



Department of Justice

STATEMENT OF

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BEFORE THE

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

FOR A HEARING ENTITLED

OVERSIGHT OF DEA'S CONFIDENTIAL SOURCE PROGRAM

PRESENTED

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Statement of Robert W. Patterson
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Chairman Chaffetz, Ranking Member Cummings, and distinguished Members of the Committee: on behalf of the approximately 9,000 employees of the Drug Enforcement Administration (DEA), thank you for the opportunity to be here today to discuss DEA's confidential source program and the enhancements we have made to our policies resulting from several reviews and reports by the Office of the Inspector General (OIG).

Our mission is to identify, investigate, disrupt, and dismantle the world's most significant drug trafficking organizations responsible for the production and distribution of illegal drugs. To that end, we work closely with our local, state, federal, and international counterparts by following the evidence wherever it leads.

Central to this mission is a world-wide confidential source (CS) network, one which uniquely positions DEA to act quickly, effectively, and proactively to reach beyond our borders to identify, investigate, and indict those that threaten the safety and interests of our country's citizens at home and abroad. This network is vital to our operations. However, DEA recognizes that the nature of using these sources has inherent risk, something that must be regularly balanced against the benefits of utilizing these individuals. We believe that strict oversight and adherence to approved procedures is necessary to ensure both the safety of our employees and to maintain the integrity of operations.

We strive to faithfully execute our mission with excellence and integrity at all levels and are continually looking for ways to further improve our operations. Our culture is a healthy and good one, and the vast majority of DEA employees perform their job to the highest standards of integrity, honesty, and ethical behavior. Under Acting Administrator Rosenberg's leadership, DEA has made tremendous strides in the manner in which we effectively, efficiently, and transparently address issues and concerns about the conduct of our employees or the manner in which we carry out our mission. One of the largest hurdles that had prevented DEA from that goal prior to his arrival in May, 2015 was a lack of staffing in key leadership positions within the DEA. For example, upon DEA Acting Administrator Rosenberg's arrival, DEA had more than two dozen vacant positions at the senior executive service (SES) level, many of which were unfilled for years, creating a vacuum of senior leadership and a culture of "acting" leaders. Among these vacant positions were the Chief Inspector, and the Deputy Chief Inspector in the Office of Professional Responsibility (OPR), the Office of Inspections (IN), and the Office of Security Programs (IS). These positions, along with all other SES positions, have since been filled. OPR, which conducts investigations of all credible allegations of misconduct levied against a DEA employee, Task Force Officer, or contract employee, had significant case backlogs and its staffing levels stood at approximately 50 percent. Under Acting Administrator Rosenberg's leadership, OPR is now staffed at 90 percent, an increase squarely aimed at creating more thorough, efficient, and accurate investigations.

OIG's First Report on DEA's Confidential Source Program

In accordance with the recommendations of the OIG report released in July 2015,¹ and a separate similar review performed by the Government Accountability Office (GAO) regarding DEA's Confidential Source (CS) policy released in September 2015,² DEA management and the Department of Justice's (DOJ) Criminal Division conducted a thorough review of DEA's CS policy. Both reports concluded that the DEA policy was not fully compliant with the Attorney General's Guidelines Regarding the Use of Confidential Informants (AG Guidelines), issued in May 2002. The GAO report recommended that DEA work with the DOJ Criminal Division to ensure that DEA's CS policy fully complied with the AG Guidelines. The OIG report contained a similar recommendation, and provided specific areas to address.

We appreciate the work of the OIG and GAO and have fully implemented all of the recommendations. Specifically, in response to the recommendations, on April 5, 2016, the Assistant Attorney General (AAG) for DOJ's Criminal Division approved a revised CS policy, which addressed all of issues identified by GAO and OIG. DEA's revised CS policy was subsequently published for DEA personnel and at the same time, a corresponding global message was broadcast to all employees to highlight notable changes to the policy. Additionally, DEA provided in-depth training to all field and headquarters CS program managers to ensure rigorous management and oversight of DEA's CS policy. These educational efforts remain ongoing, and this material was incorporated into DEA Academy curricula for new hires and management classes.

Recommendations of OIG's First Report on DEA's Confidential Sources:

The first OIG report contained seven recommendations, which can be grouped into the following four categories: categories of confidential sources; "otherwise illegal activity;" review of long-term confidential sources; and workers' compensation benefits for confidential sources.

OIG Recommendation on Categories of Confidential Sources:

DEA's confidential sources are classified into one of several categories, depending on the source's background and various specific risk factors. A source's classification dictates the supervisory level needed to approve the source for use, as well as various control requirements. The OIG report determined that DEA's confidential source classifications did not match the AG Guideline classifications with respect to high-level confidential sources (the leadership of certain national or international criminal organizations), and individuals under the obligation of a legal privilege of confidentiality, or affiliated with the media. It also found that DEA did not have a specific confidential source classification for DEA registrants, which, although not required by the AG Guidelines, was a recommendation the OIG made to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in a previous OIG report with respect to ATF registrants.

¹ Department of Justice, Office of the Inspector General. *Audit of the Drug Enforcement Administration's Confidential Source Policies and Oversight of Higher-Risk Confidential Sources*. (July 21, 2015). Available at: <https://oig.justice.gov/reports/2015/a1528.pdf#page=1>.

² U.S. Government Accountability Office. *Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies*. (GAO-15-807; Sep. 15, 2015). Available at: <http://www.gao.gov/products/GAO-15-807>.

As part of the policy revision, additional classifications have been added to recognize high level informants, individuals under the obligation of a legal privilege or affiliated with the media, and registrant informants as separate informant classifications. This conforms DEA's policy with the AG Guidelines' requirements.

OIG Recommendation on Otherwise Illegal Activity:

Law enforcement utilization of confidential sources may involve the source engaging in activity that would be illegal but for the fact that the behavior is authorized by law enforcement as part of the investigative process. The AG Guidelines define such activity as "Otherwise Illegal Activity" (OIA) and categorize it as Tier 1 OIA, for certain particularly serious activity specifically defined in the AG Guidelines, or Tier 2 OIA, for less serious felonies or misdemeanors. The AG Guidelines also delineate activities that can never be authorized under any circumstances.

The AG Guidelines require that Tier 1 OIA be approved by a U.S. Attorney and by a Special Agent in Charge (SAC). They require that a second line supervisor approve Tier 2 OIA. The AG Guidelines require approval authorities to consider certain specific factors and make a finding that the benefits outweigh the risks. They also specify certain warnings be given to confidential sources in writing after the source is authorized to engage in OIA.

The then-existing DEA policy reviewed by GAO and OIG did not speak in terms of OIA. Rather, DEA policy had required that all illegal activity, except routine undercover drug activity, be approved through the Sensitive Activity Review Committee (SARC) process, which includes U.S. Attorney and SAC approval, as well as approvals from DEA Headquarters and DOJ's Criminal Division. These processes exceed the AG Guidelines approval requirements for such activity.

DEA policy regarding routine undercover drug activity had required a second line supervisor to review and approve an operations plan outlining the activity which would take place. The OIG review expressed concern that DEA policy did not make clear that "routine undercover drug activity" did not include Tier 1 OIA. Thus, the possibility existed that Tier 1 OIA could be approved at too low a level. In addition, the prior policy did not specify the criteria to be considered in approving CS participation in such illegal activity, nor did it require a specific finding by the approval authority other than his or her signature on the operations plan. Accordingly, as part of the policy revision, DEA addressed these concerns by requiring approval authorities to consider the AG Guidelines' specific criteria, as well as make a written finding that the benefits outweigh the risks as part of the operations plan approval. The revised policy also utilizes the AG Guidelines' nomenclature of "Tier 1" and "Tier 2 OIA," and defines routine undercover drug activity as Tier 2 OIA. In the rare instance where contemplated undercover drug activity would meet the definition of Tier 1 OIA, it will require a SARC approval.

The OIG report also raised concerns about the warnings given to confidential sources after approval for OIA. Under the AG Guidelines, these warnings are to be given after a confidential source is authorized to engage in OIA, and OIA can be authorized for 90 days at a time. The specific warnings required by the AG Guidelines are contained verbatim in DEA's

confidential source agreement, which is signed annually by DEA confidential sources, but this typically occurs *before* OIA approval, not after, and it is valid for one year, although DEA confidential sources are not given blanket authority to engage in OIA for a set period of time, but rather are told they may not engage in any illegal activity unless acting under the specific direction and supervision of DEA law enforcement personnel. The revised policy addresses the OIG's concern to ensure that warnings are renewed every 90 days

OIG Recommendation on Review of Long-Term Confidential Sources:

The AG Guidelines require that confidential sources who have been active for six consecutive years be reviewed by a Confidential Informant Review Committee, which is the functional equivalent of DEA's SARC, and which must include certain specified DOJ representatives. When a source has been active for nine years, the AG Guidelines also require a review by the law enforcement agency's Headquarters. These reviews continue thereafter as long as the informant remains active, with SARC reviews at six-year intervals and Headquarters reviews occurring at the three-year midpoint between SARC reviews.

The OIG report expressed concern regarding the implementation of DEA's six-year reviews in terms of the depth of the review, and it found instances where reviews did not occur. It also found that DEA policy did not mandate the nine-year Headquarters reviews. The revised policy addresses these concerns by specifying the responsibilities of various officials to ensure the reviews take place on time and in sufficient depth, specifying the material that must be considered during the reviews, and otherwise ensuring that a stringent review takes place on the time schedule required. The revised policy also mandates the nine-year Headquarters reviews.

OIG Recommendation on Workers' Compensation Benefits:

Finally, the OIG review raised questions about confidential sources injured while assisting DEA and whether they are eligible for workers' compensation benefits under the Federal Employees Compensation Act (FECA), as DEA had eighteen confidential sources who, over the years, had been approved for FECA benefits by the Department of Labor (DOL). The OIG review recommended that DEA and DOJ determine whether confidential sources are eligible for FECA benefits and, if so, that DEA implement stricter policies for evaluating claims for such benefits. In consulting with DOJ and DOL, DEA has ascertained that confidential sources can be awarded FECA benefits by DOL in appropriate instances. DEA's revised policy addresses the OIG's concerns by specifying criteria that must be met before DEA will recommend DOL approval of a claim submitted by a confidential source and by requiring that such claims be reviewed at a high level within DEA before being submitted to DOL for adjudication. The policy also ensures communication and information sharing between DEA's Human Resources Division who is responsible for processing workers' compensation claims and its confidential source unit, to help ensure DEA is able to meet its obligations to investigate the claim.

OIG's Second Report on DEA's Confidential Source Program

On September 29, 2016 the OIG issued a second report concerning DEA's confidential source program.³ We appreciate the OIG's work and agree with all seven recommendations contained in the report. We are working swiftly to implement those recommendations as quickly as possible.

In particular, DEA is currently examining the issues raised by the OIG pertaining to the manner in which it utilizes "limited use" confidential sources and is developing guidance to address the OIG's concerns in this area. In addition, we are comprehensively evaluating its internal controls to ensure that its policies regarding payments to confidential sources are strictly followed.

Conclusion

Confidential sources provide invaluable contributions and assistance in furtherance of DEA investigations against major domestic and transnational criminal organizations. DEA's reliance on confidential sources whose motivations may be suspect, inevitably carries an inherent amount of risk. One important way for DEA leaders to mitigate this risk is through increased oversight and review, and a robust policy aimed at protecting ourselves and our sources. DEA will continue to review this important program and is committed to cooperating with the OIG to improve upon it.

³ Department of Justice, Office of the Inspector General. *Audit of the Drug Enforcement Administration's Management and Oversight of its Confidential Source Program*. (September 29, 2016). Available at: <https://oig.justice.gov/reports/2016/a1633.pdf#page=1>