



September 2015

CONFIDENTIAL INFORMANTS

Updates to Policy and
Additional Guidance
Would Improve
Oversight by DOJ and
DHS Agencies

GAO Highlights

Highlights of [GAO-15-807](#), a report to the Chairman, Committee on the Judiciary, U.S. Senate

Why GAO Did This Study

Federal law enforcement components used more than 16,000 confidential informants in fiscal year 2013 as part of criminal investigations. Informants can be critical to an investigation, but without appropriate oversight, problems can occur that undermine the credibility of the informant's role in an investigation. *The Attorney General's Guidelines* sets forth procedures on the management of informants, including vetting potential informants and overseeing informants' illegal activities that components authorize to support an investigation.

GAO was asked to review the use of confidential informants. GAO reviewed the extent to which (1) DOJ and DHS components' policies address the Guidelines for vetting informants and overseeing their illegal activities and (2) selected components have monitoring processes to ensure compliance with the Guidelines.

GAO reviewed components' documented policies and monitoring processes and interviewed agency officials about their practices. GAO visited components' field offices in three locations chosen based on the numbers of informants overseen, among other factors.

What GAO Recommends

GAO recommends that DOJ and DHS and their components take actions to update components' policies and monitoring processes to improve handling and oversight of confidential informants. DOJ and DHS concurred with our recommendations.

View [GAO-15-807](#). For more information, contact David C. Maurer at (202) 512-9627 or maurerd@gao.gov.

September 2015

CONFIDENTIAL INFORMANTS

Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies

What GAO Found

Some components within the Departments of Justice (DOJ) and Homeland Security (DHS) do not fully address procedures outlined in *The Attorney General's Guidelines* (the Guidelines)—which established procedures to help ensure that components exercise their authorities regarding the use of informants appropriately and with adequate oversight. Eight components within DOJ and DHS—the Bureau of Alcohol, Tobacco, Firearms and Explosives; the U.S. Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); the U.S. Marshals Service (USMS); U.S. Customs and Border Protection; U.S. Immigration and Customs Enforcement (ICE); the U.S. Coast Guard (USCG); and the U.S. Secret Service (USSS)—have policies in place that generally address the procedures outlined in the Guidelines for vetting a confidential informant.

However, five of the eight components' policies are not fully consistent with the Guidelines' provisions for overseeing informants' illegal activities. For example, the Guidelines require agencies to document certain information when authorizing an informant to participate in an activity that would otherwise be considered illegal (e.g., purchasing illegal drugs from someone who is the target of a drug-trafficking investigation). DEA, USMS, ICE, USCG, and USSS do not fully address the requirements to provide the informant with written instructions about the authorized activity and require signed acknowledgment from the informant. Without such documentation, if an informant engages in an activity that exceeds the scope of the authorization, the agency may not be able to demonstrate that the informant's actions were not authorized, thereby limiting the agency's ability to prosecute the informant for the unauthorized illegal activity.

The DOJ and DHS components that oversaw the most informants in fiscal year 2013—the FBI, DEA, ICE, and USSS—have monitoring processes in place to help ensure that agents are complying with their respective components' policies. Such monitoring activities include supervisory reviews, as well as headquarters inspections and self-inspections within the field offices. These agencies also use administrative tools, such as standardized forms, that cover the requirements in their policies and help ensure that agents capture necessary information. However, as noted above, some components' policies do not fully address the procedures in the Guidelines, and as a result, the components' monitoring processes likewise do not assess compliance with those procedures in the Guidelines. Consequently, agencies may not have reasonable assurance that they are complying with procedures established in the Guidelines to address the risks associated with using informants.

This is a public version of a sensitive report that GAO issued in March 2015. It does not include details that ICE deemed law enforcement sensitive.

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Abbreviations

ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
CFP	chief federal prosecutor
CHS	confidential human source
CI	confidential informant
CIRC	Confidential Informant Review Committee
DEA	U.S. Drug Enforcement Administration
DHS	Department of Homeland Security
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FPO	federal prosecuting office
HSRC	Human Source Review Committee
ICE	U.S. Immigration and Customs Enforcement
JLEA	Department of Justice Law Enforcement Agency
NCIC	National Crime Information Center
OEO	Office of Enforcement Operations
SAC	special agent in charge
USCG	U.S. Coast Guard
USMS	U.S. Marshals Service
USSG	United States Sentencing Guidelines
USSS	U.S. Secret Service

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September 15, 2015

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Federal law enforcement agencies used more than 16,000 confidential informants in fiscal year 2013 as part of investigations into criminal activities and organizations. Because of some informants' past involvement in criminal activities or organizations, the informants often have access to, or status in, such organizations and are uniquely situated to provide useful and credible information to law enforcement agencies regarding criminal activities.¹ For example, an agency may need to cultivate and use an informant who has a history with a drug cartel to obtain information about the cartel's plans for trafficking illegal substances. The information the informant provides may be critical to an investigation, but problems can occur if an agency fails to exercise appropriate oversight over the informant and the informant's activities. For example, if an informant engages in unauthorized illegal activity, this could undermine the credibility of the informant's testimony or role in an investigation or give the impression that the government has condoned the informant's illegal actions. Recent media reports have highlighted concerns about agencies' judgment and oversight in instances where law enforcement agencies have worked with informants with a known criminal history or who have allegedly committed crimes while working as informants.

Law enforcement agencies in the Departments of Justice (DOJ) and Homeland Security (DHS)—such as the U.S. Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), and U.S. Immigration and Customs Enforcement (ICE), among others—rely on the

¹*The Attorney General's Guidelines Regarding the Use of Confidential Informants* defines a confidential informant as any individual who provides useful and credible information to a law enforcement agency regarding felonious criminal activities, and from whom the law enforcement agency expects or intends to obtain additional useful and credible information regarding such activities in the future.

use of informants as one of many investigative tools at the agencies' disposal.

To help ensure appropriate oversight of informants, *The Attorney General's Guidelines* (also referred to as the Guidelines in this report) set forth detailed procedures and review mechanisms to ensure that law enforcement agencies exercise their authorities appropriately and with adequate oversight.² In 1976, DOJ developed the first set of Guidelines—*Use of Informants in Domestic Security, Organized Crime, and Other Criminal Investigations*—following congressional hearings and published reports criticizing the FBI's domestic surveillance activities in the 1950s and 1960s. Since then, DOJ has revised the Guidelines three times (1980, 2001, and 2002). The Guidelines include provisions for ensuring that informants are considered suitable for their role in a criminal investigation (vetting) and for overseeing informants' illegal activities. Adherence to the Guidelines is mandatory for DOJ law enforcement agencies and federal prosecuting offices, including the U.S. Attorneys' Offices, but it is not explicitly mandatory for DHS agencies. However, according to the Executive Office for U.S. Attorneys, federal prosecutors expect all federal agencies, including DHS component agencies, to adhere to the Guidelines to ensure the credibility of any informant witnesses used in the cases the U.S. Attorneys prosecute, as well as the sufficiency of evidence that informants contribute to a case.

You requested that we examine DOJ's and DHS's use of confidential informants. Specifically, we determined the extent to which

- DOJ and DHS component agencies' policies include procedures outlined in the Guidelines for effectively vetting informants and overseeing informants' illegal activities, and

²Two sets of *The Attorney General's Guidelines* apply to the use of informants. *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (2006), which applies to the FBI's use of informants, and *The Attorney General's Guidelines Regarding the Use of Confidential Informants* (2002), which applies to all other DOJ law enforcement agencies and federal prosecuting offices. DOJ created the FBI-specific Guidelines following an FBI effort to enhance consistency in the use of informants across locations and investigative programs and better align the management of informants with its mission. The two sets of Guidelines differ in only minor ways with respect to vetting informants and overseeing informants' illegal activities, and therefore, we refer to both sets collectively as the Guidelines. Where the requirements in the two sets of Guidelines differ for provisions within the scope of our review, we specify the provisions in each set of Guidelines.

-
- selected DOJ and DHS component agencies have monitoring processes to ensure compliance with the provisions in the Guidelines for vetting informants and overseeing informants' illegal activities.

This report is a public version of a prior sensitive report that we provided to you.³ ICE deemed some of the information in the prior report law enforcement sensitive, which must be protected from public disclosure. Therefore, this report omits sensitive information regarding findings from DOJ and DHS agencies' internal inspection reports. Otherwise, this report addresses the same questions and uses the same overall methodology as the sensitive report.

For this report, we reviewed the policies and processes for the eight DOJ and DHS component agencies that used confidential informants in fiscal year 2013, the most recent year for which data were available. The DOJ agencies included in our review are the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); DEA; the FBI; and the U.S. Marshals Service (USMS). The DHS agencies are U.S. Customs and Border Protection (CBP), ICE, the U.S. Coast Guard (USCG), and the U.S. Secret Service (USSS). We conducted interviews with officials responsible for overseeing these agencies' respective informant programs, as well as an attorney adviser from the Executive Office for U.S. Attorneys because the U.S. Attorneys are responsible for prosecuting cases for these agencies, including cases that involve the use of informants.

To address our first objective, we assessed the eight agencies' informant policies against provisions in the Guidelines regarding vetting informants or overseeing informants' illegal activities.⁴ Our assessment determined whether agencies' policies meet the minimum criteria established in the Guidelines but did not determine whether agencies' policies exceeded the requirements in the Guidelines. Appendix I provides additional information about our scope and methodology, including additional information about

³GAO, *Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies*, GAO-15-242SU (Washington, D.C.: Mar. 6, 2015).

⁴Specifically, these provisions addressed requirements for initial suitability reviews, approval for special categories of informants, continuing suitability reviews, reviews and approvals for long-term informants, and oversight of authorized otherwise illegal activity and unauthorized illegal activity.

our assessment, and appendixes II and III provide listings of the provisions we assessed regarding vetting informants and overseeing informants' illegal activities, respectively. For each agency, we also interviewed officials responsible for overseeing the agency's informant programs about policies and processes for vetting informants and overseeing informants' illegal activities. We also reviewed guidance from and interviewed representatives of DOJ headquarters offices (Office of the Deputy Attorney General and Criminal Division) and DHS headquarters offices (Office of Policy, Office of the Chief Security Officer, and Office of General Counsel).

To address our second objective, we analyzed monitoring processes at four component agencies—two from DOJ, and two from DHS. Out of DOJ's total of four component agencies, we selected DEA and the FBI for analysis because these agencies used the most confidential informants in fiscal year 2013. Likewise, out of DHS's total of four component agencies, we selected ICE and USSS for analysis for the same reason. We compared agencies' internal review mechanisms and processes against *Standards for Internal Control in the Federal Government*.⁵ We analyzed documentation from agencies' monitoring processes, including examples of inspection checklists, inspection reports, and corrective action reports. We did not review a representative sample of monitoring documents; however, the documents we reviewed demonstrate the structure of agencies' monitoring processes, such as what is covered in inspections, that allowed us to compare these monitoring processes against federal internal control standards. We visited these agencies' field division locations in three cities that we selected based on the number of informants these agencies oversaw in those locations and geographical diversity. At these 12 locations, we interviewed managerial and supervisory agents regarding how they oversee and monitor the use of confidential informants,⁶ and we analyzed supporting documentation, such as supervisory checklists. The results of the site visits are not generalizable to all field divisions, but provided important observations and insights into how these agencies oversee the use of informants using

⁵GAO, *Internal Control: Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

⁶At each field office we visited, we met with at least one manager (special agent in charge or assistant special agent in charge) who oversees the use of confidential informants. We also met with confidential informant coordinators, or officials with similar responsibilities, in 11 of the 12 offices, and supervisory agents in 6 of the 12 offices.

standardized, agency-wide methods and locally developed approaches. We also interviewed attorneys at each of the U.S. Attorneys' Offices located in the same cities as the agency field offices we visited to obtain the prosecutors' perspectives regarding the role of the Guidelines in supporting prosecution.

We conducted this performance audit from August 2013 to March 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Confidential Informants

Confidential informants provide information and take action at the direction of law enforcement agencies to further investigations, and agencies may rely on confidential informants in situations in which it could be difficult to utilize an undercover officer. An informant can be motivated by many factors, including financial gain or reduced sentencing for criminal convictions. Confidential informants who assist DOJ or DHS law enforcement agencies often have criminal histories, though some are concerned citizens with no criminal connections.

Case Study: Risk of Using Criminals as Informants

In 1995, the government indicted James "Whitey" Bulger, the leader of an organized crime syndicate in Boston, and his associate Stephen "The Rifleman" Flemmi on multiple charges of racketeering, including acts of extortion, murder, bribery, loan sharking, and obstruction of justice. Bulger and Flemmi had been Federal Bureau of Investigation (FBI) informants for much of the time period covered by the indictment. Evidence presented during the 1998 pretrial hearings in the government's case against Flemmi revealed misconduct and criminal activity by the FBI agents who handled the two informants.

Source: Department of Justice Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (Washington, D.C.: September 2005), and the FBI. | GAO-15-807

The Attorney General's Guidelines

The Guidelines require each DOJ law enforcement agency to develop agency-specific policies regarding the use of informants, and the DOJ Criminal Division is tasked with reviewing these agency-specific policies to ensure that the policies comply with the Guidelines. The Guidelines also provide that whenever an agency believes that an exception to any provision in the Guidelines is justified, the agency is to seek an exception from DOJ's Criminal Division, and the agency is required to maintain documentation of any exceptions granted. The Guidelines do not explicitly apply to DHS agencies, and neither the Guidelines nor DHS requires any such review for DHS component agencies' policies. However, one of the stated purposes of the Guidelines is to set policy with regard to informants that may become involved in criminal prosecutions by federal prosecuting offices. To the extent that DHS agencies are investigating cases that will be prosecuted federally, federal prosecutors expect agencies to adhere to the Guidelines for any informants whose role may affect prosecution. These prosecutors work with agents on a case-by-case basis to ensure the evidence from an investigation supports prosecution.

Requirements for Vetting Informants

The Guidelines require that, prior to utilizing a person as an informant, agencies vet informants to assess their suitability for the work. In particular, agents who oversee the use of informants (case agents or control agents) must complete and sign a written initial suitability report and recommendation that addresses factors about the proposed informant such as biographical information, personal information (e.g., relationship to the target of the investigation), motivation for becoming an informant, and criminal history.⁷ Additionally, the Guidelines require that agents address these same factors through continuing suitability reviews that are to occur at least annually. A first-line supervisor approves the written initial and continuing suitability reports that the agent prepares and ensures that new continuing suitability reports are completed when information becomes available that could materially affect a prior suitability determination. Upon registering an informant and every year thereafter, the agent, along with another government official who must be present as a witness, is required to review written instructions with the informant to convey the scope of the informant's authority, the limits on assurances of confidentiality, prohibitions against certain types of illegal activity, and the possible consequences of violating these conditions.

⁷Apps. II and III provide additional detail on the factors that the Guidelines require.

These instructions and the accompanying documentation are to ensure that the constraints within which the informant is to operate are clear and well documented so that unnecessary risk does not result. In particular, documenting and administering these instructions helps to prevent informants from claiming that the agency gave the informant authority to commit crimes.⁸

Case Study: Importance of Providing Instructions to Informants to Prevent Claims of Authority to Commit Crimes

During the course of several investigations, the U.S. Secret Service (USSS) uncovered the fact that Albert Gonzalez—who had previously been arrested in an unrelated case—was criminally involved while working as an informant. Gonzalez was masterminding a scheme that involved the theft and sale of more than 40 million credit and debit card numbers from numerous U.S. retailers. According to USSS officials, Gonzalez signed a stipulation stating that he was not to engage in unauthorized criminal activity. Gonzalez was subsequently charged with and pled guilty to computer fraud, wire fraud, aggravated identity theft and conspiracy for his role in the scheme.

Source: USSS press releases. | GAO-15-807

**Requirements for
Overseeing Informants’
Illegal Activities**

Since 1980, the Guidelines have permitted agencies to authorize informants to engage in activities that would otherwise constitute crimes under federal, state, or local law if someone without such authorization engaged in these same activities. For example, in the appropriate circumstance, an agency could authorize an informant to purchase illegal drugs from someone who is the target of a drug-trafficking investigation. Such conduct is termed “otherwise illegal activity.” According to the DOJ Office of the Inspector General, authorizing informants to engage in otherwise illegal activity can facilitate their usefulness as a source of information to the government but may also have adverse or unforeseen consequences. For example, the informant’s participation in authorized otherwise illegal activity could hinder prosecution of the informant’s coconspirators by prompting, for example, defenses of public authority or

⁸DOJ, Office of the Inspector General, *The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines* (Washington, D.C.: September 2005).

entrapment.⁹ Agency officials in field offices are responsible for documenting authorization and oversight of otherwise illegal activity, in some cases in consultation with the appropriate local chief federal prosecutor.

The Guidelines include certain requirements when authorizing otherwise illegal activity and restrictions on the types of activities an agency can authorize, as shown in figure 1. In particular, agencies must authorize the activity in advance, in writing, and for a specified period not to exceed 90 days. Additionally, the authorizing official must document certain findings as to why it is necessary for the informant to engage in the activity and assess whether the benefits to be obtained from the activity outweigh the risks. The Guidelines also prohibit agencies from authorizing an informant to participate in an act of violence, obstruction of justice, and other enumerated unlawful activities. After an agency authorizes an informant to engage in otherwise illegal activity, the case agent or control agent, along with another government official acting as a witness, must review with the informant additional instructions addressing the scope and limits of the otherwise illegal activity.

⁹DOJ, Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*.

Figure 1: Agency Authorities for Authorizing Otherwise Illegal Activities

Tier 1 Otherwise illegal activities	
<p>Description</p> <p>Any activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization and that involves:</p> <ul style="list-style-type: none"> • the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the confidential informant; • corrupt conduct, or the significant risk of corrupt conduct, by senior federal, state, or local public officials; • the manufacturing, importing, exporting, possession, or trafficking of large quantities of controlled substances;^a • financial loss, or the significant risk of financial loss, in an amount equal to or exceeding \$1 million;^b • a confidential informant providing to any person (other than a law enforcement agent) any item, service, or expertise that is necessary for the commission of a federal, state, or local offense, which the person otherwise would have difficulty obtaining; or • a confidential informant providing to any person (other than a law enforcement agent) any quantity of a controlled substance, with little or no expectation of its recovery by a federal law enforcement agency. 	<p>Approval level required</p> <p>Special agent in charge (or the equivalent) and the appropriate chief federal prosecutor (e.g., U.S. Attorney)</p>
Tier 2 Otherwise illegal activities	
<p>Description</p> <p>Any other activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization.</p>	<p>Approval level required</p> <p>Senior field manager (second-line supervisor, typically GS-15 rank or higher)</p>
Activities that agencies cannot authorize	
<p>Description^c</p> <p>A law enforcement agent is never permitted to authorize a confidential informant to:</p> <ul style="list-style-type: none"> • participate in an act of violence; • participate in an act that constitutes obstruction of justice (e.g., perjury, witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence); • participate in an act designed to obtain information for the law enforcement agency that would be illegal if conducted by a law enforcement officer (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search); or • initiate or instigate a plan or strategy to commit a federal, state, or local offense. 	<p>Approval level required</p> <p>Not applicable—cannot be authorized at any level</p>

Source: Department of Justice, *The Attorney General's Guidelines Regarding the Use of Confidential Informants*, and the U.S. Sentencing Commission, *Guidelines Manual*. | GAO-15-807

^aThe manufacture, importing, exporting, possession, or trafficking of a controlled substance qualifies for Tier 1 if the quantity is equal to or exceeds the quantities specified in United States Sentencing Guidelines § 2D1.1(c)(1).

^bAn activity involving financial loss would qualify for Tier 1 if the amount of the loss is equal to or exceeds the amounts specified in U.S. Sentencing Guidelines § 2B1.1(b)(1)(I).

^cThe provisions in *The Attorney General's Guidelines Regarding the Use of Confidential Human Sources* vary slightly from those in *The Attorney General's Guidelines Regarding the Use of Confidential Informants*. The FBI is never permitted to authorize an informant to participate in (1) an act of violence, except in self-defense, or (2) an act designated to

obtain information for the FBI that would be unlawful if conducted by a law enforcement agent.

According to the Guidelines, agents are to instruct informants that they may be prosecuted for any unauthorized illegal activity. However, informants who are prosecuted for such conduct may claim in defense that the government authorized or immunized their crimes.¹⁰ To address this concern, if an agency has grounds to believe that an informant has engaged in unauthorized illegal activity, the Guidelines require the agency to notify a federal prosecutor of the suspected activity and the individual's status as an informant. The Guidelines require the federal prosecutor and the agency's local special agent in charge to consult and concur regarding whether to notify state and local authorities about the individual's participation in illegal activity or the individual's status as an informant. Furthermore, if an agency has reason to believe that an informant has failed to comply with the specific terms of an authorization for otherwise illegal activity, the Guidelines require the agency to make a determination whether the informant should be deactivated, and the informant may be subject to prosecution for any unauthorized illegal activity.

Case Study: Importance of Overseeing Authorized Otherwise Illegal Activity

As part of Operation Wide Receiver, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) agents did not secure the approvals necessary under the Guidelines for allowing an informant (a licensed firearm dealer) to conduct otherwise illegal activity. Agents did not closely monitor the informant's sale of firearms, including firearms sold to buyers with suspected cartel ties, and in not doing so, the agents gave little to no consideration for the public safety repercussions. Subsequently, in November 2011, ATF revised its confidential informant policies and incorporated the Guidelines' provisions regarding authorizing otherwise illegal activity for informants, including provisions requiring the agency to closely supervise the activity.

Source: Department of Justice Office of the Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* (Washington, D.C.: September 2012). | GAO-15-807

¹⁰DOJ, Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines*.

Five Agencies' Policies Do Not Include All Requirements in the Guidelines

DOJ and DHS component agencies' policies in our review generally address a majority of the Guidelines' requirements for vetting potential informants; however, about half of those policies are not fully consistent with the provisions for overseeing informants' illegal activities. Though DOJ requires agencies to follow the Guidelines and has an established structure for overseeing this, the department has not ensured that DEA's or USMS's policies explicitly address all provisions in the Guidelines for overseeing informants' illegal activities. USSS, USCG, and ICE within DHS also have policies that do not fully reflect provisions in the Guidelines, in part because DHS does not explicitly require them to develop policies that adhere to the Guidelines. Nevertheless, federal prosecutors expect DHS agencies to follow the Guidelines to support prosecution for cases involving informants, and without additional DHS guidance regarding expectations for adhering to the Guidelines, DHS cannot ensure consistency of policy and practice across all of its agencies.

Agencies' Policies Are Generally Consistent with the Guidelines on How to Vet Informants

The eight DOJ and DHS component agencies in our review generally require agents to consider the factors identified in the Guidelines when conducting initial suitability reviews prior to utilizing a person as an informant. Specifically, with respect to the initial vetting of informants, we found that the FBI's policy addresses all of the factors outlined in *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources*, and the other seven agencies all require agents to address the following factors, among others, in an informant's initial suitability review:

- the person's reliability and truthfulness,
- whether the person is a substance abuser or has a history of substance abuse,
- whether the person is reasonably believed to pose a danger to the public, and
- whether the person has a criminal history.

Appendix IV provides additional detail on our assessment of the extent to which each agency's policy is consistent with specific provisions of the Guidelines, including the extent to which each agency addresses the required factors for an initial suitability review. Furthermore, all of the agencies' policies require that a continuing suitability review be conducted at least annually, in accordance with the Guidelines.

Five Agencies' Policies Are Not Fully Consistent with the Guidelines on How to Oversee Informants' Illegal Activities

ATF, the FBI, and CBP have policies that are consistent with each provision of the Guidelines regarding oversight of informants' illegal activities. However, the other five agencies—specifically, DEA, USMS, ICE, USSS, and USCG—have policies that we determined are either partially consistent with or do not address some provisions in the Guidelines regarding oversight of informants' illegal activities. As a result, these agencies do not have policies that explicitly inform their agents of all the activities and safeguards that the Guidelines outline for minimizing the risks involved with using informants. Implementation of the processes in the Guidelines helps increase the likelihood that informants will not engage in criminal activity that may be detrimental to the agency or the general public, thereby preventing issues with informants that agencies have experienced in the past.¹¹

Written, advance authorization of otherwise illegal activity: As depicted in table 1, three of the agencies' policies (USMS, USCG, and USSS) do not have any content that addresses the Guidelines' requirement to authorize otherwise illegal activity in advance, in writing, and for a specified period of time not to exceed 90 days. Furthermore, three of the agencies' policies (USMS, USCG, and USSS) do not require officials to document why the agency needs the informant to engage in the otherwise illegal activity—for example, that the informant's role in the activity would obtain information that is not otherwise reasonably available or that it would prevent injury or significant damage to property. These same agencies, along with DEA and ICE, are partially consistent or not consistent with the Guidelines' requirements to provide written instructions to the informant regarding the parameters of the authorized otherwise illegal activity and to have the informant sign an acknowledgment of these instructions.

¹¹In 2005, DOJ's Office of the Inspector General released a report that, among other things, discussed several cases in which confidential informants filed claims against the FBI alleging that the agency had authorized the informants to participate in illegal activity that went beyond the scope of what the agency had intended.

Table 1: Extent to Which the Departments of Justice (DOJ) and Homeland Security (DHS) Agencies' Confidential Informant Policies Address Advance Authorization for Otherwise Illegal Activity

Summary of Attorney General's Guidelines provisions	DOJ component agencies				DHS component agencies			
	ATF	DEA	FBI	USMS	CBP	ICE	USCG	USSS
Otherwise illegal activity must be authorized in advance and in writing for a specified period, not to exceed 90 days.	●	◐ ^a	●	○	●	◐ ^a	○	○
The official who authorizes otherwise illegal activity must document a finding regarding the need for the informant to engage in the activity and that the benefits to be obtained from the informant's participation in the activity outweigh the risks.	●	◐	●	○	●	◐	○	○
After an informant is authorized to engage in otherwise illegal activity, law enforcement agents shall review with the informant written instructions regarding the authorized activity and require signed acknowledgment from the informant.	●	◐	●	○	●	◐	○	○

Legend: ATF = Bureau of Alcohol, Tobacco, Firearms and Explosives; DEA = U.S. Drug Enforcement Administration; FBI = Federal Bureau of Investigation; USMS = U.S. Marshals Service; CBP = U.S. Customs and Border Protection; ICE = U.S. Immigration and Customs Enforcement; USCG = U.S. Coast Guard; USSS = U.S. Secret Service; ● = the component agency's policy is consistent with all aspects of the provision (consistent); ◐ = the component agency's policy is consistent with some, but not all, aspects of the provision (partially consistent); ○ = the component agency's policy is not consistent with any aspect of the provision or the component agency has no policy that corresponds to the provision (not consistent).

Source: Attorney General's Guidelines and GAO analysis of agencies' policies. | GAO-15-807

^aAccording to DEA and ICE officials, both agencies authorize otherwise illegal activity for individual operations rather than over an extended period of time. However, we found that the practices that agency officials described for adhering to the Guidelines was not explicitly stated in their policies.

Suspension or revocation of authorization for otherwise illegal activity: Furthermore, as depicted in table 2, five agencies (DEA, USMS, ICE, USSS, and USCG) do not have policies that are consistent with some or all of the Guidelines' provisions regarding the suspension or revocation of authorization for an informant to engage in otherwise illegal activity. Under the Guidelines, agencies are required to take certain actions when suspending authorization for otherwise illegal activity for legitimate reasons unrelated to the informant's conduct, but DEA, USMS, ICE, USSS, and USCG do not have any content in their policies that addresses these requirements.¹² If an agency has reason to believe that an informant has failed to comply with the specific terms of an authorization for otherwise illegal activity, the Guidelines require agencies to undertake specific actions to revoke the authorization, but USMS and

¹²In such circumstances, the Guidelines require the agency to suspend the authorization for otherwise illegal activity, explain to the informant that the authorization is suspended, and document these actions in the informant's files.

USSS do not have any content in their policies that addresses these requirements.¹³

Table 2: Extent to Which the Departments of Justice (DOJ) and Homeland Security (DHS) Agencies' Confidential Informant Policies Address Suspension or Revocation of Authorization for Otherwise Illegal Activity

Summary of Attorney General's Guidelines provisions	DOJ component agencies				DHS component agencies			
	ATF	DEA	FBI	USMS	CBP	ICE	USCG	USSS
Whenever an agency cannot, for legitimate reasons unrelated to the informant's conduct (e.g., unavailability of the case agent), comply with precautionary measures, such as closely monitoring the informant's illegal activities, the agency shall immediately (1) suspend the informant's authorization to engage in otherwise illegal activity until such time as the agency can comply with the precautionary measures, (2) inform the informant that this person's authorization has been suspended, and (3) document these actions in the informant's files.	●	○ ^a	●	○	●	○ ^a	○	○
If an agency has reason to believe that an informant has failed to comply with the specific terms of the authorization, the agency shall immediately (1) revoke the authorization, (2) notify the informant that this person is no longer authorized to engage in any otherwise illegal activity, (3) comply with requirements to notify the appropriate chief federal prosecutor(s), ^b (4) make a determination whether the informant should be deactivated pursuant to other provisions in the Guidelines, and (5) document these actions in the informant's files.	●	●	●	○	●	◐	◐	○
Immediately after the informant has been notified that this person is no longer authorized to engage in any otherwise illegal activity, the informant shall be required to sign or initial a written acknowledgment of this fact.	●	○	●	○	●	○	○	○

Legend: ATF = Bureau of Alcohol, Tobacco, Firearms and Explosives; DEA = U.S. Drug Enforcement Administration; FBI = Federal Bureau of Investigation; USMS = U.S. Marshals Service; CBP = U.S. Customs and Border Protection; ICE = U.S. Immigration and Customs Enforcement; USCG = U.S. Coast Guard; USSS = U.S. Secret Service; ● = the component agency's policy is consistent with all aspects of the provision (consistent); ◐ = the component agency's policy is consistent with some, but not all, aspects of the provision (partially consistent); ○ = the component agency's policy is not consistent with any aspect of the provision or the component agency has no policy that corresponds to the provision (not consistent).

Source: Attorney General's Guidelines and GAO analysis of agencies' policies. | GAO-15-807

^aAccording to DEA and ICE officials, these agencies do not authorize informants to participate in otherwise illegal activity without agent supervision, and, therefore, these officials said they believe this requirement is not applicable to their respective agencies. For example, according to DEA, certain supervisory procedures are required for the purchase of evidence (narcotics), which comprise the majority of DEA's authorized otherwise illegal activity. However, we found that DEA's and ICE's

¹³In such circumstances, the Guidelines require agencies to revoke the authorization, explain to the informant that this person is no longer authorized to engage in any otherwise illegal activity, require the informant to sign a written acknowledgment of this fact, notify relevant chief federal prosecutors, determine whether the informant should be deactivated, and document these actions in the informant's file.

policies do not explicitly state that direct supervision of an agent is required for all instances of an informant's participation in otherwise illegal activity.

^bA chief federal prosecutor can be (1) a U.S. Attorney; (2) the head of the Criminal Division, Tax Division, Civil Rights Division, Antitrust Division, or Environmental and Natural Resources Division of the Department of Justice; or (3) the head of any other litigating component of the Department of Justice with authority to prosecute federal criminal offenses.

Senior officials at multiple agencies told us that, in practice, their agencies address required Guidelines provisions, even though the provisions are not explicitly outlined in the policy. Headquarters officials from DEA, ICE, USCG, and USSS who are responsible for developing and distributing the agencies' informant policies stated that though their respective policies may not explicitly contain some or all of a particular provision of the Guidelines, these agencies believe their agents and supervisors implement some of the Guidelines' provisions in practice. For example, ICE officials stated that ICE's practice is to authorize otherwise illegal activity for a specific operation and that such an authorization would not cover a time period as long as 90 days. However, it is not clear in the policy that authorization for informants' otherwise illegal activities is to be limited to 90 days. Given that the Guidelines were developed to address the substantial risks involved in using informants, it is important that policies include the specific procedures that implement the requirements of the Guidelines. For example, informant program management and supervisory officials told us that when an agent has a question about a required procedure, they will direct the agent to the requirements in the agency's policy. Therefore, by explicitly including in the agencies' policies certain practices that the Guidelines require, agencies would be better positioned to provide sufficient guidance to their agents and supervisors to ensure that agents are implementing these practices in accordance with the Guidelines.

Senior headquarters officials from DOJ agencies whose policies were not consistent with the Guidelines' provisions discussed above provided additional rationales and approaches for their agencies. Two senior headquarters USMS officials who oversee the agency's policy stated that USMS does not authorize otherwise illegal activity because USMS's mission is to locate and arrest fugitives. Therefore, according to USMS officials, USMS does not expect its informants to provide information over a period of time regarding felonious criminal activities the way that other agencies' informants do. However, USMS's policy includes instructions that Deputy U.S. Marshals are required to provide to informants, and these instructions refer to the possibility that the agency could authorize otherwise illegal activity. Specifically, USMS's policy states that an informant is not to engage in any unlawful acts, "except as specifically

authorized by representatives of the USMS.” This language suggests that the agency could authorize an informant to engage in otherwise illegal activity, and there are no USMS policy provisions to inform agents that they are not permitted to authorize such an activity. Because the policy does not provide any further discussion of the procedures for authorizing otherwise illegal activity, this ambiguity in the policy could result in an agent authorizing an activity without adhering to the provisions set forth in the Guidelines. USMS officials agreed that, based on our findings, information about the role of informants in otherwise illegal activity could be stated more explicitly in the agency’s policy, and they will plan to update the policy in the future, but officials did not have specific details about their next steps.

With respect to the Guidelines’ requirement to authorize otherwise illegal activity in advance, in writing, and for a specified period of time not to exceed 90 days, DEA officials stated that their policy is more restrictive than the Guidelines because the agency authorizes otherwise illegal activity for a given operation that occurs within a time frame shorter than 90 days. However, our review of DEA’s policy found that it does not state this explicitly, and therefore a DEA agent looking to DEA’s policy for guidance may not understand that agents are expected to prepare documentation in accordance with the Guidelines for all circumstances that would be considered otherwise illegal activity. With respect to providing informants instructions for each instance of otherwise illegal activity, DEA’s policy requires briefing the informant for an operation, but the policy does not meet the specific requirements in the Guidelines that instructions be provided in writing and that the informant sign an acknowledgment of these instructions. Without such documentation, if an informant engages in an activity that exceeds the scope of the authorization, the agency may not be able to demonstrate that the informant’s actions were not authorized, thereby limiting the agency’s ability to prosecute the informant for the unauthorized illegal activity.

The Guidelines require DOJ component agencies to submit informant policies to the Assistant Attorney General for the Criminal Division for review, but these reviews did not ensure that DEA’s and USMS’s policies explicitly address all provisions of the Guidelines.¹⁴ DEA and USMS each

¹⁴The Criminal Division approved USMS’s policy in 2002 and DEA’s policy in 2004. ATF’s and the FBI’s policies—which the Criminal Division reviewed more recently than DEA’s and USMS’s policies—are consistent with the provisions in the Guidelines that we assessed.

submitted agency-specific policies to the Criminal Division for review after the latest version of the Guidelines was issued, in May 2002. Criminal Division officials stated that they reviewed documentation, where available, reflecting the review and approval of these agencies' policies. According to Criminal Division officials, the agencies submitted their respective policies and made revisions as a result of the Criminal Division's review, and the Criminal Division approved the amended policies. However, as discussed above, our assessment identified that DEA's and USMS's policies were not fully consistent with the Guidelines. The Guidelines permit component agencies to make departures from the Guidelines by seeking an exception or through a dispute resolution process. However, according to two senior Criminal Division officials, neither agency applied for a departure from the Guidelines. During our meeting with these officials, they stated that noncompliance with provisions in the Guidelines could have serious effects on prosecution and that agencies' policies are the tool for ensuring that agents know what steps are required in using informants. Accordingly, policies that do not address all requirements in the Guidelines could result in agents not being aware of the necessary precautions to take when working with informants, and not taking such precautions could jeopardize prosecutions. In response to our findings, Criminal Division officials said that they plan to revisit the agencies' policies in coordination with the component agencies, but did not provide further details on their plans.

As discussed earlier in this report, federal prosecutors expect DHS agencies to adhere to the Guidelines to support successful prosecution through DOJ prosecuting offices. Not adhering to the Guidelines can affect agencies' cases for prosecution and put agencies at risk when informants commit unauthorized crimes. For example, an official at one field division of a DOJ component agency we visited said that an informant continued to engage in illegal activities after an authorization had expired, and because the agency had documentation that the informant was no longer authorized to do so, the informant could not claim that the activity was authorized. This ensured that the government could successfully prosecute the informant for the activity that occurred outside of the authorization. Additionally, complying with the Guidelines can help an agency demonstrate control of how the informant obtained evidence for the case. Demonstrating such control can help to prevent the possibility that a defendant could undermine the prosecution's case by attacking the credibility or role of an informant.

In contrast to DOJ component agencies, DHS agencies do not have guidance from the department level instructing or requiring the agencies

to develop policies that directly match the Guidelines. Officials from the Offices of the Chief Security Officer, Policy, and the General Counsel said that they do not have an oversight role regarding DHS agencies' informant policies or the agencies' use of informants, although the Office of the General Counsel may provide guidance on a case-by-case basis when an agency requests assistance. Senior officials from the Office of the Chief Security Officer said that the DHS component agencies had their own informant policies prior to the formation of DHS, and therefore the agencies continued to operate under component-specific policies since that time without additional involvement from the department. Without departmental oversight, the DHS agencies have independently managed their own policies and have different perspectives about the importance of incorporating all provisions of the Guidelines. As a result, some agencies do not incorporate all requirements in the Guidelines that can be important for supporting prosecution. Specifically, four senior USSS officials who manage the agency's informant policy said that they would incorporate provisions that were missing, according to our review. USSS subsequently made changes to its policy in February 2015. Similarly, two senior USCG officials who manage the agency's policy said that they would incorporate missing provisions, although at that time, they could not estimate when a revised policy would be drafted or implemented. However, several ICE headquarters officials questioned whether their agency is subject to the Guidelines, as the Guidelines explicitly apply to DOJ, but not DHS, agencies. These officials stated that they may consider amending their policy based on the results of our review.¹⁵

Providing department-level guidance regarding compliance with the Guidelines would be consistent with federal internal control standards and help support the DHS Secretary's priority to achieve a unified DHS across its many components. Federal internal control standards require that authority and responsibility be defined throughout an organization, in consideration of factors such as the nature of operations.¹⁶ Given that the

¹⁵ICE officials also stated that they believe ICE's practice is more restrictive with respect to the requirement for documenting otherwise illegal activity. ICE officials explained that, like DEA, ICE authorizes otherwise illegal activity for a given operation that occurs within a time frame shorter than 90 days. However, we found that ICE's policy is not clear in directing agents that each instance of otherwise illegal activity is required to be authorized as part of an operation and documented in advance of the activity.

¹⁶[GAO/AIMD-00-21.3.1](#).

information from DHS agencies' investigations flows to the U.S. Attorneys within DOJ for prosecution, it is important to define the responsibilities for DHS agencies with respect to adhering to the standards that apply at prosecution, such as the Guidelines. The Secretary of Homeland Security stated in *The 2014 Quadrennial Homeland Security Review* that one of the highest priorities is to ensure that the department invests and operates in a cohesive, unified fashion and makes decisions that strengthen departmental unity of effort.¹⁷ In DHS's 2012-2016 Strategic Plan, the department identified a goal to improve departmental management, policy, and functional integration. Part of the steps identified under this goal is establishing an executive decision support structure to provide strategic direction for program management processes, among other processes. Enhancing DHS's oversight of its component agencies' informant policies could help promote adherence to the Guidelines, consistency in the approach to overseeing informants across component agencies in support of DHS's unity of effort goal, and accountability for agencies to meet prosecution standards.

Selected DOJ and DHS Agencies Monitor Compliance with Their Informant Policies but Not the Guidelines' Provisions Missing from These Policies

DEA, the FBI, ICE, and USSS—the four agencies we reviewed that had the highest numbers of informants in fiscal year 2013—have processes in place, such as ongoing monitoring activities and separate evaluations, which are designed to help ensure compliance with their respective informant policies. However, as discussed earlier, DEA's, ICE's, and USSS's informant policies do not explicitly address some requirements in the Guidelines, particularly those related to overseeing informants' illegal activities. Thus, these agencies' monitoring processes, do not verify compliance with these provisions in the Guidelines. In contrast, the FBI's processes monitor compliance with provisions in the Guidelines for both vetting informants and overseeing informants' illegal activities.

¹⁷DHS, *The 2014 Quadrennial Homeland Security Review*, (Washington, D.C.: June 18, 2014). Section 707 of the Homeland Security Act of 2002, Pub. L. No. 107-296, as amended (6 U.S.C. § 347) requires the Secretary of Homeland Security to conduct a review of the homeland security of the nation beginning in fiscal year 2009 and every 4 years thereafter.

Selected DOJ and DHS Component Agencies Have Monitoring Processes to Assess Compliance with Their Agencies' Respective Informant Policies

DEA, the FBI, ICE, and USSS have monitoring processes that are designed to help ensure compliance with their informant policies. In particular, these agencies have mechanisms in place, such as requiring regular supervisory and managerial reviews, consistent with federal internal control standards for ongoing monitoring.¹⁸ At some agencies, an assigned informant coordinator is to conduct additional reviews to ensure the documentation is complete, and initiates periodic reminders for agents to complete required documentation. Additionally, consistent with federal internal control standards for separate evaluations, each agency performs headquarters-led on-site inspections, and some agencies also have field office-based inspection programs.

Ongoing Monitoring Processes

Consistent with federal internal control standards, these four agencies have ongoing monitoring processes that include the following:

- **Supervisory and managerial oversight.** All four agencies' monitoring processes include the requirement for regular supervisory and managerial reviews that check for inconsistencies with policy. For example, all four agencies require a supervisor to review informant initial and continuing suitability reviews and assess any risk factors identified for each informant. Additionally, these agencies have developed administrative evaluation tools, such as standardized forms that correspond with their respective policy requirements, to help ensure that agents capture necessary information when vetting an informant.¹⁹ Supervisory and managerial reviews are to be used to verify that agents complete these forms correctly and properly store them in the informant's file.
- **Confidential informant coordinators.** DEA, the FBI, and ICE policies call for informant coordinator roles, or similar position assignments, and officials at the three USSS offices we visited said that they also have assigned staff to carry out similar responsibilities.

¹⁸[GAO/AIMD-00-21.3.1](#).

¹⁹The FBI's automated informant management system is designed to ensure that all required data fields for vetting an informant and authorizing otherwise illegal activity are completed prior to submitting the electronic documentation for approval. DEA, ICE, and USSS apply similar methods through a combination of electronic and hard copy standardized forms; all three agencies require the use of standardized forms that correspond with their respective policy requirements for conducting initial and continuing suitability reviews, providing instructions to the informant, and performing criminal history checks, among other forms, when vetting an informant.

Coordinators or personnel in similar positions we spoke with at each of the four component agencies told us that they employ various practices, such as initiating reminders to agents and supervisors to meet deadlines (e.g., for continuing suitability reviews), and periodically reviewing individual forms or whole informant files to ensure compliance with agency policies. According to headquarters and field officials from the four agencies, these dedicated positions help to ensure adherence with informant policies at the field division level by providing support to field staff on working with informants.

Separate Evaluations

DEA, the FBI, ICE, and USSS also perform separate evaluations, through headquarters-led on-site inspection programs that occur on a 2- to 5-year cycle. Additionally, DEA and ICE have field-based inspection programs to assess compliance with informant policies between regularly scheduled headquarters inspections. Consistent with federal internal control standards, both types of inspections help to monitor the extent to which agents are complying with their respective informant policies.

- **Headquarters-led inspection program.** All four agencies' on-site inspections assess compliance with their informant policies, and some of these inspections include inspecting administrative tools and systems (e.g., how informant files are stored, the security of the file room), reviewing the functions of officials responsible for overseeing the informant program (e.g., managers, informant coordinator), and talking to informants themselves to make sure the informants are aware of key procedures.
- **Field office–based inspection programs.** DEA, ICE, and the FBI have field office–based programs that involve independent reviews for compliance with agency policies.²⁰ DEA and ICE also require their field divisions to conduct self-inspections for compliance in major program areas, including informant management. According to DEA and ICE field officials, during the self-inspection process, field supervisors are to review other supervisors' informant files to determine whether the files comply with required policies and procedures. Additionally, in October 2014, the FBI implemented a field-based program that involves a supervisor in one field office reviewing, with the support of an intelligence analyst, informant files

²⁰USSS does not have a field office–based program that involves independent reviews of informant files for compliance with agency policies.

from another field office for compliance with the informant policy, among other things. Each FBI field office also has a division compliance council to monitor, detect, and mitigate compliance risks, including those related to informants.

As part of the monitoring processes described above, these four agencies also have procedures for addressing serious violations of informant policies, including steps for referring agent misconduct when working with an informant.²¹ Officials from these four agencies stated that alleged violations of their informant policies can be reported by an agent, by a supervisor while conducting a file review, or by a third party such as the informant or a person who has become aware of the violation. For example, inspectors are required to address in the inspections report any significant deficiency findings identified. According to officials, findings identified during an inspection are handled on a case-by-case basis and directed to headquarters-level management officials—such as inspection unit officials or the agencies’ Offices of Professional Responsibility, Integrity, or Internal Affairs—to ensure accountability for any policy violations.²² These agencies report that failure to comply with the provisions of their respective policies may result in disciplinary action, which could involve dismissal of the employee. Additionally, these agencies’ Offices of Professional Responsibility or Internal Affairs, or Inspectors General, can receive allegations of misconduct identified outside of an inspection, and these offices have procedures for investigating such allegations.

We found that the agencies’ inspections processes can help to identify deficiencies and develop corrective action steps. We reviewed examples of inspection reports from each agency; in general the reports did not identify deficiencies that would indicate systemic non-compliance, and any deficiencies noted were isolated issues. The reports we reviewed also documented the corrective actions taken to address these deficiencies, such as completing the required documentation and adding a corrective action memo to the informant file as an update.

²¹Internal control standards require that ongoing monitoring occurs in the normal course of operations and should include policies and procedures for promptly resolving findings of audits and other reviews. [GAO/AIMD-00-21.3.1](#) .

²²For example, DEA uses a “special issue” finding category in the inspections report if a problem or deficiency may require headquarters intervention.

DEA, ICE, and USSS Do Not Have Reasonable Assurance That They Are Following the Guidelines for Overseeing Informants' Illegal Activities

As noted above, DEA, the FBI, ICE, and USSS have monitoring processes in place to help ensure compliance with their respective policies on handling informants. However, as discussed earlier in this report, DEA, ICE, and USSS have policies that do not explicitly address all of the Guidelines' provisions related to oversight of informants' illegal activities. Accordingly, these component agencies' monitoring processes do not assess compliance with the provisions in the Guidelines that are missing from their policies (i.e., areas where we found that the agencies' policies were not consistent with provisions in the Guidelines). The FBI, on the other hand, fully addresses each of the provisions of the Guidelines in its informant policy, and its monitoring processes address oversight of informants' illegal activity in accordance with its policy and the Guidelines.

In particular, DEA's, ICE's, and USSS's inspections correspond with the requirements in their respective informant policies, but do not address provisions that are missing from the policies. Accordingly, these inspections generally address Guideline provisions for vetting an informant. However they do not generally address compliance with illegal activity provisions, in part because these provisions are not explicitly addressed in the agencies' respective policies. In response to our findings, senior program officials at DEA, ICE, and USSS confirmed that their informant program inspections do not assess provisions in the Guidelines that are not explicitly stated in the agencies' respective informant policies. As a result, agencies may not have reasonable assurance that agents are complying with provisions in the Guidelines for overseeing informants' illegal activities.

Conclusions

The use of confidential informants is an important law enforcement tool that supports investigations and prosecutions, but because informants often have criminal histories, it is important for agencies to have procedures that address the associated risks. *The Attorney General's Guidelines* established procedures to help ensure that agencies exercise their authorities—especially for vetting the suitability of an informant and authorizing the informant to conduct otherwise illegal activities—appropriately and with adequate oversight of informants. However, partly as a result of limited departmental oversight, some agencies' policies are not consistent with all of the provisions in the Guidelines, particularly ones regarding overseeing informants' illegal activities. Policies that explicitly impose the safeguards identified in these provisions of the Guidelines can put agencies in a better position to minimize the risks of using informants and ensure optimal prosecution of cases when using informants. For

example, if an agency does not adhere to the Guidelines' provisions for overseeing informants' otherwise illegal activities, a defendant could attempt to undermine the prosecution's case by attacking the role of the informant in the case. If the informant engaged in unauthorized illegal activity, the agency could also find itself unable to successfully prosecute the informant for the crime if the agency did not fully document and explain to the informant the parameters of what the informant is and is not allowed to do in furtherance of the investigation. Furthermore, without ensuring that monitoring processes explicitly address all of the requirements in the Guidelines for vetting and overseeing informants' illegal activities, agencies cannot fully ensure that they are complying with the Guidelines. Additional oversight at the department level could also help to ensure that the agencies are taking the necessary steps to comply with the Guidelines to effectively oversee informants in support of prosecution.

Recommendations for Executive Action

To help ensure that agencies' policies and oversight are fully consistent with *The Attorney General's Guidelines Regarding the Use of Confidential Informants*, we recommend that

- the Administrator of DEA and the Director of USMS, with assistance and oversight from the DOJ Criminal Division, update their agencies' respective policies and corresponding monitoring processes to explicitly address the Guidelines' provisions on oversight of informants' illegal activities;
- the Secretary of the Department of Homeland Security provide oversight and guidance to ensure that DHS agencies comply with the Guidelines; and
- the Assistant Secretary of ICE and the Commandant of USCG update their respective agencies' informant policies and corresponding monitoring processes to explicitly address the Guidelines' provisions on oversight of informants' illegal activities.

Agency Comments and Our Evaluation

We provided a draft of the sensitive version of this report to DOJ and DHS for their review and comment.²³ DOJ and DHS provided written comments, which are reproduced in appendixes V and VI, respectively. In their comments, DOJ and DHS concurred with our recommendations and described actions under way or planned to address them. Specifically:

- DOJ concurred with our recommendation that DEA and USMS update their respective policies and corresponding monitoring processes, and stated that DEA and USMS have begun updating their policies in consultation with the Criminal Division.
- DHS concurred with our recommendation that DHS provide oversight and guidance to ensure that DHS agencies comply with the Guidelines. DHS stated that it plans to designate a DHS entity to be responsible for developing, implementing, and overseeing policies and programs to ensure DHS-wide compliance with the Guidelines, as appropriate.
- DHS concurred with our recommendation that ICE and USCG update their respective policies and corresponding monitoring processes. DHS stated that ICE will review requirements related to the oversight of informants' illegal activities as part of an ongoing update to its informant handbook. DHS stated that USCG has issued an interim policy that requires compliance with the Guidelines and that USCG also plans to do a comprehensive review and revision of its policy.

When implemented, these ongoing and planned actions should address the intent of our recommendations, result in revised policies that are consistent with the Guidelines, and ensure that DOJ and DHS agencies impose safeguards that minimize the risk of using informants. DHS and DOJ also provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Attorney General, the Secretary of Homeland Security, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

²³GAO-15-242SU.

If you or your staff have any questions about this report, please contact me at (202) 512-9627 or maurerd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix VII.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. C. Maurer', with a long horizontal flourish extending to the right.

David C. Maurer
Director, Homeland Security and Justice

Appendix I: Scope and Methodology

For this report, we reviewed the policies and processes for the eight Department of Justice (DOJ) and Department of Homeland Security (DHS) component agencies that used confidential informants in fiscal year 2013, the most recent year for which data were available. The DOJ agencies included in our review are the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the U.S. Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); and the U.S. Marshals Service (USMS). The DHS agencies are U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), the U.S. Coast Guard (USCG), and the U.S. Secret Service (USSS).¹ For each agency, we reviewed the policies and processes that apply to criminal informants that agencies oversee domestically; we did not review policies or processes that apply only to informants that assist with national security investigations. We conducted interviews with officials responsible for overseeing these agencies' respective informant programs, as well as an attorney adviser from the Executive Office for U.S. Attorneys because the U.S. Attorneys' Offices prosecute cases for these agencies, including cases that involve the use of informants.

To determine the extent to which DOJ and DHS component agencies' policies include procedures outlined in *The Attorney General's Guidelines*, we assessed the eight agencies' informant policies against provisions in the Guidelines regarding vetting informants or overseeing informants' illegal activities.² Specifically, we compared the FBI's policy against *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources*, and we compared the policies of the other seven agencies—ATF, DEA, USMS, CBP, ICE, USCG, and USSS—against *The Attorney General's Guidelines Regarding the Use of Confidential Informants*. We identified provisions in each set of Guidelines that relate to vetting informants (see app. II) and overseeing informants' illegal activities (see app. III). To conduct our assessment, two

¹*The Attorney General's Guidelines Regarding the Use of Confidential Informants* defines a confidential informant as any individual who provides useful and credible information to a law enforcement agency regarding felonious criminal activities, and from whom the law enforcement agency expects or intends to obtain additional useful and credible information regarding such activities in the future. Agencies may use different terms to refer to such individuals.

²Specifically, these provisions addressed requirements for initial suitability reviews, approval for special categories of informants, continuing suitability reviews, reviews and approvals for long-term informants, and oversight of authorized otherwise illegal activity and unauthorized illegal activity.

independent reviewers examined each agency's informant policy and related documents to determine the extent to which an agency was consistent with each provision we identified in the Guidelines. We defined the assessment categories as follows:

- **Consistent.** The agency's policy documents generally address each requirement in the provision.
- **Partially consistent.** The agency's policy documents address some, but not all, requirements in the provision
- **Not consistent.** The agency's policy documents address none of the requirements in the provision or are contradictory to the provision.

We compared the two reviewers' assessments, and where the assessments differed, the reviewers discussed the requirements in the Guidelines' provision and agency documentation to reach agreement on an assessment, and had an additional reviewer verify the assessment as appropriate. For any provisions that we assessed the agencies as partially consistent or not consistent with the Guidelines, we provided our preliminary assessments and reasoning to the agencies for additional information or discussion. Following these communications with agency officials, agency officials provided additional documentation that they said demonstrated the agency's consistency with the Guidelines. Two reviewers analyzed the additional documentation and reached agreement on our final assessments. Our assessment determined whether agencies meet the minimum criteria established in the Guidelines; the assessment did not evaluate the policies to identify leading practices or areas where agencies' policies exceed the requirements in the Guidelines. In addition to our assessment, we interviewed officials responsible for overseeing the agencies' informant programs about policies and processes for vetting informants and overseeing informants' illegal activities. We also reviewed guidance from and interviewed representatives of DOJ headquarters offices (Office of the Deputy Attorney General and Criminal Division) and DHS headquarters offices (Office of Policy, Office of the Chief Security Officer, and Office of the General Counsel).

To determine the extent to which selected DOJ and DHS component agencies have monitoring processes to ensure compliance with the Guidelines, we analyzed monitoring processes at four component agencies—two from DOJ, and two from DHS. Out of DOJ's total of four component agencies, we selected DEA and the FBI for analysis because these agencies used the most confidential informants in fiscal year 2013.

Likewise, out of DHS's total of four component agencies, we selected ICE and USSS for analysis for the same reason. We reviewed the FBI's, DEA's, ICE's, and USSS's internal review mechanisms and processes related to compliance with their respective informant policies. We compared these mechanisms and processes with *Standards for Internal Control in the Federal Government*, specifically standards that require agencies to develop an internal control monitoring system that allows agencies to ensure that ongoing monitoring occurs in the course of normal operations and separate evaluations are performed, as necessary, to assess the effectiveness of agency controls used for monitoring compliance with agency policies.³ Internal control is an integral component of an organization's management that provides reasonable assurance that agency objectives are achieved. Given this, we reviewed the elements of the FBI's, DEA's, ICE's, and USSS's processes that monitor and ensure compliance with informant policies.

We analyzed agencies' policies on monitoring and related documentation, including agency-wide forms used to document the use of informants and examples of inspection checklists, inspection reports, and corrective action reports. We compared the controls and processes described in these documents with those in *Standards for Internal Control in the Federal Government*.⁴ In doing so, we reviewed internal controls related to identifying opportunities for ensuring compliance with informant policies; we did not review all aspects of or conduct tests of these agencies' internal control systems. We did not review a representative sample of monitoring documents; however, the documents we reviewed demonstrate the structure of agencies' monitoring processes, such as what is covered in inspections, that allowed us to compare these monitoring processes against internal control standards.

Additionally, we visited these four agencies' field division locations in three cities that we selected based on the number of informants these agencies oversaw in those locations and geographical diversity. On the basis of interviews conducted regarding the systems and methods for recording information about the number of informants, we determined that the agencies' data on the number of informants were sufficiently reliable

³GAO, *Internal Control: Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

⁴GAO/AIMD-00-21.3.1.

for selecting the agencies we reviewed for this objective and selecting field locations to visit. At these 12 locations, we interviewed managerial and supervisory agents regarding how they oversee and monitor the use of confidential informants, and we analyzed supporting documentation, such as supervisory checklists.⁵ The results of the site visits are not generalizable to all field divisions, but provided important observations and insights into how these agencies oversee the use of informants using standardized, agency-wide methods and locally developed approaches. We also interviewed attorneys at each of the U.S. Attorneys' Offices located in the same cities as the agency field offices we visited to obtain the prosecutors' perspectives regarding the role of the Guidelines in supporting prosecution.⁶

We conducted this performance audit from August 2013 to March 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁵At each field office we visited, we met with at least one manager (special agent in charge or assistant special agent in charge) who oversees the use of confidential informants. We also met with confidential informant coordinators, or officials with similar responsibilities, in 11 of the 12 offices, and supervisory agents in 6 of the 12 offices.

⁶In one location, we met with the Chief of the Criminal Division for that U.S. Attorney's Office and another Assistant U.S. Attorney. In the second location, we met with the Chief of the Organized Crime Division for that U.S. Attorney's Office. In the third location, we met with the First Assistant U.S. Attorney.

Appendix II: Attorney General's Guidelines Provisions Regarding Vetting Informants

Table 3 provides a listing of the provisions from *The Attorney General's Guidelines Regarding the Use of Confidential Informants* and *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* that were included in our assessment of agencies' policies for vetting informants.

Table 3: Provisions of the Attorney General's Guidelines Related to Vetting Informants

<i>The Attorney General's Guidelines Regarding the Use of Confidential Informants (CI)</i>	<i>The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (CHS)</i>
Initial vetting	
Initial suitability determination	Initial validation
<p>Prior to utilizing a person as a CI, a case agent of a Department of Justice Law Enforcement Agency (JLEA) shall complete and sign a written initial suitability report and recommendation, which shall be forwarded to a field manager for his or her written approval. In completing the initial suitability report and recommendation, the case agent must address the following factors (or indicate that a particular factor is not applicable):</p> <ol style="list-style-type: none"> (1) whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution; (2) the person's motivation in providing information or assistance, including any consideration sought from the government for this assistance; (3) the person's age; (4) the person's alien status; (5) whether the person is a public official, law enforcement officer, union official, employee of a financial institution or school, member of the military services, a representative or affiliate of the media, or a party, or in a position to be a party to, privileged communications (e.g., a member of the clergy, a physician, or a lawyer); (6) the extent to which the person would make use of his or her affiliations with legitimate organizations in order to provide information or assistance to the JLEA, and the ability of the JLEA to ensure that the person's information or assistance is limited to criminal matters; (7) the extent to which the person's information or assistance would be relevant to a present or potential investigation or prosecution and the importance of such investigation or prosecution; (8) the nature of any relationship between the CI and the subject or target of an existing or potential investigation or prosecution, including but not limited to a current or former spousal relationship or other family tie, and any current or former employment or financial relationship; (9) the risk that the person might adversely affect a present or potential investigation or prosecution; (10) the extent to which the person's information or assistance can be corroborated; 	<p>General</p> <p>All Federal Bureau of Investigation (FBI) CHSs must be subjected to the validation process as provided in these Guidelines and other FBI policies.</p> <p>Time Limits</p> <p>The FBI, in consultation with the Assistant Attorneys General of the Criminal Division and the National Security Division of the Department of Justice, shall establish reasonable time limits for subjecting a source to the initial validation process that are compatible with these Guidelines and other FBI policies.</p> <p>Required Information</p> <p>In opening a CHS, an FBI agent shall document information pertaining to that source and forward it to an appropriate FBI supervisor for an initial validation. At a minimum, an FBI agent shall provide the following information to facilitate the initial validation process:</p> <ol style="list-style-type: none"> (1) basic identifying information that establishes the person's true identity, or the FBI's efforts to establish the individual's true identity; (2) a photograph of the person (when possible); (3) whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution; (4) the person's motivation for providing information or assistance, including any consideration sought from the government for this assistance; (5) any promises or benefits, and the terms of such promises or benefits, that are given a CHS by the FBI, federal prosecuting office (FPO), or any other law enforcement agency (if known, after exercising reasonable efforts); and

**Appendix II: Attorney General's Guidelines
Provisions Regarding Vetting Informants**

The Attorney General's Guidelines Regarding the Use of Confidential Informants (CI)

- (11) the person's reliability and truthfulness;
- (12) the person's prior record as a witness in any proceeding;
- (13) whether the person is reasonably believed to pose a danger to the public or other criminal threat, or is reasonably believed to pose a risk of flight;
- (14) whether the person is a substance abuser or has a history of substance abuse;
- (15) whether the person is a relative of an employee of any law enforcement agency;
- (16) the risk of physical harm that may occur to the person or his or her immediate family or close associates as a result of providing information or assistance to the JLEA;
- (17) the record of the JLEA and the record of any other law enforcement agency (if available to the JLEA) regarding the person's prior or current service as a CI, cooperating defendant/witness, or source of information, including, but not limited to, any information regarding whether the person was at any time terminated for cause

The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (CHS)

- (6) any other information that is required to be documented in the CHS's file pursuant to these Guidelines and FBI policies, including, but not limited to, the instructions provided to the CHS.

Continuous vetting

Continuing suitability review

Each CI's file shall be reviewed by the case agent at least annually. The case agent shall complete and sign a written continuing suitability report and recommendation, which shall be forwarded to a field manager for his or her written approval.

In completing the continuing suitability report and recommendation, the case agent must address:

- (1) the factors set forth above for the initial suitability report and recommendation (or indicate that a particular factor is not applicable),
- (2) the length of time that the individual has been registered as a CI, and
- (3) the length of time that the individual has been handled by the same agent or agents

Each JLEA shall establish systems to ensure that all available information that might materially alter a prior suitability determination, including, but not limited to, information pertaining to unauthorized illegal activity by the CI, is promptly reported to a field manager and then recorded and maintained in the CI's file.

Upon receipt of any such information, the field manager shall ensure that a new continuing suitability report and recommendation is promptly prepared in light of such new information.

Annual validation review

Each CHS's file shall be reviewed at least annually consistent with these Guidelines and other FBI policies.

The FBI shall establish procedures to ensure that all available information that might materially alter a prior validation assessment, including, but not limited to, information pertaining to unauthorized illegal activity by the CHS, is promptly reported to an FBI supervisor and then recorded and maintained in the file of the CHS.

**Appendix II: Attorney General's Guidelines
Provisions Regarding Vetting Informants**

The Attorney General's Guidelines Regarding the Use of Confidential Informants (CI)

The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (CHS)

Categories of informants requiring additional review and approval

Long-term CIs

When a CI has been registered for more than 6 consecutive years, and, to the extent such CI remains open, every 6 years thereafter, the Confidential Informant Review Committee (CIRC) shall review the CI's completed initial and continuing suitability reports and recommendations and decide whether, and under what conditions, the individual should continue to be utilized as a CI.

Every 3 years after a CI's file is reviewed pursuant to the above, if the CI remains registered, the JLEA shall conduct an internal review, including review by a senior headquarters official, of the CI's completed initial and continuing suitability reports and recommendations.

If the designated senior headquarters official decides that there are any apparent or potential problems that may warrant any change in the use of the CI, the official shall consult the appropriate senior field manager and provide the initial and continuing suitability report and recommendations to the CIRC for review in accord with requirements for the CIRC's review of CIs every 6 years.

Special approval requirements

High-level CIs

A high-level CI is CI who is part of the senior leadership of an enterprise that

- (1) has a national or international sphere of activities, or high significance to the JLEA's national objectives, even if the enterprise's sphere of activities is local or regional; and
- (2) engages in, or uses others to commit, conduct that involves
 - (a) the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the CI;
 - (b) corrupt conduct, or the significant risk of corrupt conduct, by senior federal, state, or local public officials;
 - (c) the manufacturing, importing, exporting, possession, or trafficking of controlled substances in a quantity equal to or exceeding those quantities specified in United States Sentencing Guidelines § 2D1.1(c)(1);
 - (d) financial loss, or the significant risk of financial loss, in an amount equal to or exceeding those amounts specified in United States Sentencing Guidelines § 2B1.1(b)(1)(I);
 - (e) a CI providing to any person (other than a JLEA agent) any item, service, or expertise that is necessary for the commission of a federal, state, or local offense, which the person otherwise would have difficulty obtaining; or

Long-term sources

When a CHS has been registered for more than 5 consecutive years, and to the extent such a source remains open, every 5 years thereafter, the FBI must seek written approval, in accordance with the relevant provisions for review by the Human Source Review Committee (HSRC), for the continued use of the source.

Defined categories of sources

Within 60 days of utilizing a CHS who meets any of the following definitions, the FBI must seek written approval, in accordance with the relevant provisions for review by an HSRC, for the continued use of the source unless an FPO attorney has existing oversight of a source because the source has agreed to testify in a federal criminal prosecution:

Senior leadership source: a CHS who is in a position to exercise significant decision-making authority over, or to otherwise manage and direct, the unlawful activities of the participants in a group or organization, involved in unlawful activities that are (a) nationwide or international in scope, or (b) deemed to be of high significance to the FBI's criminal investigative priorities, even if the unlawful activities are local or regional in scope. Such organizations shall include, but are not limited to, any La Cosa Nostra Family, Eurasian Organized Crime Group, or Asian Criminal Enterprise that is recognized by FBI headquarters, and any domestic or international terrorist organization that is recognized by FBI headquarters.

Privileged or media source: a CHS who is under the obligation of a legal privilege of confidentiality or affiliated with the media.

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(f) a CI providing to any person (other than a JLEA agent) any quantity of a controlled substance, with little or no expectation of its recovery by the JLEA.

Prior to utilizing an individual as a high-level CI, a case agent of a JLEA shall first obtain the written approval of the CIRC.

Individuals under the obligation of a legal privilege of confidentiality or affiliated with the media

Prior to utilizing as a CI an individual who is under the obligation of a legal privilege of confidentiality or affiliated with the media, a case agent of a JLEA shall first obtain the written approval of the CIRC.

Federal prisoners, probationers, parolees, detainees, and supervised releases

Consistent with extant Department of Justice requirements, a JLEA must receive the approval of the Criminal Division's Office of Enforcement Operations (OEO) prior to utilizing as a CI an individual who is in the custody of the United States Marshals Service or the Bureau of Prisons, or who is under Bureau of Prisons supervision.

Current or former participants in the Witness Security Program

Consistent with extant Department of Justice requirements, a JLEA must receive the approval of OEO and the sponsoring prosecutor (or his or her successor) prior to utilizing as a CI a current or former participant in the Federal Witness Security Program, provided further that the OEO will coordinate such matters with the United States Marshals Service.

State or local prisoners, probationers, parolees, or supervised releases

Prior to utilizing a state or local prisoner, probationer, parolee, or supervised releasee as a CI, a field manager of a JLEA shall determine if the use of that person in such a capacity would violate the terms and conditions of the person's incarceration, probation, parole, or supervised release. If the field manager has reason to believe that it would violate such terms and conditions, prior to using the person as a CI, the field manager or his or her designee must obtain the permission of a state or local prison, probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the CI's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate state or local official, the JLEA may seek to obtain authorization for the use of such individual as a CI from the state or local court then responsible for the individual's incarceration, probation, parole, or supervised release.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

High-level government or union source: a CHS who is either (a) in relation to the federal government or the government of a state, the chief executive, the official next in succession to the chief executive, or a member of the legislature, or (b) a president, secretary-treasurer, or vice president of an international or national labor union or the principal officer or officers of a subordinate regional entity of an international or national labor union. The term "regional entity" shall not include a local union or a group of local unions, such as a district council, combined together for purposes of conducting collective bargaining with employers.

Federal prisoners, probationers, parolees, and supervised releases

Consistent with extant Department of Justice requirements, the FBI must receive the approval of the Criminal Division's OEO prior to utilizing as a CHS an individual who is in the custody of the United States Marshals Service or the Bureau of Prisons, or who is under Bureau of Prisons supervision.

Current or former participants in the Witness Security Program

Consistent with extant Department of Justice requirements, the FBI must receive the approval of OEO and the sponsoring FPO attorney (or his or her successor) prior to utilizing as a CHS a current or former participant in the Federal Witness Security Program, provided further that the OEO will coordinate such matters with the United States Marshals Service.

State or local prisoners, probationers, parolees, or supervised releases

Prior to utilizing a state or local prisoner, probationer, parolee, or supervised releasee as a CHS, an FBI supervisor shall determine whether the use of that person in such a capacity would violate the terms and conditions of the person's incarceration, probation, parole, or supervised release. If the FBI supervisor has reason to believe that it would violate such terms and conditions, prior to using the person as a CHS, an FBI supervisor or his or her designee must obtain the permission of a state or local prison, probation, parole, or supervised release official with authority to grant such permission, which permission shall be documented in the CHS's files. If such permission is denied or it is inappropriate for operational reasons to contact the appropriate state or local official, the FBI may seek to obtain authorization for the use of such person as a source from the state or local court then responsible for the person's incarceration, probation, parole, or supervised release.

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***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

Fugitives

Except as provided below, a JLEA shall have no communication with a current or former CI who is a fugitive. A JLEA is permitted to have communication with a current or former CI who is a fugitive:

- (1) if the communication is part of a legitimate effort by that JLEA to arrest the fugitive, or
- (2) if approved, in advance whenever possible, by a senior field manager of any federal, state, or local law enforcement agency that has a wanted record for the individual in the National Crime Information Center (NCIC) and, in the case of a federal warrant, by the FPO for the issuing district.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

Fugitives

Except as provided below, an FBI agent shall not initiate communication with a current or former CHS who is a fugitive.

An FBI agent is permitted to communicate with a current or former CHS who is a fugitive:

- (1) if the fugitive source initiates the communication;
- (2) if the communication is part of a legitimate effort by the FBI to arrest the fugitive; or
- (3) if approved, in advance whenever possible, by a supervisor of any federal, state, or local law enforcement agency that has a wanted record for the individual in the NCIC and, in the case of a federal warrant, by the FPO for the issuing district.

Source: Department of Justice, *The Attorney General's Guidelines Regarding the Use of Confidential Informants* and *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources*. | GAO-15-807

Appendix III: Attorney General's Guidelines Provisions Regarding Overseeing Informants' Illegal Activities

Table 4 provides a listing of the provisions from *The Attorney General's Guidelines Regarding the Use of Confidential Informants* and *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* that were included in our assessment of agencies' policies for overseeing informants' illegal activities. Both sets of guidelines provide the following definitions for two categories of otherwise illegal activity that an agency can authorize:

- **Tier 1 otherwise illegal activity** is any activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization, and that involves (1) the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the informant; (2) corrupt conduct, or the significant risk of corrupt conduct, by senior federal, state, or local public officials; (3) the manufacturing, importing, exporting, possession, or trafficking of controlled substances in a quantity equal to or exceeding those quantities specified in United States Sentencing Guidelines § 2D1.1(c)(1); (4) financial loss, or the significant risk of financial loss, in an amount equal to or exceeding those amounts specified in United States Sentencing Guidelines § 2B1.1(b)(1)(I); (5) an informant providing to any person (other than a law enforcement agent) any item, service, or expertise that is necessary for the commission of a federal, state, or local offense, which the person otherwise would have difficulty obtaining; or (6) an informant providing to any person (other than a law enforcement agent) any quantity of a controlled substance, with little or no expectation of its recovery by the law enforcement agent.¹
- **Tier 2 otherwise illegal activity** is any other activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization.

¹The citations to the *United States Sentencing Guidelines* [USSG] *Manual* are to the 2005 edition. The references herein to particular USSG sections are intended to remain applicable to the most closely corresponding USSG level in subsequent editions of the *USSG Manual* in the event that the cited USSG provisions are amended.

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Table 4: Provisions of the Attorney General's Guidelines Related to Overseeing Informants' Illegal Activities

<i>The Attorney General's Guidelines Regarding the Use of Confidential Informants (CI)</i>	<i>The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (CHS)</i>
<p>Instructions regarding illegal activities</p> <p>In registering a CI, at least one agent of the Justice Law Enforcement Agency (JLEA), along with one additional agent or other law enforcement official present as a witness, shall review with the CI written instructions that state that: [...]</p> <p>(1) the CI must abide by the instructions of the JLEA and must not take or seek to take any independent action on behalf of the United States government;</p> <p>(2) [if applicable:] the CI has not been authorized to engage in any criminal activity and has no immunity from prosecution for any unauthorized criminal activity. (This instruction should be provided to any CI who is not authorized to engage in otherwise illegal activity.)</p>	<p>In opening a CHS, at least one Federal Bureau of Investigation (FBI) agent, along with one additional agent or other government official present as a witness, shall review with the CHS instructions as required by these Guidelines and other FBI policies. At a minimum, these instructions must indicate that: [...] the CHS must abide by the instructions of the FBI and must not take or seek to take any independent action on behalf of the United States government.</p> <p>The following additional instructions shall also be reviewed with a CHS if applicable to the particular circumstances of the CHS: The CHS has not been authorized to engage in any criminal activity and has no immunity from prosecution for any unauthorized criminal activity. (This instruction should be provided to any CHS who is not authorized to engage in otherwise illegal activity.)</p>
<p>Procedures for overseeing otherwise illegal activities</p> <p>A JLEA shall not authorize a CI to engage in any activity that otherwise would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization, except as provided in the authorization provisions in the Guidelines.</p> <p>A JLEA is never permitted to authorize a CI to</p> <p>(1) participate in an act of violence;</p> <p>(2) participate in an act that constitutes obstruction of justice (e.g., perjury; witness tampering; witness intimidation; entrapment; or the fabrication, alteration, or destruction of evidence);</p> <p>(3) participate in an act designed to obtain information for the JLEA that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search); or</p> <p>(4) initiate or instigate a plan or strategy to commit a federal, state, or local offense.</p> <p>Tier 1 otherwise illegal activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by a JLEA's special agent in charge (SAC) (or the equivalent) and the appropriate chief federal prosecutor (CFP).</p> <p>Tier 2 otherwise illegal activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by a JLEA's senior field manager.</p>	<p>The FBI shall not authorize a CHS to engage in any activity that otherwise would constitute a criminal violation under federal, state, or local law if engaged in by a person acting without authorization, except as provided in the authorization provisions in the Guidelines.</p> <p>The FBI is never permitted to authorize a CHS to</p> <p>(1) participate in any act of violence except in self-defense, or</p> <p>(2) participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search).</p> <p>The source may take reasonable measures of self-defense in an emergency to protect his or her own life or the lives of others against wrongful force.</p> <p>Tier 1 otherwise illegal activity must be authorized by an FBI SAC and the appropriate CFP, in advance and in writing for a specified period, not to exceed 90 days, except that, with respect to all international terrorism investigations, national security investigations, or other activities under <i>The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection</i>, upon request of the FBI and at the discretion of the appropriate CFP, the otherwise illegal activity may be authorized for a period of up to 1 year.</p> <p>Tier 2 otherwise illegal activity must be authorized by an FBI SAC in advance and in writing for a specified period, not to exceed 90 days.</p>

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***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

The JLEA official who authorizes Tier 1 or 2 otherwise illegal activity must make a finding, which shall be documented in the CI's files, that authorization for the CI to engage in the Tier 1 or 2 otherwise illegal activity is necessary either to

- (1) obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization or
- (2) prevent death, serious bodily injury, or significant damage to property, and

that in either case the benefits to be obtained from the CI's participation in the Tier 1 or 2 otherwise illegal activity outweigh the risks.

In making these findings, the JLEA shall consider, among other things:

- (1) the importance of the investigation;
- (2) the likelihood that the information or evidence sought will be obtained;
- (3) the risk that the CI might misunderstand or exceed the scope of his authorization;
- (4) the extent of the CI's participation in the otherwise illegal activity;
- (5) the risk that the JLEA will not be able to supervise closely the CI's participation in the otherwise illegal activity;
- (6) the risk of violence, physical injury; property damage, and financial loss to the CI or others; and
- (7) the risk that the JLEA will not be able to ensure that the CI does not profit from his or her participation in the authorized otherwise illegal activity.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

The written authorization by the FBI SAC or CFP of otherwise illegal activity shall be as narrow as reasonable under the circumstances as to the unlawful activity's scope, geographic area, duration, and other related matters.

The FBI special agent in charge and the CFP who authorize the otherwise illegal activity must make a finding, which shall be documented in the CHS's files, that the illegal activity is necessary either to

- (1) obtain information or evidence essential for the success of an investigation that is not reasonably available without such activity, including circumstances in which the CHS must engage in the illegal activity in order to maintain his credibility and thereby obtain the information or evidence, or
- (2) prevent death, serious bodily injury, or significant damage to property; and that the benefits to be obtained from the CHS's participation in the otherwise illegal activity outweigh the risks.

In making these findings, the FBI SAC and the CFP shall consider, among other things:

- (1) the importance of the investigation;
 - (2) the likelihood that the information or evidence sought will be obtained;
 - (3) the risk that the CHS might misunderstand or exceed the scope of his authorization;
 - (4) the extent of the CHS's participation in the otherwise illegal activity;
 - (5) the risk that the FBI will not be able to closely monitor the CHS's participation in the otherwise illegal activity;
 - (6) the risk of violence, physical injury, property damage, or financial loss to the CHS or others; and
 - (7) the risk that the FBI will not be able to ensure that the CHS does not realize undue profits from his or her participation in the otherwise illegal activity.
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***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

After a CI is authorized to engage in Tier 1 or 2 otherwise illegal activity, at least one agent of the JLEA, along with one additional agent or other law enforcement official present as a witness, shall review with the CI written instructions that state, at a minimum, that

- (1) the CI is authorized only to engage in the specific conduct set forth in the written authorization described above and not in any other illegal activity;
- (2) the CI's authorization is limited to the time period specified in the written authorization;
- (3) under no circumstance may the CI:
 - (a) participate in an act of violence;
 - (b) participate in an act that constitutes obstruction of justice (e.g., perjury; witness tampering; witness intimidation; entrapment; or the fabrication, alteration, or destruction of evidence);
 - (c) participate in an act designed to obtain information for the JLEA that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search); or
 - (d) initiate or instigate a plan or strategy to commit a federal, state or local offense;
- (4) if the CI is asked by any person to participate in any such prohibited conduct, or if he or she learns of plans to engage in such conduct, he or she must immediately report the matter to his or her contact agent; and
- (5) participation in any prohibited conduct could subject the CI to full criminal prosecution.

Immediately after these instructions have been given, the CI shall be required to sign or initial, and date, a written acknowledgment of the instructions. As soon as practicable thereafter, a field manager shall review and, if warranted, approve the written acknowledgment.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

If a CHS is authorized to engage in otherwise illegal activity, at least one FBI agent, along with one additional government official present as a witness, shall review with the CHS written instructions that

- (1) the CHS is authorized only to engage in the specific conduct set forth in the written authorization and not in any other illegal activity (the CFP's written authorization should be read to the CHS unless it is not feasible to do so);
- (2) the CHS's authorization is limited to the time period specified in the written authorization;
- (3) under no circumstance may the CHS:
 - (a) participate in an act of violence (except in self-defense);
 - (b) participate in an act designed to obtain information for the FBI that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search);
 - (c) if applicable: participate in an act that constitutes obstruction of justice (e.g., perjury; witness tampering; witness intimidation; entrapment; or the fabrication, alteration, or destruction of evidence);
 - (d) if applicable: initiate or instigate a plan or strategy to commit a federal, state, or local offense;
- (4) if the CHS is asked by any person to participate in any illegal activity other than the specific conduct set forth in the written authorization, or learns of plans to engage in such illegal activity, the source must immediately report the matter to the FBI case agent; and
- (5) participation in any illegal activity other than the specific conduct set forth in the written authorization could subject the CHS to criminal prosecution.

Immediately after these instructions have been given, the CHS shall be required to sign or initial, and date, a written acknowledgment of the instructions. If the CHS refuses to sign or initial the written acknowledgment, the FBI agent, and the additional agent or other government official present as a witness, shall document that the instructions were reviewed with the CHS and that the source acknowledged the instructions and his or her understanding of them. As soon as practicable thereafter, an FBI supervisor shall review and, if warranted, approve the documentation.

**Appendix III: Attorney General's Guidelines
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The Attorney General's Guidelines Regarding the Use of Confidential Informants (CI)

Whenever a JLEA has authorized a CI to engage in Tier 1 or 2 otherwise illegal activity, it must take all reasonable steps to:

- (1) supervise closely the illegal activities of the CI;
- (2) minimize the adverse effect of the authorized otherwise illegal activity on innocent individuals; and
- (3) ensure that the CI does not profit from his or her participation in the authorized otherwise illegal activity.

Whenever a JLEA cannot, for legitimate reasons unrelated to the CI's conduct (e.g., unavailability of the case agent), comply with the precautionary measures described above, it shall immediately:

- (1) suspend the CI's authorization to engage in otherwise illegal activity until such time as the precautionary measures can be complied with;
- (2) inform the CI that his or her authorization to engage in any otherwise illegal activity has been suspended until that time; and
- (3) document these actions in the CI's files.

If a JLEA has reason to believe that a CI has failed to comply with the specific terms of the authorization of Tier 1 or 2 otherwise illegal activity, it shall immediately:

- (1) revoke the CI's authorization to engage in otherwise illegal activity;
- (2) inform the CI that he or she is no longer authorized to engage in any otherwise illegal activity;
- (3) comply with requirements to notify the appropriate CFP(s);
- (4) make a determination whether the CI should be deactivated pursuant to other provisions in the Guidelines; and
- (5) document these actions in the CI's files.

Immediately after the CI has been informed that he or she is no longer authorized to engage in any otherwise illegal activity, the CI shall be required to sign or initial, and date, a written acknowledgment that he or she has been informed of this fact. As soon as practicable thereafter, a field manager shall review and, if warranted, approve the written acknowledgment.

The CI may sign or initial the written acknowledgment by using a pseudonym that has been previously approved and documented in the CI's files and designated for use by only one CI. If the CI refuses to sign or initial the written acknowledgment, the JLEA agent who informed the CI of the revocation of authorization shall document that the CI has orally acknowledged being so informed and the field manager shall, as soon as practicable thereafter, review and, if warranted, approve the written documentation.

The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (CHS)

Whenever the FBI has authorized a CHS to engage in otherwise illegal activity, the FBI must take all reasonable steps to:

- (1) monitor closely the activities of the CHS;
- (2) minimize the adverse effect of the otherwise illegal activity on innocent persons; and
- (3) ensure that the CHS does not realize undue profits from his or her participation in the otherwise illegal activity.

Whenever the FBI cannot, for legitimate reasons unrelated to the CHS's conduct (e.g., unavailability of the case agent), comply with the precautionary measures described above, it shall immediately:

- (1) suspend the CHS's authorization to engage in otherwise illegal activity until such time as the precautionary measures can be complied with;
- (2) inform the CHS that his or her authorization to engage in any otherwise illegal activity has been suspended until that time; and
- (3) document these actions in the CHS's files.

If an FBI agent has reason to believe that a CHS has failed to comply with the terms of the authorization of otherwise illegal activity, the FBI agent shall immediately:

- (1) revoke the CHS's authorization to engage in otherwise illegal activity;
- (2) inform the CHS that he or she is no longer authorized to engage in any otherwise illegal activity;
- (3) comply with requirements to notify the appropriate CFP(s);
- (4) determine whether the CHS should be closed pursuant to other provisions in the Guidelines; and
- (5) document these actions in the CHS's files.

Immediately after the CHS has been informed that he or she is no longer authorized to engage in any otherwise illegal activity, the CHS should sign or initial, and date, a written acknowledgment that he or she has been informed of this fact. If the CHS refuses to sign or initial the written acknowledgment, the FBI agent who informed the CHS of the revocation of authorization shall document the refusal, and the source's oral acknowledgment of the information if such oral acknowledgment is provided. As soon as practicable thereafter, an FBI supervisor shall review the written acknowledgment or documentation of refusal.

The CHS may sign or initial the written acknowledgment by using a pseudonym that has been previously approved and documented in the CHS's files and designated for use by only one CHS.

**Appendix III: Attorney General's Guidelines
Provisions Regarding Overseeing Informants'
Illegal Activities**

***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

A JLEA that seeks to reauthorize any CI to engage in Tier 1 or 2 otherwise illegal activity after the expiration of the authorized time period, or after revocation of authorization, must first comply with the procedures set forth in the Guidelines for authorizing otherwise illegal activity.

A JLEA that seeks to expand in any material way a CI's authorization to engage in Tier 1 or 2 otherwise illegal activity by the JLEA must first comply with the procedures set forth in the Guidelines for authorizing otherwise illegal activity.

In exceptional circumstances, a JLEA's SAC (or the equivalent) and the appropriate CFP may orally authorize a CI to engage in Tier 1 otherwise illegal activity without complying with the documentation requirements for authorizing otherwise illegal activity when they each determine that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization shall be completed within 48 hours of the oral approval and maintained in the CI's files.

In exceptional circumstances, a JLEA's senior field manager may orally authorize a CI to engage in Tier 2 otherwise illegal activity without complying with the documentation requirements for authorizing otherwise illegal activity when he or she determines that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization shall be completed within 48 hours of the oral approval and maintained in the CI's files.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

If the FBI seeks to re-authorize any CHS to engage in otherwise illegal activity after the expiration of the authorized time period, or after revocation of authorization, the FBI must first comply with the procedures set forth in the Guidelines for authorizing otherwise illegal activity.

If the FBI seeks to expand in any material way a CHS's authorization to engage in otherwise illegal activity, the FBI must first comply with the procedures set forth in the Guidelines for authorizing otherwise illegal activity.

In exceptional circumstances, an FBI SAC and the appropriate CFP may orally authorize a CHS to engage in Tier 1 otherwise illegal activity without complying with the documentation requirements for authorizing otherwise illegal activity, when they each determine that a highly significant and unanticipated investigative opportunity would be lost-were the time taken to comply with these documentation requirements, and that the circumstances support a finding required for authorizing otherwise illegal activity. In such an event, the documentation requirements, as well as a written justification for the oral authorization, shall be completed within 72 hours or as soon as practicable following the oral approval and maintained in the CHS's files.

In extraordinary circumstances, an FBI SAC may orally authorize a CHS to engage in Tier 2 otherwise illegal activity without complying with the documentation requirements for authorizing otherwise illegal activity above when he or she determines that a highly significant and unanticipated investigative opportunity would be lost were the time taken to comply with these requirements. In such an event, the documentation requirements, as well as a written justification for the oral authorization, shall be completed within 72 hours or as soon as practicable following the oral approval and maintained in the CHS's files.

The FBI shall maintain a file for each CHS containing all the written authorizations, findings and instructions regarding Tier 1 otherwise illegal activity, as required under the authorization procedures provisions of these Guidelines.

At the end of each calendar year, the FBI shall report to the Assistant Attorneys General of the Criminal Division and the National Security Division the total number of times each FBI field office authorized a CHS to engage in otherwise illegal activity, and the overall nationwide totals.

If requested, the FBI shall provide to the Assistant Attorneys General of the Criminal Division and the National Security Division a copy of any written authorization, finding, or instruction issued pursuant to the authorization procedures provisions of these Guidelines.

**Appendix III: Attorney General's Guidelines
Provisions Regarding Overseeing Informants'
Illegal Activities**

***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

Procedures for overseeing unauthorized illegal activity

When a JLEA has reasonable grounds to believe that a current or former CI being prosecuted by, is the target of an investigation by, or is expected to become a target of an investigation by an FPO for engaging in alleged felonious criminal activity, a SAC (or the equivalent) of the JLEA must immediately notify the CFP of that individual's status as a current or former CI.

Whenever such a notification is provided, the CFP and SAC (or the equivalent), with the concurrence of each other, shall notify any other federal, state or local prosecutors' offices or law enforcement agencies that are participating in the investigation or prosecution of the CI.

Whenever a JLEA has reasonable grounds to believe that a CI who is currently authorized to engage in specific Tier 1 or 2 otherwise illegal activity has engaged in unauthorized criminal activity, or whenever a JLEA knows that a CI who has no current authorization to engage in any Tier 1 or 2 otherwise illegal activity has engaged in any criminal activity, an SAC of the JLEA (or the equivalent) shall immediately notify the following CFPs of the CI's criminal activity and his or her status as a CI:

- (1) the CFP whose district is located where the criminal activity primarily occurred, unless a state or local prosecuting office in that district has filed charges against the CI for the criminal activity and there clearly is no basis for federal prosecution in that district by the CFP;
- (2) the CFP, if any, whose district is participating in the conduct of an investigation that is utilizing that active CI, or is working with that active CI in connection with a prosecution; and
- (3) the CFP, if any, who authorized the CI to engage in Tier 1 otherwise illegal activity.

Whenever such notifications are provided, the CFP(s) of the FPOs and the SAC (or the equivalent), with the concurrence of each other, shall notify any state or local prosecutor's office that has jurisdiction over the CI's criminal activity, and that has not already filed charges against the CI for the criminal activity, of the fact that the CI has engaged in such criminal activity. The CFP(s) and the SAC (or the equivalent) are not required, but may with the concurrence of each other, also notify the state and local prosecutor's office of the person's status as a CI.

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

If an FBI agent has reasonable grounds to believe that the alleged felonious activity of a current or former CHS is, or is expected to become, the basis of a prosecution or investigation by an FPO or a state or local prosecutor's office, the FBI agent must immediately notify a CHS coordinator or the assigned FPO attorney of that individual's status as a current or former CHS. However, with respect to a former CHS whose alleged felonious activity is, or is expected to become, the basis of a prosecution or investigation by a state or local prosecutor's office, no notification obligation shall arise unless the FBI agent has reasonable grounds to believe that the CHS's prior relationship with the FBI is material to the prosecution or investigation.

Whenever such a notification occurs, the CHS coordinator or the assigned FPO attorney shall notify the CFP. The CFP and FBI SAC, with the concurrence of each other, shall notify any other federal, state or local prosecutor's office or law enforcement agency that is participating in the investigation or prosecution of the CHS.

If an FBI agent has reasonable grounds to believe that a CHS has engaged in unauthorized criminal activity (other than minor traffic offenses), the FBI shall promptly notify a CHS coordinator or the assigned FPO attorney. In turn, the CHS coordinator or assigned FPO attorney shall notify the following FPOs of the CHS's criminal activity and his or her status as a CHS:

- (1) the FPO in whose district the criminal activity primarily occurred, unless a state or local prosecuting office in that district has filed charges against the CHS for the criminal activity and there is no basis for federal prosecution in that district;
- (2) the FPO attorney, if any, who is participating in the conduct of an investigation that is utilizing the CHS or is working with the CHS in connection with a prosecution; and
- (3) the FPO attorney, if any, who authorized the CHS to engage in otherwise illegal activity. Whenever such notifications to FPOs are provided, the FBI must also comply with the annual validation review requirements.

Whenever such notifications are provided, the CFP(s) and the FBI SAC, with the concurrence of each other, shall notify any state or local prosecutor's office that has jurisdiction over the CHS's criminal activity and that has not already filed charges against the CHS for the criminal activity of the fact that the CHS has engaged in such criminal activity. The CFP(s) and the FBI SAC(s) are not required, but may with the concurrence of each other, also notify the state and local prosecutor's office of the person's status as a CHS.

**Appendix III: Attorney General's Guidelines
Provisions Regarding Overseeing Informants'
Illegal Activities**

***The Attorney General's Guidelines Regarding the Use of
Confidential Informants (CI)***

***The Attorney General's Guidelines Regarding the Use of
FBI Confidential Human Sources (CHS)***

If the FBI determines that a CHS should be closed for cause or for any other reason the FBI shall promptly: [...] if the CHS was authorized to engage in otherwise illegal activity, immediately revoke that authorization.

Source: Department of Justice, *The Attorney General's Guidelines Regarding the Use of Confidential Informants* and *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources*. | GAO-15-807

Appendix IV: Selected Results from GAO's Assessment of Agencies' Informant Policies

This appendix provides selected results of our assessments for the provisions of the Guidelines discussed in this report. We found that the agencies generally address the required factors for initially vetting informants. Table 5 provides our assessment regarding the 17 factors that *The Attorney General's Guidelines Regarding the Use of Confidential Informants* requires in the initial suitability report and recommendation, and table 6 provides our assessment regarding the six pieces of information that *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* requires when initially establishing an informant.

Table 5: Extent to Which the Departments of Justice (DOJ) and Homeland Security (DHS) Component Agencies' Confidential Informant Policies Address the Factors in *The Attorney General's Guidelines Regarding the Use of Confidential Informants* for an Initial Suitability Report and Recommendation

Factor	DOJ component agencies			DHS component agencies			
	ATF	DEA	USMS	CBP	ICE	USCG	USSS
The person's age	●	●	●	●	●	●	●
The person's alien status	●	●	●	●	●	●	●
Whether the person is a public official; law enforcement officer; union official; employee of a financial institution or school; member of the military services; a representative or affiliate of the media; or a party, or in a position to be a party to, privileged communications (e.g., a member of the clergy, a physician, or a lawyer)	●	●	●	●	●	●	●
The extent to which the person would make use of his or her affiliations with legitimate organizations in order to provide information or assistance to the Department of Justice Law Enforcement Agency (JLEA), and the ability of the JLEA to ensure that the person's information or assistance is limited to criminal matters	●	●	○	●	●	○	○
The extent to which the person's information or assistance would be relevant to a present or potential investigation or prosecution and the importance of such investigation or prosecution	●	●	●	●	◐	●	●
The nature of any relationship between the confidential informant (CI) and the subject or target of an existing or potential investigation or prosecution, including but not limited to a current or former spousal relationship or other family tie, and any current or former employment or financial relationship	●	●	◐	●	●	○	●
The person's motivation in providing information or assistance, including any consideration sought from the government for this assistance	●	◐	●	●	●	●	●
The risk that the person might adversely affect a present or potential investigation or prosecution	●	●	●	●	●	●	●

**Appendix IV: Selected Results from GAO's
Assessment of Agencies' Informant Policies**

Factor	DOJ component agencies			DHS component agencies			
	ATF	DEA	USMS	CBP	ICE	USCG	USSS
The extent to which the person's information or assistance can be corroborated	●	●	●	●	○	●	●
The person's reliability and truthfulness	●	●	●	●	●	●	●
The person's prior record as a witness in any proceeding	●	◐	○	●	●	○	○
Whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution	●	●	●	●	●	●	●
Whether the person is reasonably believed to pose a danger to the public or other criminal threat, or is reasonably believed to pose a risk of flight	●	●	●	●	●	●	●
Whether the person is a substance abuser or has a history of substance abuse	●	●	●	●	●	●	●
Whether the person is a relative of an employee of any law enforcement agency	●	●	●	●	●	●	●
The risk of physical harm that may occur to the person or his or her immediate family or close associates as a result of providing information or assistance to the JLEA	●	●	●	●	●	●	●
The record of the JLEA and the record of any other law enforcement agency (if available to the JLEA) regarding the person's prior or current service as a CI, cooperating defendant/witness, or source of information, including, but not limited to, any information regarding whether the person was at any time terminated for cause	●	●	●	●	◐	●	●

Legend: ATF = Bureau of Alcohol, Tobacco, Firearms and Explosives; DEA = U.S. Drug Enforcement Administration; USMS = U.S. Marshals Service; CBP = U.S. Customs and Border Protection; ICE = U.S. Immigration and Customs Enforcement; USCG = U.S. Coast Guard; USSS = U.S. Secret Service ● = the component agency's policy is consistent with all aspects of the provision (consistent); ◐ = the component agency's policy is consistent with some, but not all, aspects of the provision (partially consistent); ○ = the component agency's policy is not consistent with any aspect of the provision or the component agency has no policy that corresponds to the provision (not consistent).

Source: *The Attorney General's Guidelines Regarding the Use of Confidential Informants* and GAO analysis of agencies' policies. | GAO-15-807

Table 6: Extent to Which the Federal Bureau of Investigation (FBI) Addresses the Information Required in *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* for Initially Establishing a Source

Information required	FBI
Basic identifying information that establishes the person's true identity, or the FBI's efforts to establish the individual's true identity	●
Photograph of the person (when possible)	●
Whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution	●
The person's motivation for providing information or assistance, including any consideration sought from the government for this assistance	●
Any promises or benefits, and the terms of such promises or benefits, that are given a confidential human source by the FBI, federal prosecuting office or any other law enforcement agency (if known, after exercising reasonable efforts)	●
Any other information that is required to be documented in the confidential human source's file pursuant to these Guidelines and FBI policies, including but not limited to, the instructions provided to the confidential human source	●

Legend: ● = the component agency's policy is consistent with all aspects of the provision (consistent); ◐ = the component agency's policy is consistent with some, but not all, aspects of the provision (partially consistent); ○ = the component agency's policy is not consistent with any aspect of the provision or the component agency has no policy that corresponds to the provision (not consistent).

Source: *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* and GAO analysis of the FBI's policy. | GAO-15-807

We found that some of the agencies' policies do not address provisions in the Guidelines for authorizing otherwise illegal activity and subsequently supervising informants that are authorized to engage in otherwise illegal activity. Table 7 provides additional detail on the extent to which agencies are consistent with provisions regarding informants' otherwise illegal activity. For these provisions, *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* are almost identical to the provisions in *The Attorney General's Guidelines Regarding the Use of Confidential Informants*, and therefore our assessment of FBI's policy is included alongside our assessment of the other seven agencies in table 7. *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* has an additional provision regarding the authorization of otherwise illegal activity—specifically that the written authorization by the FBI special agent in charge or chief federal prosecutor of otherwise illegal activity shall be as narrow as reasonable under the circumstances as to the unlawful activity's scope, geographic area, duration, and other related matters—and we assessed FBI's policy as consistent with respect to this provision.

Table 7: Extent to Which Departments of Justice (DOJ) and Homeland Security (DHS) Agencies' Confidential Informant Policies Address the Provisions in the Attorney General's Guidelines for Overseeing Confidential Informants' Otherwise Illegal Activities

Provision	DOJ component agencies				DHS component agencies			
	ATF	DEA	FBI	USMS	CBP	ICE	USCG	USSS
Tier 1 otherwise illegal activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by a Department of Justice Law Enforcement Agency's (JLEA) special agent in charge (or the equivalent) and the appropriate chief federal prosecutor.	●	◐	●	○	●	◐	○	○
Tier 2 otherwise illegal activity must be authorized in advance and in writing for a specified period, not to exceed 90 days, by a JLEA's senior field manager.	●	◐	●	○	●	◐	○	○
The JLEA official who authorizes Tier 1 or 2 otherwise illegal activity must make a finding, which shall be documented in the confidential informant's (CI) files, that authorization for the CI to engage in the Tier 1 or 2 otherwise illegal activity is necessary either to								
(1) obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization or	●	◐	●	○	●	◐	○	○
(2) prevent death, serious bodily injury, or significant damage to property,								
and that in either case the benefits to be obtained from the CI's participation in the Tier 1 or 2 otherwise illegal activity outweigh the risks.	●	○	●	○	●	◐	○	○
In making these findings, the JLEA shall consider, among other things:								
(1) the importance of the investigation;								
(2) the likelihood that the information or evidence sought will be obtained;								
(3) the risk that the CI might misunderstand or exceed the scope of his authorization;								
(4) the extent of the CI's participation in the otherwise illegal activity;	●	◐	●	○	●	◐	○	○
(5) the risk that the JLEA will not be able to supervise closely the CI's participation in the otherwise illegal activity;								
(6) the risk of violence, physical injury, property damage, and financial loss to the CI or others; and								
(7) the risk that the JLEA will not be able to ensure that the CI does not profit from his or her participation in the authorized otherwise illegal activity.								

**Appendix IV: Selected Results from GAO's
Assessment of Agencies' Informant Policies**

Provision	DOJ component agencies				DHS component agencies			
	ATF	DEA	FBI	USMS	CBP	ICE	USCG	USSS
After a CI is authorized to engage in Tier 1 or 2 otherwise illegal activity, at least one agent of the JLEA, along with one additional agent or other law enforcement official present as a witness, shall review with the CI written instructions that state, at a minimum, that:	●	◐	●	○	●	◐	○	○
(1) the CI is authorized only to engage in the specific conduct set forth in the written authorization described above and not in any other illegal activity;	●	◐	●	○	●	◐	○	○
(2) the CI's authorization is limited to the time period specified in the written authorization;	●	◐	●	○	●	◐	○	○
(3) under no circumstance may the CI:								
(a) participate in an act of violence;	●	◐	●	○	●	◐	○	○
(b) participate in an act that constitutes obstruction of justice (e.g., perjury; witness tampering; witness intimidation; entrapment; or the fabrication, alteration, or destruction of evidence);	●	◐	●	○	●	◐	○	○
(c) participate in an act designed to obtain information for the JLEA that would be unlawful if conducted by a law enforcement agent (e.g., breaking and entering, illegal wiretapping, illegal opening of or tampering with the mail, or trespass amounting to an illegal search); or	●	◐	●	○	●	◐	○	○
(d) initiate or instigate a plan or strategy to commit a federal, state or local offense;	●	◐	●	○	●	◐	○	○
(4) if the CI is asked by any person to participate in any such prohibited conduct, or if he or she learns of plans to engage in such conduct, he or she must immediately report the matter to his or her contact agent; and	●	◐	●	○	●	◐	○	○
(5) participation in any prohibited conduct could subject the CI to full criminal prosecution.	●	◐	●	○	●	◐	○	○
Immediately after these instructions have been given, the CI shall be required to sign or initial, and date, a written acknowledgment of the instructions. As soon as practicable thereafter, a field manager shall review and, if warranted, approve the written acknowledgment.	●	○	●	○	●	○	○	○
Whenever a JLEA has authorized a CI to engage in Tier 1 or 2 otherwise illegal activity, it must take all reasonable steps to:								
(1) supervise closely the illegal activities of the CI;	●	●	●	○	●	●	○	○
(2) minimize the adverse effect of the authorized otherwise illegal activity on innocent individuals; and	●	●	●	○	●	●	○	○
(3) ensure that the CI does not profit from his or her participation in the authorized otherwise illegal activity.	●	●	●	○	●	●	○	○

**Appendix IV: Selected Results from GAO's
Assessment of Agencies' Informant Policies**

Provision	DOJ component agencies				DHS component agencies			
	ATF	DEA	FBI	USMS	CBP	ICE	USCG	USSS
Whenever a JLEA cannot, for legitimate reasons unrelated to the CI's conduct (e.g., unavailability of the case agent), comply with the precautionary measures described above, it shall immediately:								
(1) suspend the CI's authorization to engage in otherwise illegal activity until such time as the precautionary measures can be complied with,	●	○	●	○	●	○	○	○
(2) inform the CI that his or her authorization to engage in any otherwise illegal activity has been suspended until that time, and								
(3) document these actions in the CI's files.								
If a JLEA has reason to believe that a CI has failed to comply with the specific terms of the authorization of Tier 1 or 2 otherwise illegal activity, it shall immediately:								
(1) revoke the CI's authorization to engage in otherwise illegal activity,								
(2) inform the CI that he or she is no longer authorized to engage in any otherwise illegal activity,	●	●	●	○	●	◐	◐	○
(3) comply with requirements to notify the appropriate chief federal prosecutor(s),								
(4) make a determination whether the CI should be deactivated pursuant to other provisions in the Guidelines, and								
(5) document these actions in the CI's files.								
Immediately after the CI has been informed that he or she is no longer authorized to engage in any otherwise illegal activity, the CI shall be required to sign or initial, and date, a written acknowledgment that he or she has been informed of this fact. As soon as practicable thereafter, a field manager shall review and, if warranted, approve the written acknowledgment.	●	○	●	○	●	○	○	○

Legend: ATF = Bureau of Alcohol, Tobacco, Firearms and Explosives; DEA = U.S. Drug Enforcement Administration; FBI = Federal Bureau of Investigation; USMS = U.S. Marshals Service; CBP = U.S. Customs and Border Protection; ICE = U.S. Immigration and Customs Enforcement; USCG = U.S. Coast Guard; USSS = U.S. Secret Service, ● = the component agency's policy is consistent with all aspects of the provision (consistent); ◐ = the component agency's policy is consistent with some, but not all, aspects of the provision (partially consistent); ○ = the component agency's policy is not consistent with any aspect of the provision or the component agency has no policy that corresponds to the provision (not consistent).

Source: Attorney General's Guidelines and GAO analysis of agencies' policies. | GAO-15-807

Appendix V: Comments from the Department of Justice



U.S. Department of Justice

FEB 23 2015

Washington, D.C. 20530

David C. Maurer
Director
Homeland Security and Justice Team
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Maurer:

Thank you for the opportunity to review and comment on the Government Accountability Office's draft report, *Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies*, which represents the culmination of an 18-month audit of the Department's law enforcement agencies' policies and practices regarding the use of confidential informants. The Department appreciates the GAO's efforts to understand the Department's programs and policies and to incorporate into the report the substantive and technical comments submitted by its components.

In the draft report, the GAO recommends that "the Administrator of the DEA and the Director of the USMS, with assistance and oversight from the DOJ Criminal Division, update their respective agencies' policies and corresponding monitoring processes to explicitly address the Guidelines' provisions on oversight of informants' illegal activities." The Department concurs in the GAO's recommendation.

As required by the Attorney General's Guidelines Regarding the Use of Confidential Informants (Guidelines), in 2004 and 2002 the Criminal Division reviewed and then endorsed the policies and practices of the DEA and the USMS, respectively, as being in compliance with the Guidelines. Notwithstanding these prior determinations, the DEA and the USMS have commenced the process of updating their respective policies, in consultation with the Criminal Division, to explicitly address the Guidelines' provisions on oversight of informants' illegal activities.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lee J. Lofthus".

Lee J. Lofthus
Assistant Attorney General
for Administration

Appendix VI: Comments from the Department of Homeland Security

U.S. Department of Homeland
Security
Washington, DC 20528



**Homeland
Security**

February 20, 2015

David C. Maurer
Director, Homeland Security and Justice
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Draft Report GAO-15-242SU, "CONFIDENTIAL INFORMANTS: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies"

Dear Mr. Maurer:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO's) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's positive recognition that U.S. Customs and Border Protection has confidential informant policies that are consistent with each provision of *The Attorney General's Guidelines* regarding oversight of informants' illegal activities. DHS also values GAO's acknowledgement that U.S. Immigration and Customs Enforcement (ICE) and the U.S. Secret Service have processes in place to monitor compliance with their informant policies. DHS is committed to having an appropriate level of oversight to ensure it is effectively overseeing informants in support of investigations and prosecutions.

The draft report contained two recommendations directed to DHS with which the Department concurs. Specifically, GAO recommended that:

Recommendation 1: The Secretary of Homeland Security provide oversight and guidance to ensure that DHS agencies comply with the Guidelines.

Response: Concur. The DHS Chief Security Officer will meet with the Law Enforcement Advisor to the Secretary of Homeland Security no later than March 30, 2015, to discuss how the Department might move forward to implement this recommendation. Following this meeting, actions will be taken to formally identify and designate a DHS entity as being responsible for developing, implementing, and

overseeing policies and programs to ensure DHS-wide compliance with *The Attorney General's Guidelines*, as appropriate. Estimated Completion Date (ECD): To Be Determined.

Recommendation 2: The Assistant Secretary of ICE and Commandant of USCG (U.S. Coast Guard) update their respective agencies' informant policies and corresponding monitoring processes to explicitly address the Guidelines' provisions on oversight of informants' illegal activities.

Response: Concur. ICE's informant policy is delineated in its Informant's Handbook, dated August 2012, and related guidelines. ICE's Homeland Security Investigations directorate is currently updating this handbook and selected guidelines, and will include a review requirements related to oversight of informants' illegal activities as part of this update.

Although existing Coast Guard Investigative Service (CGIS) policy is more restrictive than *The Attorney General's Guidelines* (i.e., confidential informants are not authorized to conduct any illegal activities), on February 4, 2015, the Director of CGIS issued interim policy to immediately comply with and align the CGIS Confidential Informant Policy with the *Guidelines*. A comprehensive review and revision will be completed by June 30, 2015.

In addition, ICE and the USCG have initiated a collaborative effort to modernize their informant polices and corresponding procedures/processes to address ICE and USCG guidelines when conducting investigations involving confidential informants. Their first meeting is scheduled for February 24, 2015. ECD: January 31, 2016.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. Please feel free to contact me if you have any questions. We look forward to working with you in the future.

Sincerely,



Jim H. Crumacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Appendix VII: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

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