they would need to protect evidence or prevent the escape of a suspect.

b. The supported Agency and National Guard supervisors will ensure all supported operations are not designed or conducted in such a manner as to involve a significant likelihood of requiring arrests or searches.

(2) National Guard personnel are not permitted to participate in searches. National Guard members may support digital forensic efforts after a search conducted by the Agency in accordance with the 4th Amendment to the U.S. Constitution.

(3) Digital Forensics: National Guard personnel may assist law enforcement agencies with digital forensics: the approved preparation/extraction, identification, and analysis of legally obtained digital devices i.e. computer systems, networks, handheld devices, storage devices and other peripheral devices.

a. Once the Agency has obtained legal consent or a signed search warrant for a digital device, the Agency will seize the device and secure the evidence. At this point, the Agency may task National Guard personnel to provide the technical expertise needed to initiate and conduct the extraction of digital information using a digital extraction device (ex. Cellebrite). The Agency officer continuously maintains positive control of the digital device.

b. The National Guard does not store or maintain criminal information. All digital forensic analysis will take place on “mirror” copies of the platform to be analyzed. The supported Agency is responsible for executing the search of the device. The original piece of evidence will remain in Agency custody unaltered. Conducting analysis on “mirror” copies does not put a Guardsman in the chain of custody of evidence. Agency personnel maintain positive control of the evidence throughout the extraction of digital data from the digital storage device. Supported Agencies are responsible for obtaining legal consent or signed search warrants required for searches or for determining the need for searches, inspections, and observations that do not require warrants.

(4) Surveillance: National Guard personnel will not be utilized or participate in surveillance activities that have not been approved by a court or are in violation of the Intelligence Oversight Act.

(5) National Guard Counterdrug personnel do not enter into the chain of custody of evidence, but may provide Agency personnel with technical support for digital evidence extraction, preservation, processing and analysis.

C. Sensitive Information:

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(1) Information or data obtained by the National Guard, as a result of work done in support of the Agency, will be passed on immediately as obtained to the Agency and will not be stored/maintained or retained by National Guard personnel or in National Guard facilities. Procedures to be utilized for reporting such information will be established by the Agency in accordance with internal practices and procedures. The Agency will be responsible for follow-up on any such information.

(2) Information gathered by members of the National Guard will be given adequate classification consideration.

D. Funding:

(1) Normally, the support and coordination provided by the National Guard, pursuant to this agreement, will be funded federally from 32 USC 112 and no reimbursement by the Agency will be required. However, any loan of equipment or missions which may require reimbursement, and therefore incur obligations from Agency funding, should be coordinated and approved between the parties prior to mission accomplishment, subject to the availability of funds.

(2) In no case will the National Guard expend state resources on behalf of the Agency, except in emergency operations to ensure the protection of human life, without a reasonable expectation of funding by the federal government.

(3) Any funds expended by the Agency conforming Guard members to the standards expected of other employees employed by Agency (whether in relation to security concerns or professional expertise) will not be reimbursed by the National Guard, nor will the National Guard expend any resources beyond those normally expended by the National Guard to conform its members in such areas for any particular Agency.

(4) All National Guard support is subject to available funding.

E. Information Sharing:

(1) National Guard Members assigned to the Agency under the authority of this MOU may be asked to support a Request for Information (RFI) formally submitted by an authorized component of a Combatant Command or subordinate entity. Information maintained, entrusted to, stored, collated, or collected by the Agency and/or its law enforcement partners shall at-all-times be controlled and protected from improper disclosure or dissemination.

(2) When a RFI is received by the National Guard or its members and before any information is gathered, reviewed, aggregated and/or disclosed, the National Guard will receive approval from an ASAC or FIM (or equivalent rank in other agencies) (or his/her designee) that the information can be collected or provided. The ASAC or FIM (or

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equivalent rank in other agencies) (or his/her designee) may also require that any final product prepared by National Guard personnel be submitted for review by the Agency before it is disclosed or disseminated.

(3) Information provided in response to a RFI shall be limited to statistical or numerical data collection or general compilations or generic aggregations of information. Any information provided shall be devoid of personally identifiable data, case-sensitive or classified information, investigative techniques or methods, and/or any identifiable information concerning or arising from an open case or pending prosecution (including matters which may be on appeal).

7. FORCE PROTECTION RULES FOR USE OF FORCE:

A. National Guard members should not be placed into situations that could be life threatening since they have not received the appropriate law enforcement training for this type of situation.

B. National Guard members have the right to use force only if necessary to defend themselves or in the defense of others. The utilization of any step in the rules for use of force is authorized in extreme circumstances to protect law enforcement, military personnel or other persons from death or serious injury.

(1) The member can only use the amount of force necessary to achieve self-protection or preservation.

(2) Members are to use deadly force only if all lesser means of force have been exhausted or are unavailable, and will use only the minimum amount of force immediately necessary to defend against the unlawful use of deadly force and only if the risk of injury to innocent persons or bystanders is not increased by the use of deadly force.

C. National Guard personnel may carry weapons, at the request of the Agency, but only on express approval of The Adjutant General in each case, and as allowed by law.

8. PUBLIC AFFAIRS:

A. Release of Personnel Information: Information released to the media concerning National Guard assistance to Agency or National Guard participation in drug law enforcement missions will be coordinated between the Agency and National Guard public affairs/information officers. Participating National Guard personnel or specific units will not be identified by name, address or photograph unless cleared through the CDC, who will be responsible for obtaining a release through applicable National Guard channels.

B. Dissemination of Operational Information: The lead party for the dissemination of information will be the Agency and therefore members of the National Guard will refer all

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questions from the media to the Agency for reply. The National Guard public affairs office may provide guidance on issues specific to the National Guard as appropriate.

C. Media Interaction: National Guard members in duty status will not be interviewed by the media without National Guard approval and consultation with the Agency.

9. SAFETY:

A. National Guard members should not knowingly be sent to or directed to enter a hostile environment where there is a probability of encountering life threatening situations.

B. Every effort must be made by the Agency to avoid placing National Guard personnel in situations where they will come into contact with suspects.

10. RESPONSIBILITIES:

A. National Guard will:

(1) Ensure that National Guard personnel are given all necessary training and tools needed prior to assignment.

(2) Support the Agency as agreed upon in the validated support request.

B. Agency:

(1) If requested, the Agency agrees to provide the CDC with a law enforcement after action report within five days after the completion of a particular operation.

(2) Different operations and missions may carry different security classifications and these may not correspond to the standard DOD security classification system. Therefore, the Agency will be responsible for classifying the operation and any information obtained and for making any public information releases. The National Guard desires to keep a low profile concerning media contact and information released. Any requests for release of National Guard information will be forwarded to the CDC for consideration.

(3) Will provide necessary training to National Guard personnel that is appropriate to the mission which is supported.

(4) Will brief and train members of the National Guard on any matters of security peculiar to the Agency to ensure that National Guard members do not inadvertently disclose information about their support roles with the Agency or any specific missions with which they are involved.

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(5) The Agency will submit a request for support to the National Guard for approved counterdrug operations. These requests must be coordinated through the CDC on an annual basis.

11. LIABILITIES:

A. The parties hereby agree to bear any and all costs and liabilities arising from their obligations under this agreement to the extent they are legally obligated to do so pursuant to the Federal Tort Claims Act, 28 U.S.C. 267, et seq., Both the National Guard and HSI-Seattle (the Agency), as part of the United States Government, are bound by federal laws including the FTCA and the Anti-Deficiency Act, 31 U.S.C. § 1341. Both parties are “self-insured” under the FTCA, which provides the United States may be sued for damage to or loss of property, personal injury, or death caused by the negligent or wrongful acts or omissions of employees while those employees are acting within the scope of their offices. The United States is liable to the same extent an individual would be in like circumstances. The FTCA substitutes the United States as the defendant in such a suit and the United States—not the individual employee—bears any resulting liability. The Agency does not assume liability for any third party claims for damages arising out of this MOU.

12. RENEGOTIATION:

A. National Guard personnel are initially deployed to support the Agency based upon specific requests for National Guard support to perform specific job skills in specific mission areas. Any deviation from the initial support request should be coordinated and approved in writing by the CDC.

B. This agreement constitutes the entire agreement between the Agency and the National Guard. Any modifications, additions or deletions shall be in writing and signed by both parties. In the event any provision of this agreement shall be determined to be unenforceable, that provision shall be deleted from the agreement and this agreement shall remain in force.

13. TERMINATION OF AGREEMENT:

A. Agreement: This memorandum is in effect upon signature of both parties and will remain in effect until rescinded, revised or suspended by either party with 30 days written notice or revised in writing by mutual consent. Upon signature, this agreement supersedes any other previously signed agreement which is inconsistent with this agreement.

B. Termination of Support: National Guard personnel will not be directed or permitted to conduct support activities that violate National Guard directives or guidance. Use of National Guard personnel contrary to this MOU or the applicable regulations is a basis for immediate termination of support.

C. Agreements will terminate upon 90 days notice by either party. Inclusion of an end date is not required merely because funds are appropriated on an annual basis.

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