

THE
ROCKY MOUNTAIN REGIONAL COMPUTER FORENSICS LABORATORY
(RMRCFL)
COOPERATION AGREEMENT/MEMORANDUM OF UNDERSTANDING (MOU)

An FBI Task Force for the
Forensic Analysis of Digital Evidence

I. PREAMBLE.

A. The Regional Computer Forensics Laboratory (RCFL) Program was established through funding by the United States (U.S.) Congress under the auspices of the Federal Bureau of Investigation (FBI) to provide the highest quality, uniform digital forensics support to federal, state, and local criminal and national security investigations. The RCFL Program consists of RCFLs—each headed by an RCFL Director and Deputy Director, and the RCFL National Program Office (NPO) of the Operational Technology Division, FBI.

II. PARTIES—PARTICIPATING AGENCIES.

A. This “Cooperation Agreement,” referred to hereinafter as a “Memorandum of Understanding” (MOU), is by and between “Executive Agencies” of the U. S. Government and of state and local governmental entities, “Federal Executive Agency[ies]” (FEA) and “State Executive Agency[ies]” (SEA), respectively—collectively referred to herein as “participating agency[ies]”—who are signatories hereto and/or signatories to any amendment or modification hereto, specifically:

B. State Executive Agencies:

1. Adams County Sheriff
2. Colorado Bureau of Investigation
3. Denver Police Department
4. Douglas County Sheriff’s Office
5. Jefferson County Sheriff’s Office
6. Littleton Police Department

C. Federal Executive Agencies:

1. Federal Bureau of Investigation (FBI) through its Operational Technology Division (OTD)

2. FBI Denver Division

D. Other Non-Law Enforcement, Governmental Executive Agencies/Entities.

Inclusion of participating agencies that are not themselves part of a federal, state, or local sovereign government of the U.S. presents unusual legal issues. Similarly, inclusion of non-law enforcement agencies also presents unique issues given the relationship between digital evidence forensics and Fourth Amendment search authority. As such, OTD, RCFL NPO, and FBI Headquarters Office of General Counsel (OGC) approval should be sought in writing sufficiently in advance to allow proper vetting before inviting such agencies to participate in an RCFL. The request for such approval should include a description of the role of the agency (e.g., whether the agency will attend and/or vote in Local Executive Board meetings, if the agency will have access to seized evidence, etc.).

III. AUTHORITY TO ENTER INTO AGREEMENT.

A. Federal Bureau of Investigation

The FBI is authorized to enter into this agreement pursuant to Title 34, U.S. Code, section 21131; the USA PATRIOT Act of 2001 (P.L. 107-56, section 816 (115 Stat. 305)), the Adam Walsh Child Protection & Safety Act of 2006 (P.L. 109-248, section 705 (120 Stat. 649)); the PROTECT Our Children Act of 2008 (P.L. 110-401, section 201 (122 Stat. 4241)); Attorney General Order No. 2954-2008; Title 28, Code of Federal Regulations, sections 0.85(e) and (g); and the Digital Evidence Policy Guide.

B. [Other Federal Agencies]

C. [State Agencies]

D. [Local Agencies]

IV. THE PARTICIPATING AGENCIES HEREBY AGREE AS FOLLOWS:

A. PURPOSE/VISION/MISSION

1. Purpose of this MOU. The purpose of this MOU is to delineate the responsibilities of the RCFL participants, maximize interagency cooperation, and formalize relationships between the participating agencies and their employees regarding forensic operations, policies, planning, training, public, and media relations of the RCFL.

2. Vision of the RCFL and the RCFL Program. Each RCFL shall be selected, located, operated, and managed both nationally and locally so as to increase and enhance the digital evidence forensics capabilities and capacity of state and local law enforcement agencies.

3. Mission of the RCFL. The mission of the RCFL is to provide the services described below first, to the participating agencies, and second, to such other law enforcement agencies as shall be authorized by the RCFL Director consistent with any policies, procedures, or requirements as may be issued by the RCFL Local

Executive Board or the Assistant Director (AD) of the FBI's OTD (hereafter "AD of OTD") or his/her designee:

- a) Forensic Examinations—To provide forensic examinations of digital or multimedia storage devices, as will be transferred to the RCFL pursuant to consent, judicial order, executive or administrative seizure, and/or search order or warrant, which devices are believed to contain evidence relevant to the investigation and/or prosecution of federal, state, or local crimes, violations of U.S. law, or, as authorized by the AD of OTD or his/her designee, counterintelligence or counterterrorism investigations or violations of foreign law. For the purpose of this MOU, the term "Forensic Examination[s]" shall mean the forensic acquisition, collection, recovery, processing, preservation, analysis, storage, maintenance, and/or presentation of digital evidence through a validated and verified process designed to minimize or eliminate the risk that any process employed has unacceptably diminished the probative value of the information derived from such processes;
- b) Forensic Collaboration—To facilitate and promote the sharing of federal, state, and local law enforcement expertise and information about the forensic examination of digital evidence and the investigation and prosecution of digital evidence-related and digitally-facilitated crime with law enforcement personnel and prosecutors;
- c) Forensic Examination Training—To provide training and education for federal, state, and local law enforcement personnel and prosecutors regarding the forensic examination of digital evidence as it relates to the investigation and prosecution of digital evidence-related or facilitated crime; and
- d) Miscellaneous—To support such other functions as may be authorized by the AD of OTD or his/her designee.

V. ORGANIZATIONAL STRUCTURE, SUPERVISION, AND CONTROL.

A. PRESUMED DESIGNEE OF THE AD of OTD

- 1. RCFL National Program Office Assumed OTD Designee. Except where expressly stated to the contrary in this MOU or any writing signed by the AD of OTD, any instance in this MOU assigning any right, duty, or authority to the FBI "AD of OTD or his/her designee," shall be exercised by the Unit Chief of the Digital Evidence Field Operations Unit (DEFOU), Digital Forensics & Analytics Section (DFAS), OTD through the RCFL NPO or its successor entity as may be noticed in writing to the Local Executive Board.

B. ORGANIZATIONAL STRUCTURE/LOCAL EXECUTIVE BOARD

- 1. Law Enforcement/Intergovernmental Entity. The RCFL is a task force of law enforcement agencies (federal, state, and local) as well as Other Government Agency (OGA) entities that is intended to operate in a manner similar to other task forces composed of U.S. sovereign governmental entities. The RCFL is not intended to and shall not be deemed to have or be represented to have any legal status separate and distinct from its constituent governmental entities.

2. Organizational Control: Local Executive Board/Voting/Votes/Full-Time Assignees.

a) Local Executive Board Function and Membership. Overall organizational control of the RCFL shall be vested in a Local Executive Board, which shall comprise of the following entities:

(1) Agencies that, at the time of any action requiring Local Executive Board action, have employee(s) actively assigned to the RCFL:

(a) the Chief Executive Officer (CEO) from each of the State Executive Agencies (SEAs),

(b) the Official in Charge (OIC) of each of the Federal Executive Agencies (FEAs), and, if applicable,

(c) the Management Official in Charge (MOIC) from each Non-Law Enforcement participating agency that is a signatory to this MOU and that, at the time of any action of the Local Executive Board, has employee(s) actively assigned to the RCFL.

(2) The AD of OTD or his/her designee.

b) Actively Assigned Defined. Employee(s) of a participating agency shall be considered actively assigned to the RCFL only if one hundred percent (100%) of the hours of employment of such employee(s) are allocated to work at the RCFL or the participating agency's employee(s) is formally detailed to the FBI pursuant to the Inter-Governmental Personnel Act 5 U.S.C. § 3374, EXCEPT THAT:

When authorized in advance in writing by the AD of OTD or his/her designee, the RCFL Director may accept one or more additional employee(s) of a Participating Agency to be assigned for the purpose of conducting forensic examinations from a voting participating agency but only if at least fifty percent (50%) of the hours of employment of such additional employee(s) are allocated to work at the RCFL. Assignment of employees part-time shall not, in the absence of at least one full-time assignee by the same participating agency, entitle such Agency to a vote upon any Local Executive Board matter.

c) Participating agencies with Actively Assigned Employee(s)—One Vote on Local Executive Board. Except as noted below with regard to a Prosecuting Agency, each participating agency with employee(s) actively assigned to the RCFL at the time of voting, shall have only one (1) vote regardless of the total number of its employees assigned to the RCFL.

d) Non-Assigned Participating Agency Supervisor Employee(s) Be Designated/Restricted Proxy Voting. Any CEO of any SEA, any OIC of any FEA, or any MOIC from any Non-Law Enforcement participating agency may delegate or designate any one of his/her executive level supervisory subordinates who are not currently assigned to the RCFL to serve on his/her behalf as a substitute and vote at Local Executive Board meetings. In addition, any CEO of any SEA, any OIC of any FEA, and MOIC of any Non-Law Enforcement participating agency may authorize

in any manner established by the Local Executive Board (or the Chair in the absence of any action by the Local Executive Board) any other participating SEA or FEA to exercise its vote by proxy, EXCEPT THAT no SEA may delegate its vote to a participating FEA, and no FEA may delegate its vote to a participating SEA. Delegation/designation to a non-RCFL assigned executive level supervisory subordinate shall be effectuated by actual notice from the CEO or OIC to the Chair of the Local Executive Board. Voting rights of members of the Local Executive Board are limited to CEO, OIC, or delegee/designee at the executive supervisory subordinate level.

3. Prosecuting Agency Personnel—Local Executive Board Membership.

a) A State or Local Prosecuting Agency seeking to become a participating agency may, upon a unanimous approving vote of the Local Executive Board, be deemed to have employee(s) actively assigned to the RCFL for purposes of voting on the Local Executive Board if the Prosecuting Agency designates in writing one (1) or more of its full-time prosecutors to act as counsel to the RCFL solely with respect to state or local legal matters uniquely pertaining to their agency's assigned jurisdiction, and to be subject to call during duty hours and after hours by the RCFL for legal assistance solely with respect to state or local legal matters uniquely pertaining to their agency's assigned jurisdiction. Where a non-FBI OGC legal advisor (LA) has been assigned to advise the LEB and/or RCFL management on matters uniquely pertaining to state or local law, these LAs may only advise within that limited subject matter and must coordinate with the appropriate FBI OGC attorney(s) on how FBI legal policy guidance may impact state law issues.

b) Where the agency is a U.S. Attorney's Office, personnel may be assigned to the RCFL and counted as participants, but they may not assign an Assistant U.S. Attorney to provide federal legal advice to the RCFL, as that remains the responsibility of agency counsel, in this case, the FBI's Office of the General Counsel in accordance with attorney-client legal ethics requirements, and consistent with section 3.7 of the FBI's Domestic Investigations and Operations Guide. Instead, AUSAs shall continue to coordinate on legal issues unique to their cases with the assigned case agent, who can coordinate with FBI OGC, RCFL management, and FBIHQ personnel as needed.

c) It is important for prosecutorial agencies to understand that OGC legal policy guidance and advice, as well as issues of national import, are binding on the RCFLs. PROVIDED HOWEVER, the Prosecuting Agencies that become participating agencies pursuant to this paragraph shall collectively have one (1) vote. The Prosecuting Agencies shall designate from amongst themselves the agency to cast their one vote. In the event a consensus cannot be reached as to the voting Prosecuting Agency, the Local Executive Board shall select the Prosecuting Agency to perform this duty. A Prosecuting Agency may not otherwise gain membership in or a right to cast a vote on Local Executive Board matters unless at least one of its own employees is assigned full time (in a capacity other than to provide legal counsel or legal assistance) to the RCFL in the manner required by this MOU for other participating agencies. For purposes of this MOU, the assignment of employees of a law enforcement agency shall not qualify as assignment of employees of a Prosecuting Agency based upon a theory that the CEO of the Prosecuting Agency is the nominal "head" or "chief" of all law enforcement in the relevant jurisdiction (e.g., assignment of full-time FBI employee(s) does not qualify

as a basis of membership or a vote of the Department of Justice (DOJ) on a theory that the Attorney General is the “Chief Law Enforcement Officer” of all federal law enforcement agencies). The CEO of the Prosecuting Agency authorized to cast a vote at Local Executive Board meetings pursuant to this section may delegate or designate any one of that Prosecuting Agency’s executive level supervisory subordinates who are not currently assigned to the RCFL to serve on his/her behalf as a substitute and vote at Local Executive Board meetings.

4. Non-Participating Agency Special Voting. Upon a unanimous vote of the total membership of the Local Executive Board, at a meeting scheduled and noticed for that purpose, an otherwise nonvoting, non-prosecuting, non-participating agency of a federal, state, or local sovereign government of the U.S. that has made or agrees in advance in a signed writing to make a substantial and continuing non-personnel contribution to the RCFL, as determined by the Local Executive Board, may, with the written concurrence of the AD of OTD or his/her designee, be authorized to vote at all Local Executive Board meetings, at specified Local Executive Board meetings, or upon such issues as the Local Executive Board may subscribe.

5. Appendix or Initial Commitment of Resources. An initial commitment of resources and/or employee(s) to the RCFL by the participating agencies is attached hereto as an APPENDIX.

6. Addition of Subsequent Participating Agencies/Local Executive Board Vote and Amendment Required/Notice of Staffing Changes of Participating Agencies.

a) New Participating Agencies Upon Local Executive Board Vote and OTD Approval. Subject to paragraph b, below, a federal, state, or local law enforcement agency may, with the written consent of the AD of OTD or his/her designee and upon a three-fourths (3/4) approving vote of the total membership of the Local Executive Board at a meeting scheduled and noticed for that purpose, assign personnel to the RCFL on a full-time basis and thereby become a participating agency effective upon the execution by the CEO or OIC thereof of an addendum to this MOU consenting and agreeing to the terms and conditions contained herein.

b) Advance Notice of New Participating Agencies to OTD. Reasonable advance notice of the intent of the Local Executive Board to vote on pending requests to become a participating agency shall be provided to the RCFL NPO with the name of the prospective participating agency and the date of the proposed vote. The Local Executive Board shall obtain written concurrence of the AD of OTD or his/her designee prior to any vote on accepting prospective participating agencies.

c) Contents of MOU Addendum. The addendum to the RCFL MOU will reference the date of the written consent of the AD of OTD or his/her designee, the date of the vote by the Local Executive Board, and the actual vote of the Board (e.g., unanimous vote). Execution of the addendum will be by signature of the Chair of the Local Executive Board and the CEO or OIC of the newly selected participating agency. A copy of the addendum will be forwarded to the RCFL NPO upon its execution.

d) Notice to OTD of Changes in Participating Agency Staffing. The Local Executive Board shall provide reasonable notice to the RCFL NPO of any other

changes in staffing levels of the actively assigned full-time and part-time employees of the RCFL participating agencies, including, but not limited to:

- (1) the withdrawal of a participating agency from the RCFL, and;
- (2) any increase or decrease of examiners by a participating agency, or the removal of a full-time examiner by a participating agency that has assigned only one (1) full-time examiner to the RCFL without assigning a replacement within 30 days.

7. Local Executive Board Meetings/Chair/Duties/Authority of the Local Executive Board. The Local Executive Board shall:

- a) Majority Vote Required for Actions/24 Hour Notice Required. Unless otherwise specifically provided herein, take or endorse no action except upon majority vote of a quorum of its members, convened upon prior notice to all participating agencies of not less than twenty-four (24) hours. A majority of the total number of Local Executive Board members then entitled to vote shall constitute a quorum for the transaction of business, unless a vote by a number greater than a majority is required for a vote by this MOU or is otherwise required by any directive of the Local Executive Board adopted by a vote of three-quarters (3/4) of the Local Executive Board's total voting membership.
- b) Exercise of Lawful Local Executive Board Authority—Appropriate Legal Review. Take or endorse no action of the Local Executive Board purporting to supersede, excuse, alter, or obviate any obligation or prohibition of statute, rule, or regulation applicable to a FEA or SEA. The Local Executive Board Chair and Assistant Chair, and where applicable, the RCFL Director, shall exercise due diligence in seeking legal counsel prior to presenting matters to the Local Executive Board for a vote to reasonably ensure that matters submitted to the Board have been appropriately reviewed for compliance with applicable federal, state, and local statutes, rules, and regulations. The Chair, Assistant Chair, and, where applicable, the RCFL Director, shall document such legal review and ensure that the same is duly noted in the record of minutes of the RCFL Local Executive Board.
- c) Minimum Bi-Annual Meetings Required. Meet initially at the Denver Division of the FBI or other determined place in the Denver area within thirty (30) days or contemporaneously with the completed execution of this MOU. Thereafter, the Local Executive Board shall meet not less than bi-annually at a place to be set by the Local Executive Board, or by authority of the Chair of the Local Executive Board. Meetings (and minutes and records thereof) of the Local Executive Board, to the maximum extent permitted by law, shall be deemed non-public, confidential meetings/records of law enforcement agencies relating to law enforcement investigations. Attendance (as distinguished from voting rights) shall be open only to 1) the RCFL Director, or in his/her absence, his/her designee; 2) members of the Local Executive Board or their respective designees (as authorized by this MOU); and 3) such other persons as the Chair, the Local Executive Board, or the AD of OTD or his/her designee shall explicitly authorize, including, but not limited to, an administrative support person to perform secretarial duties for the meeting. The AD of OTD or his/her designee may attend any meeting via teleconference or

videoconference. At the discretion of the Chair, any other Local Executive Board members may attend any meeting via teleconference.

d) Special Local Executive Board Meetings. Either the AD of OTD or his/her designee or a majority of the total number of the Local Executive Board members then in office may, in a writing signed by them and noticed to all members, convene a special meeting of the Local Executive Board for a stated purpose with or without approval of the Chair. A copy of any such notice not initiated by the AD of OTD or his/her designee shall be delivered to AD of OTD or his/her designee no less than three (3) business days prior to any special meeting.

e) Chair of Local Executive Board. Select at its first meeting and authorize from amongst its members a Chair and Assistant Chair to serve for a term of one (1) year or such longer term as the Local Executive Board authorizes. For coordination purposes and to facilitate the establishment of the RCFL, the initial Chair of the Local Executive Board shall be a management representative of the FBI Denver Division but may not be the RCFL Director or any FBI employee assigned to work in the RCFL. The Chair shall, in addition to duties authorized by the Local Executive Board, be responsible for scheduling, noticing, and coordinating meetings of the RCFL Local Executive Board, and maintaining minutes of its meetings, which shall be open to inspection by any participating agency. In the absence of the Chair at a properly noticed meeting of the Local Executive Board, a previously appointed Assistant Chair shall serve as the Chair for that meeting. In the absence of the Chair or an Assistant Chair at any meeting of the Local Executive Board, the Local Executive Board may select from amongst its members a Chair Pro Tem. The Chair Pro Tem shall perform all the functions of the Chair for that meeting alone, shall inform the Chair of any actions taken, and shall provide to the Chair any records relating to matters addressed during such a meeting. The Chair, or in the Chair's absence, the Assistant Chair, shall be responsible for providing any secretarial assistance required in performing their duties.

f) Appointment of RCFL Director and Deputy Director.

(1) RCFL Director. Nominate, and with the prior concurrence of the AD of OTD or his/her designee, appoint and authorize a qualified RCFL Director, whose duties, in addition to those described by the AD of OTD or his/her designee, this MOU, or any amendment, may be augmented by the Local Executive Board.

(2) First and Successor RCFL Directors. The first RCFL Director shall be a qualified FBI employee. Thereafter, successive RCFL Directors shall be either a qualified FBI employee or a qualified federal, state, or local law enforcement agency employee, PROVIDED HOWEVER, that if a successor RCFL Director is not an FBI employee, then there shall be a full-time Deputy Director who shall be an FBI employee selected by the FBI with the prior concurrence of the AD of OTD or his/her designee. RCFL Directors must be sworn law enforcement, regardless from which participating agency they are drawn.

g) Appointment of a General Treasurer Agency. Appoint and authorize from amongst its State Executive Agency (SEA) members, one Agency that shall, with its

consent and to the extent necessary to effectuate the mission, purpose, and vision of the RCFL, act as the General Treasurer Agency for the RCFL by directly or indirectly:

(1) Grants. Executing applications for, certifications of, and otherwise administering compliance with financial grants on behalf of and/or in support of the RCFL participating agencies as may be available to SEAs from the Federal Government or other entities;

(2) Property Title. Lawfully soliciting, accepting, holding, inventorying, and receiving property (e.g., computer hardware, software, furniture, and monetary instruments) properly acquired by operation of state law or other lawful action, gift, loan, or grant to the RCFL to be held in the name of that General Treasurer Agency for the collective use and benefit of the RCFL, EXCEPT THAT—

(a) No General Treasury Agency shall knowingly act in concert with any FEA to utilize this provision to circumvent gift acceptance, solicitation, augmentation, and other rules imposed upon the FEA by operation of law;

(b) Funds lawfully provided to or acquired by a SEA by operation of state law (e.g., state forfeiture, restitution, gifts, fees) as a direct result of the SEA's participation in the RCFL shall, in the sole and unfettered discretion of such SEA, either be: A) received, retained, and utilized exclusively by the SEA for any lawful use other than to benefit the RCFL or personnel assigned to the RCFL, or B) be transferred to and administered by the General Treasury Agency solely for the direct benefit of SEAs participating in the RCFL and may only be expended for the following purposes:

(i) Training of state or local employees;

(ii) Digital evidence forensic and review networks and equipment used by state and/or local officers for the examination and review of state and local service requests; and

(iii) Such other purposes in direct support of SEA employee(s) or agencies participating in the RCFL as shall be determined after consultation with the AD of OTD or his/her designee who shall seek input from the FBI Office of General Counsel.

(c) No title to property acquired by gift or grant for the collective use and benefit of the RCFL shall be transferred to an FEA without prior written legal approval of that FEA;

(d) The Local Executive Board and the General Treasury Agency shall, in the exercise of due diligence, seek appropriate legal counsel on issues affecting this subsection; and

(e) The General Treasury Agency shall conduct annual audits of state funds administered by the General Treasury Agency. Audits shall be reviewed and approved by unanimous vote of the Local Executive Board. A copy of the annual audit report shall be disclosed to the AD of OTD or his/her designee upon request.

(3) Property Distribution upon Dissolution. Consistent with (c) above, equitably distribute or dispose of property held for the collective use and benefit of the RCFL pursuant to such principles as the General Treasurer Agency deems equitable;

(4) Other Duties. Engaging in such other activities relating to the financial operations of the RCFL as the Local Executive Board may lawfully authorize.

h) Review of Policies, Procedures, Practices, and/or Rules. At the request of the RCFL Director, review and, if the Local Executive Board deems appropriate, approve such policies, procedures, practices, and/or rules affecting the day-to-day operations of the RCFL that are consistent with quality assurance requirements and standard operating procedures as required by the AD of OTD or his/her designee. Failure of the Local Executive Board to review, approve, or disapprove within ninety (90) days any such policy, procedure, practice, and/or rule as proposed and noticed to the Local Executive Board members by the RCFL Director (either directly or through the Chair) shall constitute an approval of such policy, procedure, practice, or rule and may, thereafter, only be reviewed upon thirty (30) days prior notice to the RCFL Director. Any such policy, procedure, practice, and/or rule as proposed by the RCFL Director shall be presumed to have immediate effect pending any Local Executive Board review or review period unless otherwise stated by the RCFL Director or mandated by vote of the Local Executive Board. Nothing in this provision shall prevent the Local Executive Board from sua sponte reviewing any policy, procedure, practice, and/or rule proposed by the RCFL Director regardless of whether the RCFL Director has referred such a review to the Local Executive Board, EXCEPT THAT any such Local Executive Board initiated review shall require that prior reasonable advance notice of attendance be provided to the RCFL Director and the AD of OTD or his/her designee regarding the purpose of said meeting.

VI. RCFL DIRECTOR—TERM/DUTIES.

A. Daily Operational Control. The daily operational control, management, supervision of, and responsibility for operations of the RCFL shall be vested in the Director of the RCFL. The RCFL Director shall be a full-time employee of a participating agency assigned to the RCFL and shall be a sworn law enforcement officer who is highly experienced by education, practice, and/or study in computer sciences (including practical digital forensics, computer-crime investigations, and computer network engineering or architecture), engineering, or information technologies. The initial term of office of the RCFL Director shall be two (2) years to commence upon appointment by a majority vote of the Local Executive Board.

B. The RCFL Director shall be responsible for the day-to-day operations of the RCFL, including, but not limited to, the following duties:

1. proposing, implementing, and enforcing such policies, procedures, practices and/or rules (subject to approval by the Local Executive Board) as may be necessary or reasonably calculated to effectuate the purposes and mission of the RCFL;
2. assigning cases to assignees that are submitted to the RCFL. If an RCFL Director cannot promptly assign a matter involving or affecting national security or involving an imminent credible threat of serious bodily injury or death to persons known or unknown, the RCFL Director shall immediately notify the submitting agency of the fact of the delay;
3. assigning such other duties and responsibilities to assignees relating to the forensic examination of digital evidence or administrative and/or educational duties;
4. subject to the provisions of this MOU, infra, prioritizing the assignment of cases in conformity with this MOU and directives of the Local Executive Board;
5. in coordination with the AD of OTD or his/her designee, establishing minimum qualification standards for employee(s) offered for prospective assignment to the RCFL;
6. subject to the approval of the AD of OTD or his/her designee, diligently work to optimize the number of participating agencies assigning employee(s) to the RCFL;
7. establishing ethical and conflict of interest guidelines for assignees and operations of the RCFL that shall supplement and augment the ethical and conflict of interest guidelines or rules established by each participating agency with respect to their individual assignees;
8. establishing standard forms and reports for use by the RCFL;
9. collecting, recording, and submitting quarterly reports to the Local Executive Board regarding non-case specific data reflecting the operations and activities of the RCFL;
10. coordinating and controlling contacts with and responding to inquiries from members of the mass media in consultation with the appropriate participating agencies, or submitting law enforcement agency, if the inquiry is case specific;
11. in coordination with the AD of OTD or his/her designee, establishing or adopting supplemental guidelines/protocol for the forensic examination of digital evidence by the RCFL after conferring, as appropriate, with employee(s) assigned to the RCFL, members of the Local Executive Board, and, at the discretion of the RCFL Director, such other relevant agencies, departments, or institutions;
12. purchasing, in coordination with the General Treasurer Agency, and on behalf of the RCFL with available funds of the RCFL, such property, equipment, supplies, or materials as are necessary for operations;
13. maintaining, in coordination with the General Treasurer Agency, an annual inventory of all property used, or held by or on behalf of the RCFL, which inventory is to be submitted annually to the Local Executive Board; and

14. performing such other functions and duties as are reasonably related to the successful operation of the RCFL as may be subscribed and authorized by the Local Executive Board.

C. Renewal of Terms of Offices. Subsequent terms of office of the RCFL Director may be renewed without limit by the Local Executive Board¹. The RCFL Director shall serve until the earlier of: A) expiration of the term, B) his/her resignation or transfer, or C) removal from office by vote of a majority of the total membership of the Local Executive Board at a meeting of the Local Executive Board scheduled and noticed for that purpose. The RCFL Director may only serve contingent upon continued consent of the CEO or OIC of his/her employing participating agency and shall resign when such consent is withdrawn. Barring extraordinary circumstances, the CEO or OIC of the employing participating agency shall not withdraw such consent except upon prior written notice of not less than thirty (30) days to each of the member agencies of the Local Executive Board.¹

VII. FBI AFFILIATE STATUS.

A. In General. Because it is in the interests of the FBI and the U.S. to promote and facilitate the creation, development, and propagation of uniform, scientifically sound policies, procedures, practices, protocols, guidelines, and techniques relating to the forensic examination of digital evidence, the FBI supports the mission of the RCFL as stated herein. Subject to the written consent of the AD of OTD or his/her designee and the conditions described below, the RCFL shall be an “Affiliate” Regional Computer Forensic Laboratory of the Federal Bureau of Investigation of the Department of Justice, and may hold itself out as such.

B. Conditions of Affiliation. As a continued condition to retaining FBI “Affiliate” status, the RCFL shall:

1. adhere to such quality assurance standards of the FBI OTD, Digital Evidence Laboratory (DEL) Quality Assurance Manual (QAM) and standard operating procedures, or such specialized standards and procedures as may thereafter be designated for application to RCFLs by the AD of OTD or his/her designee;
2. propose, implement, and enforce such policies, procedures, practices, and/or rules as are consistent with recognized practices relating to the forensic examination of digital evidence and that are consistent with the minimum quality assurance standards designated for application to RCFLs;
3. due to the likely impact on the overall RCFL Program, provide timely notice to, consult with, and obtain the concurrence of the AD of OTD or his/her designee, on any proposed policies, procedures, practices, and/or rules relating to the forensic examination of digital evidence, or other policy affecting non-forensic matters that may affect the overall RCFL Program, e.g., funding or fee generation issues;
4. collect, record, and report on a quarterly basis to the AD of OTD or his/her designee, such non-case specific data reflecting the activities and operations of the RCFL in such format or manner as the NPO shall designate, PROVIDED THAT:

¹ The term of office for an FBI SSA may not exceed the limit for field supervisory positions as determined by the FBI Human Resources Division.

- a) the FBI shall agree to make such data and reports available at any time to any participating agency;
 - b) FBI personnel assigned to the RCFL shall administratively assist in the generation of such reports;
 - c) the provision of such reports or data to the FBI shall not, in and of itself, constitute a referral of or a transfer of investigative control to the FBI; and
 - d) the FBI shall not access for investigative purposes RCFL data and reports relating to any investigation referred to the RCFL without the prior approval of the referring agency.
5. seek appropriate scientific and educational accreditations and certifications for the RCFL and its assigned employee(s) as may be required by the AD of OTD or his/her designee;
 6. attend and successfully complete all FBI sponsored and financed training as may be offered to the RCFL unless otherwise exempted by the RCFL Director with the concurrence of the AD of OTD or his/her designee; and
 7. provide timely notification to the AD of OTD or his/her designee, of any allegations of misconduct or failure to fulfill the RCFL mission by any Digital Forensic Examiner (DFE) or Digital Forensic Specialist (DFS) assigned to the RCFL.

C. Effect and Benefit of Affiliation on Employee(s) Status and Authorities.

1. Status of State Executive Agency Employee(s). In limited circumstances and subject to the successful completion of additional documentation and agreements (including non-disclosure agreements), background investigation inquiries and security clearances as may be deemed appropriate in the discretion of the FBI, participating agency employee(s) accepted for assignment to the RCFL in accordance with this MOU may, upon written request of their CEO and the consent of such employee(s) and the AD of OTD or his/her designee, qualify and be accepted as employee(s) "detailed" directly to the FBI in accordance with the specific requirements of the Inter-Governmental Personnel Act, 5 U.S.C. §3374, for the limited purposes of fulfilling the mission of the RCFL as stated herein. Thereafter, he/she shall be entitled to all of the rights, privileges, and immunities accorded by that law, EXCEPT THAT such a detail shall be presumed to be without reimbursement by the FBI to the SEA or detailee for any salary or contribution to the detailee's employee benefits system(s) unless otherwise explicitly and conspicuously agreed to in a writing signed by the AD of OTD or his/her designee.
2. SEA Employee(s) Generally Shall Not Otherwise Be Deemed FEA Employee(s). Except as expressly authorized in a separate writing pursuant to a cross-designation agreement or a detail pursuant to the Intergovernmental Personnel Act, 5 U.S.C. §3374, SEA employee(s) assigned to the RCFL shall not be deemed employees of the FBI or the United States of America for any purpose merely by virtue of their assignment to the RCFL.

3. Deputations. SEA sworn law enforcement assignees, subject to a background inquiry or appropriate security clearance procedures, may be federally deputized for the limited purpose of providing direct support to the RCFL with the FBI or other FEA facilitating the securing of the required deputation authorization. These deputations may remain in effect throughout the tenure of each individual's assignment to the RCFL, as limited by the terms of the deputation or until termination of the relationship between the FBI or other FEA and the RCFL or the termination or dissolution of the RCFL itself, whichever comes first. Administrative and employee policies imposed by the participating agencies will not be voided by deputation of their respective employee(s).

a) Sworn law enforcement assignees include those state and local law enforcement officers authorized by law to enforce criminal statutes and judicial sanctions, including investigative, arrest, and/or detention authority, and who are authorized to carry a firearm and exercise appropriate force, to include deadly force, in effecting their assigned duties.

4. Status of FBI Personnel. All FBI personnel, and all participating agency employee(s) formally detailed to the FBI pursuant to the specific requirements of the Inter-Governmental Personnel Act, 5 U.S.C. §3374, and thereafter assigned to an FBI Affiliated RCFL, shall thereby be deemed to be authorized by the FBI OTD pursuant to 28 C.F.R. §0.85 and other pertinent authorities to assist federal executive agencies and any state and local law enforcement agency seeking assistance from such RCFL with the forensic examination of digital evidence regardless of whether such evidence was relevant to a state or a federal crime within the jurisdiction of any individual employee's participating agency, PROVIDED HOWEVER, that nothing in this section shall be construed as authorizing any FBI employee or personnel, pursuant to their assignment to the RCFL to:

a) act as an applicant for any state or non-federal search warrant, EXCEPT THAT such personnel may provide information under oath that is incorporated into the application of a state or other authorized officer;

b) act as the executing officer of any state or non-federal search warrant, EXCEPT THAT, under this section, FBI personnel (and employee(s) detailed to the FBI pursuant to 5 U.S.C. §3374) may assist through the forensic examination of digital evidence in the execution of a state search warrant or its equivalent under the laws of another nation as authorized by the RCFL Director and consistent with the Foreign Technical Assistance Policy Guide, to the extent that it applies, at the request and direction of a state or foreign law enforcement officer authorized by the laws of a state or other nation to execute such warrants and make such requests, PROVIDED HOWEVER, that the RCFL Director shall promptly notify and obtain the concurrence of the AD of OTD or his/her designee, of any assistance offered to any foreign law enforcement officer or agency; and

c) arrest any person for violation of state law or non-federal law, EXCEPT as may be expressly authorized by any provision of law or pursuant to any lawful cross-designation as a state law enforcement officer as approved by the FBI in conformity with this MOU and FBI policy.

5. FEA Personnel Generally Shall Not Be Deemed SEA Employee(s). Except as expressly authorized in a separate writing pursuant to the terms of a cross-designation or a detail pursuant to the Intergovernmental Personnel Act, 5 U.S.C. §3374 et seq., FEA personnel, including FBI personnel, assigned to the RCFL shall not be deemed employees of any SEA for any purpose merely by virtue of their assignment to the RCFL.

6. Training Opportunities. Pursuant to 42 U.S.C. §3771(a) and 28 C.F.R. §0.85 and other legal authority, the FBI OTD may, at its discretion and subject to available funding, offer to the RCFL, at FBI expense, such training and educational opportunities as may be appropriate.

7. FBI Network Access, Use, and Support. Subject to available funding, equipment, and security requirements, the AD of OTD or his/her designee, may, at his/her discretion, provide and require the RCFL to use the FBI/Computer Analysis Response Team (CART) FBI-controlled network or application for purposes of facilitating:

- a) measuring, improving, and managing case assignments and forensic examination processes;
- b) forensic examinations discussions amongst all FBI CART-trained DFEs nationwide, including other RCFL participants;
- c) the transmission and provision of applicable software and software updates for forensic examinations and operations;
- d) the transmission and/or maintenance of records of examinations and operations; and
- e) such other purposes as the AD of OTD or his/her designee, may authorize.

8. Performance Reviews. As a condition for continuing FBI affiliation, each RCFL will, at the request of the AD of OTD or his/her designee, undergo a performance review no less than annually. The purpose of this review is to measure and report program success. The AD of OTD or his/her designee will identify and disseminate measurable performance standards prior to the period of review.

D. Termination of Affiliation. FBI Affiliate Status will continue in effect for a minimum period of two (2) years from the effective date of this MOU unless otherwise expressly extended or terminated. The AD of OTD or his/her designee may terminate the “affiliate” status at any time in his/her unfettered discretion, upon thirty (30) days written notice to the RCFL Director or the Chair of the Local Executive Board. The RCFL may, upon a three-fourths (3/4) vote of the total membership of the Local Executive Board noticed, scheduled, and convened for that expressed purpose, terminate the “affiliate status” effective upon thirty (30) days prior written notice to the AD of OTD or his/her designee. Termination of Affiliate Status will result in the systematic withdrawal of all FBI personnel and assets assigned to the RCFL, and the termination of all FBI funding, coordination, assistance, collaboration, and cooperation with the designated RCFL subject to a schedule and conditions as the AD of OTD or his/her designee may provide.

VIII. NON-DISCLOSURE OF INFORMATION/MASS MEDIA POLICY.

A. Restrictions on Public Comments. Except as required in testimony or otherwise required by law, or as part of an authorized training, academic, or educational assembly, participating agencies and their employee(s) assigned to the RCFL shall not publicly comment on or disclose information to non-participating agencies or persons relating to:

1. specific cases or matters that have been or may be submitted to the RCFL, except, when authorized by the submitting agency, to confirm the fact of a submission or request for assistance, or as otherwise required by law of the jurisdiction of the submitting agency; or
2. the particular methods used to collect, recover, process, analyze, store, maintain, and/or present digital evidence, except as otherwise required by the federal laws of the United States of America or the law of the jurisdiction of the submitting agency, PROVIDED HOWEVER that, in all cases involving Law Enforcement Sensitive or Classified information, methods, software, or evidence, **no** disclosure can occur without prior appropriate approval from FBI Headquarters authorities.

B. Media Inquiries Referred to the RCFL Director. All media inquiries are to be referred to the RCFL Director. The RCFL Director or his/her designee, may comment to the media upon the general operation of the RCFL and the participation of the member agencies and departments after consultation with the appropriate participating agency(ies). Where the inquiry is case specific, comments, if any, will be left to the discretion of the submitting law enforcement agency. In the case of the public release of information by a DOJ employee or information relating to a case or matter investigated or prosecuted by the DOJ, the release of such information shall comply with the requirements of 28 C.F.R. §50.2.

C. Release of RCFL or FBI Information. Consistent with Title 5, U.S. Code, Section 301, Title 28, Code of Federal Regulations, section 16.21 *et seq.*, and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the AD of OTD has the sole discretion to determine what, if any, materials in the records of the RCFL are FBI records, and his guidance on the production or disclosure of FBI materials is binding on the RCFL.

IX. MATTERS RELATING TO PERSONNEL ASSIGNED TO THE RCFL.

A. No RCFL Employees. The RCFL is not a separate legal entity capable of maintaining an employer-employee relationship and, as such, all personnel assigned to the RCFL shall NOT be considered employees of the RCFL or the FBI for any purpose unless otherwise expressly authorized in writing. Responsibility for conduct of each RCFL assignee, both personally and professionally, which is not at the direction of the RCFL Director pursuant to this MOU, shall remain with their respective agency head, and each participating agency shall be responsible for the actions of its respective employees.

B. Participating Agency Employment Administration Continues. Each RCFL assignee will continue to report to his or her respective agency head for administrative matters (e.g., leave, pay, benefits), and for other matters unrelated to the case-specific work assignments of the RCFL.

C. Employment Performance Appraisals of Participating Agency Employees. Employment performance appraisals of personnel assigned to the RCFL shall not be conducted by the RCFL Director or Deputy Director on behalf of that assignee's participating agency unless the RCFL

Director or Laboratory Deputy Director is otherwise an assignee of the same participating agency as the employee(s) under performance review, EXCEPT THAT the RCFL Director or Deputy Director may, at the request of an appropriate rating official from an assignee's employing agency, provide written comments for discretionary use by that official regarding performance-related issues/appraisals.

D. SEA Assignees Shall Voluntarily Consent to RCFL Assignment. SEA personnel may not be assigned to the RCFL unless they voluntarily consent prior to the assignment. Upon assignment to the RCFL, SEA assignees (except for prosecutor assignees) shall be provided access to a copy of this MOU and any amendments or modifications for each assignee's review and acknowledgement. The RCFL Director shall maintain a certification record signed by each assignee upon completion of his/her review of the MOU certifying that the assignee understands, acknowledges, and accepts the provisions of the MOU, amendments, and modifications thereto. It shall be the duty of all assignees to promptly notify the RCFL Director in writing within seven (7) days of review of the MOU if such assignee did not voluntarily consent to the assignment, in which case, the assignee shall return to his/her participating agency.

E. RCFL Assignees to Perform RCFL Mission-Related Duties. At the request or direction of the RCFL Director or Deputy Director, personnel assigned by participating agencies to the RCFL shall, in conformity with this MOU and any directive of the Local Executive Board, perform all acts reasonably related to the forensic examination of digital evidence or such other duties as are reasonably related to the fulfillment of the mission of the RCFL. Full time personnel assigned to the RCFL for enrollment in the FBI CART program are required to make progress towards attaining full DFE or DFS status as outlined by the Digital Evidence Staffing Education and Development Unit (DESEDU). Personnel who do not make progress as outlined above will be removed from the RCFL and returned to their agency.

1. Duration of RCFL Assignments.

a) Duration of DFE or DFS Assignments. Subject to the voting provisions of the MOU, each participating agency shall assign to the RCFL at least one (1) qualified employee to be trained as necessary to serve as a full-time DFE or DFS. Service commitments for DFEs or DFSs assigned to the RCFL shall be for a period of two (2) years to commence on the date the DFE or DFS attains CART certification.

b) Support Personnel. All participating agencies share the burden of providing administrative support for the RCFL. The duration of assignment for full and part-time, non-DFE or DFS administrative staff is at the discretion of the assigning participating agency with the caveat that assignments of one (1) year or more are in the best interest of the RCFL.

c) Approval. All prospective employee(s) must be approved by the RCFL Director prior to assignment to the RCFL.

F. Employee Costs of Participating Agencies. Participating agencies shall bear all personnel costs for any employee(s) assigned to the RCFL, including but not limited to, salaries, retirement, expenses, disability, and all other employment-related benefits incident to their employment with their respective agencies. Transportation, both to and from the RCFL and in support of the mission and operational requirements of the RCFL, will be the responsibility of and provided in accordance with the policies and procedures of the assignee's employing agency and this MOU. With respect to vehicles, each participating agency agrees to assume liability for its employees as

more fully described in Section XV, *infra*. Each assignee will be provided a cellular telephone by the assignee's participating agency to ensure communication capabilities with the RCFL. The RCFL Director shall coordinate with the AD of OTD or his/her designee and participating agencies, if and when alternate funding is available (e.g., grants, HIDTA, OCDETF, DOJ Assets Forfeiture Fund, etc.) for the payment or reimbursement of vehicle leases, fuel, maintenance, and cellular telephones.

G. Reimbursement for RCFL-Related Travel Costs of Participating Agency Employees. Subject to funding availability, any participating agency may, at its discretion, pay travel costs for out-of-state travel of RCFL assignees, should the participating agency deem such travel necessary, PROVIDED THAT the fact of such a payment in any one instance or number of instances shall not create or support any duty or obligation to make future payments unless otherwise agreed to in writing.

H. Leave and Overtime of Participating Agency Personnel. Compensation for “overtime,” “holiday pay,” etc. shall be the responsibility of each participating agency with respect to its assigned personnel. It shall be the joint responsibility of each participating agency and its assigned employee to regularly and in a timely manner inform the RCFL Director of available overtime, scheduled vacation, annual leave, or sick leave. Participating agencies may, at their discretion, delegate to the RCFL Director limited authorization to schedule their assigned personnel for overtime or holiday pay or other applicable compensation as may be necessary to effectuate the purpose and mission of the RCFL. The RCFL Director shall coordinate with the AD of OTD or his/her designee and participating agencies, if and when alternate funding is available (e.g., grants, HIDTA, OCDETF, DOJ Assets Forfeiture Fund, etc.) for the payment or reimbursement of overtime or special compensation.

I. Grievances, Complaints, Discipline.

1. Personnel Rights Unaffected by Assignment to RCFL/Remedies with Assigning Participating Agencies. Because FEA assigned personnel are not employees of the RCFL or of any of the SEAs, and, similarly, because SEA assigned personnel are not employees of the RCFL or of any of the FEAs, the substantive and procedural rights of such personnel regarding employment-related grievances or discipline are governed solely by the contracts, rules, and regulations existing between the assigned personnel and their respective agencies. Assignment to the RCFL is a voluntary act by personnel and their agencies and creates no legally enforceable rights for such personnel to the continuation of the assignment to the RCFL. There shall be NO disciplinary or grievance procedure, policy, or process within the RCFL that will vest any rights in any assigned personnel, and all participating agencies and their assignees agree that no alleged procedure, policy, process, or practice shall be relied upon or be binding upon the parties to this agreement, or their assigned personnel.

2. Application of SEA/FEA Grievance Procedures. All personnel assigned to the RCFL with complaints, suggestions, comments, or concerns regarding the policies, procedures, practices, or decisions of the RCFL Director or the Local Executive Board are strongly encouraged to informally discuss such matters with the RCFL Director, or in lieu thereof, the Chair of the Local Executive Board. Thereafter, RCFL assignees who are unsatisfied with RCFL policies, procedures, practices, or decisions may refer the matter to their employing agency for processing pursuant to that agency's grievance procedure, the sole remedy of which shall be the

discontinuance of their assignment to the RCFL and their return to their respective agency.

a) In the event that RCFL assigned personnel refer a matter to their employing agency for appropriate grievance processing, the CEO or OIC of that agency (or his/her designee) shall, to the maximum extent possible, inform the RCFL Director of the nature and circumstances of the grievance and the agency's grievance procedure as permitted or authorized by that participating agency's regulations, policies, practices, employee-related contractual agreements, or consent of the complainant. The CEO or OIC shall order the temporary return of the grieving assignee to his/her agency pending the grievance procedure unless otherwise agreed to by the RCFL Director or the Local Executive Board. The CEO or OIC or their designee shall, at the conclusion of the grievance procedure, inform the RCFL Director of the grievance findings, and/or recommendation, if any. The RCFL Director and the Local Executive Board are NOT bound by any such final or intermediary decision of any SEA or FEA grievance procedure and are NOT required to implement any final or intermediary grievance recommendation. However, the RCFL Director or the Local Executive Board may, in their discretion, consider incorporating or adopting all or part of any agency's grievance recommendation. All participating agencies shall ensure that discontinuance of an assignment to the RCFL incident to a assignee-initiated grievance procedure SHALL NOT be considered or interpreted as discipline or otherwise negatively affecting or reflecting upon that person's performance while assigned to the RCFL.

J. Reports of Assignee Misconduct by RCFL Director/Chair to Participating Agencies for Possible Discipline. Pursuant to Section IIV(B)(7) of this MOU, any allegation of misconduct or failure to fulfill the RCFL mission by any assignee brought to the attention of the RCFL shall be provided to the AD of OTD or his/her designee in a timely manner. In any instance in which an assignee, in the judgment of the RCFL Director or the Local Executive Board upon majority vote, may have engaged in misconduct or failure to fulfill the mission or purpose of the RCFL as requested, the RCFL Director or the Chair at the behest of the Local Executive Board, shall notify the CEO or OIC of the assignee's employing agency in writing of the details of the alleged misconduct or failure. The notification shall carry no greater weight or effect than any other complaint by another law enforcement agency. The CEO or OIC shall then take such steps as the CEO or OIC deems appropriate in conformity with the statutory or contractual obligations, policies, procedures, and/or practices of that agency. The CEO or OIC shall order the temporary return of the assignee to his/her employing agency pending that agency's disciplinary or review process unless otherwise agreed to by the RCFL Director or the Local Executive Board. At the conclusion of the disciplinary procedure of the employing agency, the CEO or OIC shall notify the RCFL Director or Chair of the agency's findings, decisions, and/or actions, if any. The RCFL Director, the Local Executive Board, or the AD of OTD or his/her designee may, in their independent judgment, accept the findings, decisions, and/or action of the agency that assigned the employee(s). In addition, upon vote of the Local Executive Board, or by the decision of the AD of OTD or his/her designee, may elect to terminate the assignment of the assignee and return the assignee to the employing agency. In the event that the conduct under review is not found by the employing agency to constitute misconduct or a violation requiring any action, but the Local Executive Board or AD of OTD or his/her designee nonetheless elects to discontinue the assignment to the RCFL, the termination of the assignment SHALL NOT be considered or interpreted as discipline or otherwise negatively affect or reflect upon that person's performance while assigned to the RCFL. The Local Executive Board is not bound by any final or intermediary disciplinary decision of an employing agency, EXCEPT THAT the RCFL Director

and the Local Executive Board are bound by and shall honor any agency decision or ruling suspending from employment or otherwise suspending the law enforcement powers of any employee.

X. DELEGATION OF CASES/EXCLUSIVITY OF FORENSIC SERVICES DURING ASSIGNMENT.

Generally, cases shall be delegated to RCFL assignees at the discretion of the RCFL Director, Deputy Director, or either of their designees, without regard to the identity of the assignee's employing agency or the identity of the submitting agency, except that specific cases or categories of cases requiring specific security clearance or lawful authority (e.g., secret state or federal grand jury investigations requiring express court-authorized disclosure, Foreign Intelligence Surveillance Act (FISA), or other national security matters) may be specifically assigned by the RCFL Director based upon such other criteria. Cases will, in general, be assigned on the basis of case priority, as set forth herein, and the experience and workload of an assignee. Except as authorized by the RCFL Director, participating agencies will neither task nor permit their RCFL assignees to conduct forensic examinations of digital evidence outside of the auspices of the RCFL.

XI. DIGITAL FORENSIC PROTOCOLS AND PROCEDURES REQUIRED FOR FBI EVIDENCE.

Only FBI Headquarters CART certified computer DFEs (who may be either FEA employees or SEA employees) may examine FBI evidence and only in conformity with FBI Headquarters Digital Forensics & Analytics Section (DFAS) approved CART Standard Operating Procedures and protocols and quality assurance manuals utilizing FBI Headquarters CART approved hardware and validated software. Solely for purposes of this MOU, "FBI Evidence" means (physical property or electronic data) that is: 1) seized or acquired pursuant to Federal process (i.e., Federal search warrant, subpoena, court order, etc.) in which an FBI agent or employee served as the applicant for such process or as the executing officer, OR 2) evidence that, at the time of its seizure or thereafter, is relevant to an ongoing, open FBI investigation EXCEPT THAT:

A. In investigations where another law enforcement agency is exercising valid jurisdiction in a "joint investigation" with the FBI, FBI evidence may be examined by a bona fide federal, state, or local criminal "laboratory" of that other law enforcement agency engaged in the joint investigation. This exception applies:

1. only when referral is to an actual "laboratory" of the agency exercising joint investigative jurisdiction with the FBI and not merely referral to any officer (or DFE) not associated with or working under the control of that agency's "laboratory;" and
2. where the employee(s) of the other law enforcement agency's laboratory conduct the examination—the exception does not authorize FBI employee(s) to conduct the examination utilizing the forensic software, equipment, utilities, standards, or protocols of the other laboratory; and
3. the joint investigatory activity of the other law enforcement agency(ies) is an investigative activity other than providing digital evidence forensic examination support.

B. If the FBI elects to “Opt Out” and not to conduct the examination of the digital evidence pursuant to the approval of the AD of OTD or his/her designee, such evidence shall not be examined in the RCFL later, unless expressly authorized by the AD of OTD.

XII. ONLINE, UNDERCOVER INVESTIGATIONS/NON-FORENSIC INVESTIGATIVE ACTIVITY PROHIBITED.

Except as expressly authorized on a case-by-case basis by the RCFL Director and with written concurrence by the AD of OTD or his/her designee as necessarily incident to the forensic examination of digital evidence submitted to the RCFL, no employee(s) assigned to the RCFL shall engage in any online undercover investigation during the period of their assignment to the RCFL or from RCFL forensic examination space or storage. The RCFL space shall not be utilized as an “Online Undercover Facility,” and no active investigative activity, online or otherwise, shall be conducted from RCFL space, except as expressly authorized by the RCFL Director and with written concurrence by the AD of OTD his/her designee after taking appropriate measures to ensure the integrity of the examinations conducted by the RCFL. Forensic examinations shall not be considered investigative activity.

XIII. ETHICAL CONSIDERATIONS/CONFLICTS OF INTEREST.

A. Controlling Principle. FEA and SEA employees assigned to the RCFL to conduct forensic examinations of digital evidence shall not engage in any activity that, either in appearance or in fact, conflicts with their duties at the RCFL or reasonably impeaches the independence or integrity of their work for the RCFL.

B. Supplemental Policies Not Conflicting with the Controlling Principle. Except upon the express approval of the RCFL Director, or as authorized by a policy approved by the Local Executive Board, both of which require written concurrence by the AD of OTD or his/her designee, no assignee shall conduct forensic examinations or analysis of digital evidence or digital material independent from the RCFL or act as a consultant regarding the same either for free or for profit or remuneration beyond the salary paid by his or her employing agency during the period of assignment to the RCFL. (Caveat: All outside employment must be pre-approved consistent with FBI policy). RCFL assignees shall not endorse any hardware, software, or other product on behalf of the RCFL and shall take affirmative steps to refute any impression of endorsement. Notwithstanding any other provision of this section, employee(s) assigned to the RCFL shall continue to be subject to the standards of conduct, professional accreditation requirements, prepublication-review obligations, and similar rules, policies, and directives (including any procedural obligations to obtain an exception or exemption thereto) affecting their individual conduct as imposed by their employing agencies or as may be imposed by any cross-deputation or detail pursuant to Title 5 of the United States Code. No RCFL assignee may be assigned to conduct a forensic examination upon any digital evidence in a case in which that assignee served as the lead investigator, case agent, or search warrant executing officer/agent. Subject to the approval of the Local Executive Board as required by this MOU for all other policies and procedures of the RCFL, the RCFL Director may issue such supplemental policies, procedures, and guidelines relating to the ethical conduct of employee(s) assigned to the RCFL as may be appropriate. Such policies and guidelines may include “mitigating” procedures designed to reasonably accomplish the effect of mitigating any breach of the “controlling principle,” (including procedures requiring full, timely, automatic, mandatory disclosure to the prosecution in each affected matter of any potential conflict or bias), but only after such policy(ies) and guideline(s) have been reviewed by the Local Executive Board and have received the unanimous concurrence of all then participating agency(ies), including, in the case of the FBI, the AD of OTD or his/her designee. Notwithstanding any provision of this MOU, no FBI employee shall be

absolved or relieved of any ethics obligation under Federal law or regulation without the express prior authorization of the designated FBI ethics official at FBI Headquarters.

XIV. GIFTS BY NON-GOVERNMENTAL ENTITIES FOR THE BENEFIT OF THE DOJ FEA PARTICIPATING AGENCIES PROHIBITED.

Neither the RCFL, any participating agency, nor any personnel assigned to the RCFL may solicit or accept any tangible or intangible property or services without just compensation in exchange therefore or monies for the benefit of any DOJ participating agency or assignees of such a DOJ Agency from any non-participating agency or nongovernmental entity or person, EXCEPT THAT:

- A.** nothing in this provision shall prohibit the solicitation, or temporary or incidental acceptance of information or software from any person as may be necessitated by the need to conduct a forensic examination of digital evidence in a case-specific matter (e.g., disclosure by manufacturer of proprietary decryption software or instructions imbedded in a seized hard drive);
- B.** nothing in this provision shall prohibit any SEA, acting in accordance with its applicable rules, regulations, and laws from soliciting or accepting on behalf of any SEA any property, monies, or services for the benefit of that SEA, or fellow SEAs, as long as all money and property is treated as described in Section IV of this document;
- C.** PROVIDED HOWEVER, that nothing in this provision shall prohibit the acceptance or solicitation of any gift by any DOJ FEA in accordance with 28 U.S.C. §524(d)(1) and applicable DOJ orders, or any amendments thereto or other lawful authority;
- D.** nothing in this provision shall prohibit the acceptance or solicitation by the FBI of any non-service gifts:

- 1. pursuant to the prior approval of the Property Procurement and Management Section (PPMS) Chief of the FBI Finance and Facilities Division and the FBI-designated Agency Ethics Official (e.g., OGC Deputy General Counsel) as may be required pursuant to Manual of Administrative and Operations Procedures (MAOP), Part I, 1-13.2.4, or any amendment thereto;
- 2. that are valued at under \$150; and
- 3. that will be transferred upon execution by the donor of a "Gift Donation Form;" and
- 4. all DOJ FEAs and their detailee/assignees shall, at all times, comply with 5 C.F.R. 2635.201 et. seq. as well as any rules and regulations of their respective agencies.

XV. FINANCIAL AND CIVIL LIABILITIES IN GENERAL.

A. RCFL Assignees Federally Deputized. The participating agencies and their assignees acknowledge that financial and civil liability for the acts and omissions of each assignee remains vested with the assignee's employing agency except when the act or omissions is determined to be covered by the Federal Tort Claims Act, 28 U.S.C. §1346 and §2671 et seq. This may apply to those employees formally detailed to a FEA pursuant to the provisions of the Inter-Governmental Personnel Act, 5 U.S.C. §3374, or those sworn law enforcement officers who have been

deputized by an FEA and are acting within the scope of their duties and responsibilities associated with the RCFL and under the guidance and direction of a FEA in investigating violations of federal law.

B. The Congress has provided that the exclusive remedy for the negligent or wrongful act or omission of an employee of the United States Government, acting within the scope of his employment, shall be an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), §§ 2671-2680.

C. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), 28 U.S.C. § 2679(b)(1), the Attorney General or his/her designee may certify that an individual defendant acted within the scope of his employment at the time of the incident giving rise to the suit (28 U.S.C. § 2679(d)(2)). The United States can then be substituted for the employee as the sole defendant with respect to any tort claims (28 U.S.C. § 2679(d)(2)). If the United States is substituted as a defendant, the individual employee is thereby protected from suits in his/her official capacity.

D. If the Attorney General declines to certify that an employee was acting within the scope of employment, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his/her office or employment." (28 U.S.C. § 2679(d)(3)).

E. Liability for any negligent or willful acts of any employee(s) assigned to the RCFL undertaken outside the terms of this MOU will be the sole responsibility of the respective employee and his/her employing agency.

F. Liability for violations of federal constitutional law rests with the individual Federal agent or officer, or employee pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) or pursuant to 42 U.S.C. § 1983 for state and local officers or cross-deputized federal officers.

G. If a federally deputized officer is found to be liable for a constitutional tort, he/she may request indemnification from DOJ to satisfy an adverse judgment rendered against the employee in his/her individual capacity (28 C.F.R. § 50.15(c)(4)). The criteria for payment are substantially similar to those used to determine whether a Federal employee is entitled to DOJ representation under 28 C.F.R. § 50.15(a).

H. Both state and federal officers enjoy qualified immunity from suit for constitutional torts "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

I. Federally deputized officers and state and local personnel formally detailed to the FBI pursuant to 5 U.S.C. § 3374 may request representation by the DOJ for civil suits against them in their individual capacities for actions taken within the scope of employment (28 C.F.R. §§ 50.15, 50.16).

J. An employee may be provided representation "when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his/her designee determines that providing representation would otherwise be in the interest of the United States." (28 C.F.R. § 50.15(a)).

K. A state and local employee formally detailed to the FBI pursuant to 5 U.S.C. §3374 and duly federally deputized officer's written request for representation should be directed to the Attorney General and, in the case of officers federally deputized through the FBI, provided to the Chief Division Counsel (CDC) of the FBI division participating in the RCFL. In the case of state and local employee(s) formally detailed to the FBI and officers federally deputized through the FBI, the CDC will then forward the representation request to the FBI's OGC together with a letterhead memorandum concerning the factual basis for the lawsuit. FBI/OGC will then forward the request to the Civil Division of DOJ together with an agency recommendation concerning scope of employment and Department representation (28 C.F.R. § 50.15(a)(3)).

L. The participating agencies agree to notify each other or the Local Executive Board at a meeting of the Local Executive Board of any claim or lawsuit arising out of an activity conducted pursuant to this MOU. Nothing in this paragraph shall prevent any Agency made a party to or affected by any claim or lawsuit from conducting an independent administrative review of any matter giving rise to the claim or lawsuit. All participating agencies agree to cooperate fully with one another in the event of an administrative review or official investigation arising from alleged negligence or misconduct arising out of activity conducted pursuant to this MOU. Nothing in this paragraph shall be construed as supplanting any applicable statute, rule, or regulation.

XVI. EQUIPMENT, VEHICLES, AND OFFICE SPACE.

A. Vehicles in General. RCFL assignees shall be subject to calls as necessary to fulfill the mission of the RCFL. Therefore, each participating agency, in accordance with its own policies and procedures, shall ensure that each assignee is provided necessary transportation and/or reimbursement for official travel to carry out and perform the mission and duties of the RCFL. Travel and per diem in support of providing testimony will be the responsibility of the requesting party in accordance with applicable federal/state laws or rules regarding responding to subpoenas, court orders, etc.

B. Use of Vehicles for Official Purposes Only. The FBI Denver Division may authorize SEA and FEA employee(s) assigned to the RCFL to use (operate or be transported in) available vehicles owned or leased by the FBI when necessary and in direct support and connection with official business of the RCFL.

C. FBI Vehicles Subject to FBI Vehicle Rules. When authorized, RCFL assignees using FBI vehicles, including rented and leased vehicles, agree to operate the vehicles in accordance with all applicable FBI rules and regulations as outlined in the FBI Manual of Administrative Operations and Procedures (MAOP), Part I, Section 3.1.

D. Use of FBI Vehicles. The participating agencies agree that FBI vehicles will be used only in direct support of the RCFL and to transport individuals assigned to the RCFL or who have official business with the RCFL.

E. Vehicle Damage. The participating agencies agree to be responsible for any damage incurred to their agency vehicles or FBI vehicles caused by any act or omission on the part of their respective employees, third parties, or acts of God, and participating agencies agree to assume financial responsibility for property damage to or caused by said vehicles. In this regard, participating agencies shall be self-insured or carry sufficient liability insurance that meets or exceeds that required by appropriate state and federal law.

F. Computers, Equipment, Forfeitures, Property, and Monies.

- a. Property provided solely for the benefit of contributing agency. Equipment and other tangible property provided by participating agencies will remain the property of that agency and will be retrieved by that agency within ninety (90) days upon the termination of that agency's relationship with the RCFL unless otherwise agreed to in writing. Equipment and other tangible property not so retrieved shall be deemed to be abandoned property and shall be transferred to the General Treasurer Agency for the collective benefit of the RCFL.
- b. Property provided for the collective benefit of the RCFL. The following tangible property and monies when provided to the RCFL are to be transferred to or titled in the name of the General Treasurer Agency for the collective benefit of the RCFL:
 1. tangible and intangible property and/or monies forfeited to any state, local, or non-law enforcement participating agency primarily as result of services rendered by the RCFL, or otherwise provided to the RCFL by action of state law;
 2. tangible and intangible property and/or monies obtained by any state, local, or non-law enforcement participating agency through a grant to the RCFL; and
 3. tangible and intangible property and/or monies expressly provided by state, local, or non-law enforcement participating agencies to and for the benefit of the RCFL.
 4. Upon the dissolution or termination of the RCFL, the General Treasurer Agency shall equitably distribute or dispose of said property pursuant to the directives of the SEAs serving on the Local Executive Board, or, in the absence of any such prior specific or general directive, following dissolution or termination, pursuant to such principles as the General Treasurer Agency deems equitable. Property damaged or destroyed that was utilized by the RCFL in connection with its operations and is in the custody and control and used at the direction of the RCFL will be the financial responsibility of the agency that provided/contributed said property if title to such property was retained.

G. Intellectual Property. Except as expressly authorized by the Local Executive Board, all intellectual property rights and interests generated in whole or in part by the RCFL or its assignees, or otherwise generated in whole or in part through the use of equipment or property granted, purchased, donated, forfeited, or abandoned to or for the benefit of the RCFL shall transfer to or be titled in the name of the General Treasurer Agency for the collective benefit of the RCFL participating agencies and shall be controlled by the Local Executive Board, EXCEPT THAT intellectual property rights in educational text, journals, or treatises of assignees created without use of or reliance on RCFL materials or information for activities outside the assignee's duties at the RCFL shall NOT inure to the benefit of the RCFL, but be governed by policy of the assignee's participating agency, if any.

H. Release of FBI/RCFL Information to the Public. Except as authorized by the RCFL Director or by any action or policy of the Local Executive Board, no assignee shall disseminate to the public at large any text, journal, treatise, or other material relating to the forensic examination or analysis of digital evidence that discusses or discloses any policy, practice, or procedure of the RCFL that has not clearly been identified as authorized for public dissemination, or has otherwise not been made public consistent with VIII(C) above. The RCFL Director shall ensure that any release of FBI information is consistent with the FBI's pre-publication review policy. No assignee

shall disclose his/her present affiliation with the RCFL except in accordance with 5 C.F.R. §2635.807(b) in a manner reasonably satisfactory to the RCFL Director. Upon the termination or dissolution of the RCFL, any residual intangible property rights held by or for the RCFL shall be equitably disposed by the General Treasurer Agency in a manner similar to that provided herein for disposition of tangible property.

I. Operational Supplies. Digital media and other supplies necessary to operate the RCFL shall be provided to the RCFL by participating agencies and/or be purchased through available funds by the RCFL Director or his/her designee. In the absence of necessary media or supplies, it is agreed that an agency submitting digital media for forensic examination or otherwise requesting the assistance of the RCFL shall be required to provide the necessary media or supplies in kind or submit funds necessary for purchase of the same.

J. Records. Consistent with VIII(C) above, the Local Executive Board shall, by majority vote, direct that one of the participating agencies be deemed owner and custodian of such records of the RCFL and, in the absence of such a directive by the Local Executive Board, such records shall be deemed the property of the General Treasurer Agency, EXCEPT THAT:

1. All records determined by the FBI to constitute FBI records shall continue to be owned by the FBI and are subject to the FBI Record Management Division's rules and regulations regarding the retention, disclosure, and destruction of records. Further, all FBI records shall be returned to the FBI as directed by the AD of OTD or his/her designee if at any time:
 - a) RCFL loses its FBI "Affiliate" status;
 - b) the FBI ceases to be a participating agency to the RCFL; or
 - c) dissolution or termination of the RCFL.

XVII. PRIORITIZATION OF RCFL CASES.

A. Subject to the participating agency service priority specified in the RCFL Mission statement, supra, or any contrary duly executed amendment to this MOU adopted by unanimous vote of the Local Executive Board, evidence submitted to the RCFL for processing and examination will be prioritized for service based upon the following criteria.

1. Imminent credible threat of serious bodily injury or death to persons known or unknown, including examinations of evidence necessary to further the investigation of an at-large or unknown suspect who poses an imminent threat of serious bodily injury or death to persons known or unknown;
2. Potential threat of serious bodily injury or death to person(s);
3. Matters involving or affecting national security;²
4. Imminent credible risk of loss of or destruction to property of significant value;

² If an RCFL Director cannot promptly assign a matter involving or affecting national security, the RCFL Director shall promptly notify the submitting federal agency of the fact of the delay.

5. Immediate pending court date, or non-extendable, outcome-determinative legal deadline;
6. Potential risk of loss of or destruction to property, or the exam is needed to further the investigation; and
7. No credible potential threat of bodily injury or death to person(s) and/or loss or destruction of property.

XVIII. EFFECTIVE DATE/DURATION/TERMINATION.

- A.** This MOU shall become effective by and between each participating agency upon execution by all its respective representatives.
- B.** This MOU may be executed in one or more counterparts, including by facsimile, each of which when compiled in its entirety shall together constitute one and the same instrument.
- C.** The term of this MOU is for the duration of the RCFL operations, EXCEPT that provisions relating to the disclosure of RCFL/FBI information shall remain in effect indefinitely after withdrawal from or termination of participation by that agency in the RCFL.
- D.** Any participating agency may terminate its relationship with the RCFL and withdraw from the RCFL at any time by written notification to the then remaining participating agencies at least thirty (30) days prior to withdrawal. Notice of termination of a participating agency shall be attached to this MOU and be maintained by the RCFL Director and the Local Executive Board Chair.
- E.** Any participating agency that withdraws or reduces the number of assigned DFE or DFS below the minimum required by this agreement and fails to assign a replacement within thirty (30) days shall be re-designated as a non-participating agency.

XIX. AMENDMENTS TO THIS AGREEMENT.

- A.** Except for Amendments adding one or more participating agencies, this MOU may be modified or amended only by combined written consent of each participating agency of the RCFL with the prior written concurrence of the AD of OTD or his/her designee.
- B.** Amendments to this agreement shall have no force and effect until such modifications/ amendments are reduced to writing and signed by an authorized representative from each participating agency, EXCEPT THAT amendments adding participating agency(ies) may only be made pursuant to the procedure referenced herein.

XX. MISCELLANEOUS.

- A.** Headings Irrelevant. The paragraph headings and numbering in this MOU are inserted for convenience only and shall not affect the meaning or interpretation of the terms of this MOU.
- B.** Succession of FBI Division Authority. All rights, obligations, duties, notices, or other procedural references to the OTD may transfer and inure to any other Division of the FBI,

without amendment to this MOU, upon written notice to the Chair of the Local Executive Board by the AD of OTD or his/her designee.

C. No Third-Party Rights. Nothing in this MOU is intended to confer or does confer any rights, duties, or obligations on any person other than the participating agencies and, to such limited extent as explicitly noted, their employee(s) assigned to the RCFL.

D. Settlement of Disagreements/ Disputes. Disagreements and disputes between the participating agencies arising under or relating to this MOU shall be resolved only by consultation by and between the affected Agencies or, in the case of a disagreement or dispute affecting all participating agencies, through the Local Executive Board, and will not be referred to a state court, federal court, or to any other person or entity for settlement.

E. No Superseding Standard of Care, Duty, or Conduct. Nothing in the MOU or any policy, procedure, practice, protocol, or guideline resulting therefrom is intended to alter or affect or does alter or affect any standard of care, standard of conduct, lawful authority to search, seize, or arrest as may be otherwise authorized by the Constitution of the United States, any federal or state law or international treaty or its equivalent, or any policy or procedure of the FBI or any FEA or SEA.

F. Severability. If any portion of this MOU is declared invalid by a court of competent jurisdiction, this MOU shall be construed as if such portion had never existed, unless such construction would constitute a substantial deviation from the intent of the participating agencies as reflected in this MOU.

G. Funding/Acquisitions/Contracting. This MOU does not obligate any participating agency to provide, nor does it constitute a basis for the transfer of funds. Rather it is a basic statement of understanding between the parties hereto. Expenditures of funds in connection with the implementation of this MOU will be subject to the budgetary processes of each participating agency and to the availability of funds and resources pursuant to applicable laws, regulations and policies. The parties expressly acknowledge that this in no way implies that Congress will appropriate funds for such expenditures. Acquisitions and purchasing commitments by FEAs with their own federal funding which are in support of the RCFL will be made in accordance with applicable federal rules and regulations. No such acquisitions may be made without proper authorization from the appropriate federal contracting official.

H. Binding Effect. This MOU shall inure to the benefit of, and shall be binding upon, the participating agencies and their respective successors.

XXI. SIGNATURES. IN WITNESS WHEREOF, the below enumerated participating agencies, by and through their respective Chief Executive Officer and Official in Charge, hereby execute this agreement.

Gene Claps, Sheriff
Adams County Sheriff's Office

Date

Christopher Schaefer, Director
Colorado Bureau of Investigation

Date

Ron Thomas, Chief
Denver Police Department

Date

Darren Weekly, Sheriff
Douglas County Sheriff's Office

Date

Reggie Marinelli, Sheriff
Jefferson County Sheriff's Office

Date

Doug Stephens, Chief
Littleton Police Department

Date

Mark D. Michalek
Special Agent in Charge (SAC)
Denver Division
Federal Bureau of Investigation

Date

David G. Nanz
Assistant Director
Operational Technology Division
Federal Bureau of Investigation

Date

Appendix A

Description and Identification of Specific Employee(s) and Resources Initially Committed by Each participating agencies to the RCFL.