



Office of the Inspector General
U.S. Department of Justice



**A Review of the Department of Justice's
and ATF's Implementation of
Recommendations Contained in the OIG's
Report on Operations Fast and Furious
and Wide Receiver**

EXECUTIVE SUMMARY

In September 2012, the Office of the Inspector General (OIG) issued a 471-page report that described the findings of our review of two Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) firearms trafficking investigations, one code named "Operation Fast and Furious" and the other "Operation Wide Receiver."¹ Our review identified serious management flaws in both investigations and we made six recommendations to address the deficiencies we found. We requested that the Department of Justice (Department or DOJ) examine ATF's law enforcement policies to ensure that they comply with the Department's guidelines and policies, and evaluate the sufficiency of ATF's case review procedures for matters that present heightened risk to the public or agents. We also believed that ATF should institute training; we requested the Department work with ATF to develop guidance on how agents should investigate gun trafficking organizations.

The remainder of our recommendations were focused on the Department itself or its law enforcement components other than ATF. We requested that the Department evaluate the policies of the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), and U.S. Marshals Service (USMS) to ensure that they are sufficient to address the concerns we identified from the conduct of Operations Fast and Furious and Wide Receiver. We also recommended that the Department more carefully scrutinize wiretap applications and regularly convene a working group of leaders from the Department's law enforcement components to ensure appropriate coordination among them. In its initial written response to the report, the Department stated that it agreed with our recommendations and committed to implementing them.

In this follow-up review we evaluated the Department's efforts to implement our recommendations. We determined that four of the six recommendations can be closed. The two remaining recommendations have been resolved, but additional work needs to be completed in order for them to be closed.

The four recommendations we are closing were directed to the Department and ATF. We found that the Department completed the review of ATF's policies for consistency with the Department's guidelines and policies as we requested. ATF finished its own internal policy review in 2014 which resulted in revisions to the Agency's policies, including to its Orders on Undercover Operations and Confidential Informants. In addition, the Office of the Deputy Attorney General (ODAG) led a working group of senior officials that addressed risk management issues, including ones identified in Operations Fast and Furious and Wide Receiver and the findings and recommendations of the OIG's report.

¹ The OIG's report, *A Review of Operation Fast and Furious and Related Matters*, can be found at <http://www.justice.gov/oig/reports/2012/s1209.pdf>.

The working group examined the policies of all of the Department's law enforcement components and issued two significant guidance documents that provide instructions on risk management. ATF modified several of its policies, including those addressing sensitive matters, as a result of ODAG's review and inquiries from the OIG. For example, ATF made changes to its policies regarding home invasion undercover operations after the OIG raised concerns about the sufficiency of ATF's oversight of these cases.²

ATF also created guidance for its agents regarding how to develop enterprise/conspiracy cases involving firearms consistent with the policy on firearms transfers that ATF instituted as a result of Operation Fast and Furious. The guidance furnishes examples of investigative techniques that can be used in such investigations and instructs agents to "communicate and coordinate" with prosecutors, law enforcement partners, and within ATF "regarding potential criminal acquisition of firearms, trafficking, and acts of violence."

The remaining two closed recommendations were directed at the Department. As we recommended, the Department instituted regular coordination meetings with leadership from the law enforcement components, and developed new procedures regarding the review of wiretap applications.

The first resolved recommendation concerns ATF's case review procedures for sensitive matters. ATF has made significant progress to enhance its oversight of sensitive matters, such as by instituting a Monitored Case Program (MCP) to provide heightened scrutiny over cases that involve significant risk and by revising its Orders on Undercover Operations and Confidential Informants. We identified a limited number of steps that ATF should take to further improve its oversight of sensitive matters, such as revising ATF's inspection process and certain aspects of the MCP to better account for risk. ATF has now taken many of the steps we recommended and has committed to making additional improvements. The OIG will continue to monitor ATF's progress in this area.

The second resolved recommendation involves the Department's evaluation of the policies of the DEA, FBI, and USMS to ensure that they are sufficient to address the concerns we identified in the conduct of Operations Wide Receiver and Fast and Furious. We found that the efforts of ODAG's working group on risk management resulted in the Department's review of component policies on issues that overlapped with ones we identified in those Operations, such as oversight of sensitive cases and informant otherwise illegal activity, and led to the issuance of important guidance documents. However, we determined that the policies of the Department and its law enforcement components other than ATF did not sufficiently address risks associated with firearms transfers.

² In a "home invasion" undercover operation, ATF agents provide an opportunity for suspects to commit an armed robbery of a drug "stash house."

The Department has responded positively to our concerns on firearms transfers, though some work remains to be done. During our follow-up review, DEA issued a policy on risk assessment and mitigation that included guidance on firearms transfers, and revised it in January 2016 to comply more directly with our recommendation by specifying that agents were required to consult with a supervisor when confronted with firearms transfers. ODAG has informed us that the FBI and USMS also will be modifying their policies similarly, and that this work will be completed expeditiously. We will continue to monitor this process to ensure that the recommendations based on the problems uncovered in our prior review are fully addressed.

As our 2012 report also made clear, our concerns with Operations Fast and Furious and Wide Receiver extended to issues other than firearms. For example, we emphasized the importance of oversight of confidential informants, especially in circumstances where the component has a regulatory function. We found that the Department and DEA failed to respond to our recommendation that addresses DEA's use of informants who also are regulated by DEA, such as physicians and pharmacists. In addition, our review of DEA's policies revealed that they did not incorporate important requirements from the Department's guidelines on confidential informants, such as directions regarding otherwise illegal activity or procedures mandated by the guidelines for approval of certain highly sensitive informants. The Department has informed the OIG that it is working with DEA to revise DEA's informant policies and to address these issues. Our report identifies the steps that we believe the Department and its law enforcement components need to take in order to close the two remaining recommendations.

I. Introduction

On December 14, 2010, U.S. Customs and Border Protection Agent Brian Terry was shot and killed while on patrol near Rio Rico, Arizona, approximately 18 miles from the border with Mexico. Investigation of his death revealed that two firearms recovered at the scene of the shooting had been purchased 11 months earlier by a suspect in a Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) case in Phoenix, Arizona, code named "Operation Fast and Furious."

Agent Terry's death resulted in scrutiny of ATF's management of Operation Fast and Furious, which became the subject of Congressional inquiries and media attention. ATF staff contacted members of Congress and reported that ATF had grossly mismanaged the operation and allowed the trafficking of hundreds of firearms to drug cartels in Mexico. On January 27, 2011, Senator Charles E. Grassley wrote to ATF Acting Director Kenneth Melson that the Senate Judiciary Committee had received allegations that ATF had "sanctioned the sale of hundreds of assault weapons to suspected straw purchasers," who then transported the firearms throughout the Southwest Border area and into Mexico. In February 2011, news stories began to appear describing flaws with ATF's handling of its investigation.

Senator Grassley's staff also alerted the Office of the Inspector General (OIG) to an ATF agent's allegations concerning Operation Fast and Furious. The OIG interviewed the whistleblower and opened a preliminary inquiry. On February 28, 2011, then-Attorney General Holder requested that the OIG conduct a review of Operation Fast and Furious, which the OIG commenced in combination with its earlier inquiry.

Following an extensive review, we issued a 471-page report in September 2012 that described our findings.³ The OIG determined that in October 2009 ATF agents in Phoenix initiated an investigation of persons suspected of purchasing high-powered firearms on behalf of drug cartels. We found that during the ensuing 15-month investigation ATF and the U.S. Attorney's Office in Arizona pursued a joint strategy that deferred overt enforcement action against individual purchasers of these firearms in favor of trying to build a case against the leaders of the organization that was trafficking them, with the consequence that agents seized only about 100 out of over 2,000 firearms that approximately 40 subjects in the case had purchased. We determined that in many instances ATF and the U.S. Attorney's Office failed to take enforcement action when they had both the opportunity and legal authority to seize firearms. Moreover, many of these firearms were later recovered by law enforcement officials at crime

³ U.S. Department of Justice Office of the Inspector General, *A Review of ATF's Operation Fast and Furious and Related Matters* (September 2012).

scenes in Mexico and the United States, including at the murder scene of Agent Terry.

During our review of Operation Fast and Furious, the OIG also received allegations of ATF mismanagement of other firearms trafficking investigations. Our review included examination of one of these investigations, Operation Wide Receiver, which was conducted by the Tucson Office of ATF's Phoenix Field Division with the assistance of the U.S. Attorney's Office in Arizona. As with Operation Fast and Furious, we determined that ATF failed to take necessary enforcement actions.

Our findings concerning the causes of ATF's conduct were troubling. We concluded that both Operation Fast and Furious and Operation Wide Receiver were supervised irresponsibly by ATF's Phoenix Field Division and the U.S. Attorney's Office, most significantly in their failure to adequately consider the risk to public safety in the United States and Mexico. We also found that ATF Headquarters and the leadership of the U.S. Attorney's Office failed to exercise adequate oversight of Operation Fast and Furious in light of the risks the operation posed to public safety and on our country's relationship with Mexico. We concluded that ATF's senior leadership should have recognized that its agents were failing to take adequate enforcement action as the firearms straw purchasing activity continued at an alarming pace, and should have promptly concluded the case. In addition, we determined that some senior ATF officials ignored warnings from ATF staff about agents failing to seize firearms when they had the legal authority to confiscate the firearms.

We also identified other instances where potential warnings went unrecognized. We found that the wiretap applications submitted to the Department of Justice (DOJ or the Department) Criminal Division in Operations Fast and Furious and Wide Receiver contained "red flags" regarding the failure to seize firearms in the investigations. However, during our review we found that Criminal Division staff did not raise concerns about the firearms information contained in the applications.

We found problems with ATF's coordination with other law enforcement agencies. We identified instances where ATF resisted efforts by U.S. Immigration and Customs Enforcement (ICE) to conduct independent or coordinated investigations even though ATF lacked sufficient resources to complete the work itself. In addition, ATF missed an early opportunity in Operation Fast and Furious to advance the investigation when it failed to exploit information that the Drug Enforcement Administration (DEA) provided that may have led to the identification of a significant suspect.

In light of these findings, our report made six recommendations to strengthen oversight of ATF, improve coordination among law enforcement components, and ensure that the mistakes that were made in Operations Fast and Furious and Wide Receiver are not repeated within DOJ. Our recommendations therefore were not focused exclusively on ATF. The recommendations were as follows:

1. The Department should examine ATF's policies on law enforcement operations to ensure that they are in compliance with Department guidelines and policies.

2. The Department should examine ATF's case review procedures to verify that they are consistent with procedures adopted in other Department law enforcement components to ensure that matters involving "sensitive circumstances," "special requirements," and "otherwise illegal activity," are sufficiently evaluated. The Department should assess ATF's implementation of these procedures to ensure that they are effective and consistently applied.

3. The Department should work with ATF to develop guidance on how to conduct enterprise investigations against gun trafficking organizations consistent with lessons learned from Operation Fast and Furious.

4. The Department should review the policies and procedures of other law enforcement components to ensure that they are sufficient to address the concerns we have identified in the conduct of Operations Wide Receiver and Fast and Furious, particularly regarding oversight of sensitive and major cases, otherwise illegal activity, and use of informants where the component has a regulatory function.

5. The Department should maintain a regular working group involving leadership from component law enforcement agencies to ensure appropriate coordination among them on significant law enforcement policies and procedures, and major investigations and law enforcement initiatives.

6. The Department should require that high-level officials who are responsible for authorizing wiretap applications conduct reviews of the applications and affidavits that are sufficient to enable those officials to form an independent judgment that the applications meet the statutory criteria.

In its initial written response to the report, the Department stated that it agreed with our recommendations and committed to implementing them.

The Department's response to our follow-up report is attached.

II. Summary of the OIG Follow-Up Review and Structure of the Report

In this follow-up review we evaluated the Department's efforts to implement our recommendations. Since issuance of our report on Operations Fast and Furious and Wide Receiver on September 19, 2012, the OIG received written updates from the Office of the Deputy Attorney General (ODAG) on December 18, 2012, and May 6, 2013, that described the Department's progress. Beginning in 2014, the ODAG, ATF, DEA, the Federal Bureau of Investigation (FBI), and U.S. Marshals Service (USMS) also provided information in response to additional OIG requests regarding implementation of the

recommendations, such as the status of particular policy revisions. We also conducted interviews of staff from these components.

Overall, we determined that four of the six recommendations can be closed and two of the recommendations are resolved.⁴ Although we found that ATF has made significant progress to implement our recommendations, we identified some remaining issues with the Department's oversight of its other law enforcement components regarding issues we highlighted in our report. For example, we determined that the policies of the Department and its law enforcement components, except for a new policy adopted by ATF, did not fully address risks associated with firearms transfers, and that DEA's policies on confidential informants failed to address problems we identified in Operations Fast and Furious and Wide Receiver and were not consistent with the text of the applicable Attorney General's Guidelines.⁵ During the course of this follow up review and in response to concerns we raised regarding its efforts to amend its policy, the DEA issued a risk mitigation and assessment policy that addresses firearms transfers, and the FBI and USMS have committed to revising their policies to address this subject. In addition, the Department and DEA are conducting a review of DEA informant policies that will address concerns we identified. We will continue to monitor the Department's ongoing efforts in these areas.

We believe it is important that the Department's law enforcement components recognize and implement lessons from our reviews. This report supplements our recommendations to address this issue.

Below we discuss each of our recommendations and their current status.

⁴ Consistent with our normal practice, when specific action has been taken on a recommendation to fully address the issues raised by the recommendation, we consider the recommendation to be "closed." Where a component has indicated a plan or an intention to implement measures in the future to address the recommendation, we consider the recommendation to be "resolved." We consider a recommendation "open" where no action has been taken or insufficient information has been provided to determine whether sufficient action will be taken.

⁵ The OIG has written extensively in the past about the importance of compliance with these Guidelines. See U.S. Department of Justice Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (September 2005). The OIG is currently evaluating DEA's informant program and recently issued a report with seven recommendations, including one that requests that DEA "ensure compliance" with Guidelines' requirements. See U.S. 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*, Audit Report 15-28 (July 2015).

III. Recommendations

A. Recommendation One: ATF Policy Review

We recommended that the Department examine ATF's policies on law enforcement operations to ensure that they comply with Department policies and guidelines.⁶ Our review of Operations Fast and Furious and Wide Receiver identified instances where ATF had not revised its policies to institute controls sufficient to protect the public or to account for its move to the Department in 2003. For example, until 2011 ATF had not updated its policies on confidential informants to account for the requirements of the Attorney General's Guidelines Regarding the Use of Confidential Informants ("Informant Guidelines"). These Guidelines applied to ATF beginning in 2003 pursuant to an Order of the Attorney General. The Department, however, failed to amend the Guidelines to include ATF until February 2013.

As we noted in our September 2012 report, ATF initiated a comprehensive evaluation of its policies on law enforcement operations and investigative techniques beginning in 2011. These policies are found in multiple ATF "Orders" that address topics such as Undercover Operations; Confidential Informant Usage; Investigative Policies, Procedures, and Techniques; Operational Planning, and ATF's Firearms Enforcement Program.⁷ One objective of ATF's review was to ensure that its policies comply with Department mandates. We found that ATF completed its evaluation in 2014 and accounted for the OIG's recommendations, though some of its policy revisions were made earlier in anticipation of the 2012 OIG report's findings. According to ATF staff, the agency's policy review identified omissions of subjects that are addressed in DOJ policies, but did not identify conflicts with those policies. As described further below, ATF responded to these omissions by updating its Orders on Undercover Operations and Confidential Informants, and establishing a policy on firearms transfers.

In addition to ATF's policy review, ODAG examined a subset of ATF's law enforcement policies while leading a Risk Assessment Working Group (RAWG) that the Attorney General formed in 2012 due in part to risk management issues identified in Operations Fast and Furious and Wide Receiver and the findings and recommendations of the OIG's report. The RAWG was comprised of representatives of the Department's law enforcement components, the Office of the Attorney General, ODAG, the Criminal Division, the Executive Office of U.S. Attorneys, and members of the Attorney General's Advisory Committee of U.S. Attorneys. The RAWG's mission was to evaluate the Department's procedures

⁶ Due to the focus of this follow-up review on the implementation of the recommendations contained in our report on Operations Fast and Furious and Wide Receiver, and the number of policies at issue, the OIG did not conduct a separate audit of ATF's policies to determine their consistency with the Department's policies and guidelines.

⁷ Besides its review of Orders, ATF reports that it also has completed a review of 55 ATF Directives. These do not address law enforcement operations.

for assessing risk in law enforcement investigations and operations. The Group met regularly for approximately 1 year and examined issues such as the initiation and oversight of sensitive investigative activities, the use of confidential informants, and the authorization for informants or undercover agents to engage in otherwise illegal activities (OIA).⁸ With respect to ATF, ODAG staff assigned to the RAWG examined ATF's policies on firearms transfers; monitoring of sensitive cases (ATF's Monitored Case Program (MCP)); the alcohol and tobacco enforcement programs; home invasion operations; undercover operations, including undercover storefront operations; confidential informants; operational planning; and inspections.

The RAWG's efforts resulted in the Deputy Attorney General's issuance of two significant guidance memoranda concerning risk assessment that are pertinent to issues we identified in Operations Fast and Furious and Wide Receiver. On March 11, 2013, the Deputy Attorney General provided recommendations to prosecutors on how to evaluate sensitive investigative activities that require approval by headquarters review committees (Memorandum from Deputy Attorney General James M. Cole, "Sensitive Investigative Activities Requiring Committee Review"). The Deputy Attorney General's memorandum recommended that Department attorneys thoroughly evaluate issues such as the role of confidential informants, civil liability, and safety, including the transfer of dangerous commodities such as firearms. *Id.* at 2-5. The Deputy Attorney General followed this guidance with another memorandum on December 7, 2013, which established law enforcement and prosecutor protocols for assessing and mitigating risk in law enforcement operations (Memorandum from Deputy Attorney General James M. Cole, "Baseline Risk Assessment and Mitigation Policies for Law Enforcement Operations in Criminal Matters"). The Baseline Risk Assessment Memorandum establishes 55 protocols in the following areas: assessing risk during the course of an investigation, initiation and oversight of sensitive investigative activities, use of confidential informants, authorization of OIA by undercover agents or informants, and investigations in which project generated income is contemplated.

Following discussions with the OIG about Recommendation One, ODAG staff informed us that the Department believed that ATF's law enforcement policies complied with DOJ policies with three exceptions. First, aside from ATF's undercover storefront operations, ATF's policies did not require the submission of a concurrence letter from the U.S. Attorney for undercover operations that included a "sensitive circumstance."⁹ "Sensitive circumstances" are defined in

⁸ The Informant Guidelines define OIA as "activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization." The Guidelines recognize two types of OIA (Tier I and Tier II), with the more serious type (Tier I) including activities such as corrupt conduct by public officials and violence committed by persons other than confidential informants.

⁹ After widespread publicity regarding its use of storefront operations in early 2013, ATF issued guidance to the field in March 2013 requiring written concurrence from the U.S. Attorney

the Attorney General's Guidelines on Federal Bureau of Investigation Undercover Operations (generically "Undercover Guidelines"), and include matters such as the investigation of elected officials or activities that could give rise to tort claims against the United States.¹⁰ ODAG staff agreed with our assessment that ATF's failure to require written concurrence from the U.S. Attorney conflicted with the requirements of the Undercover Guidelines, which ATF has committed to implement as requested by the Department. Former Deputy Attorney General Cole's cover letter accompanying ODAG's memorandum on Sensitive Investigative Activities Requiring Committee Review described these concurrence letters, reflecting the views of the prosecutor regarding the operation, as "extremely important" in the Department's assessment of risk. ATF staff informed us that its agents were in the practice of obtaining the concurrence of U.S. Attorney's Offices for sensitive matters, and in some cases this concurrence was obtained in writing. ATF agreed that its policies should be amended and issued a revised policy in March 2015 that requires the submission of a concurrence letter from the U.S. Attorney for undercover operations that include a "sensitive circumstance" as defined in the Undercover Guidelines.¹¹

The second discrepancy between ATF and DOJ policies also involved undercover operations. We found that the "sensitive circumstances" criteria that ATF used to trigger review by its headquarters-based Undercover Review Committee (URC) did not expressly include operations that involve a "significant risk of violence or physical injury to individuals." The Undercover Guidelines, as well as the undercover operations policies of the DEA, FBI, and USMS, all identify the "significant risk of violence" or "injury" as a "sensitive circumstance" that necessitates headquarters review.

During this follow-up review we informed the Department of our belief that the omission of the "significant risk of violence" from the list of "sensitive circumstances" in ATF's undercover policies was significant and warranted

for undercover storefront operations. The OIG has initiated a review that is evaluating ATF's storefront operations.

¹⁰ The Department has not established Attorney General's Guidelines on undercover operations for ATF, DEA, or the USMS. When we inquired with ODAG why the Undercover Guidelines applied only to the FBI, we were told that the omission of the other DOJ law enforcement components was longstanding and did not warrant revising the Guidelines because, with the exceptions concerning ATF that we describe below, the components' undercover policies comply with them. According to ODAG, then-Attorney General Holder decided that all of the DOJ law enforcement components should comply with the Undercover Guidelines to the extent it is appropriate to their jurisdiction. We also were told by ODAG that the RAWG examined the law enforcement components' undercover policies and confirmed that they complied with the Guidelines.

¹¹ The USMS has informed the OIG that it is revising its undercover policies to require the submission of a concurrence letter from the U.S. Attorney for undercover operations that include a "sensitive circumstance" under the Attorney General Guidelines and that are likely to lead to the collection of evidence supporting a federal prosecution. According to staff from the USMS, they could not recall when the USMS had an undercover operation that included a "sensitive circumstance," and hence the omission of the concurrence letter policy did not affect prior cases.

revision of the policies to include that language or comparable text. We were especially concerned about this omission given ATF's failure to properly evaluate public safety in Operations Fast and Furious and Wide Receiver. For example, we found that ATF was not presenting its "home invasion" undercover operations to the URC, or requiring a written concurrence letter from the U.S. Attorney, even though the operations in fact presented "a significant risk of violence."¹² Moreover, we found that some judges had leveled criticism at ATF concerning its handling of these operations.¹³ ODAG staff agreed with the OIG's assessment that ATF's policies concerning review of home invasion undercover operations were insufficient to meet Department requirements.

In response to these concerns, ATF amended its undercover policies. Given the significant risks associated with home invasion undercover operations, ATF changed its authorization procedure to require review by the URC and the submission of a written concurrence letter from the U.S. Attorney. In addition, we were told by ODAG and ATF that ATF is amending its Order on Undercover Operations to add the "significant risk of violence" to its list of "sensitive circumstances" and supplementing the list with examples of operations that present such a risk. According to ATF, in light of the agency's focus on violent crime involving firearms and explosives, the term "significant risk of violence" standing alone lacked sufficient specificity to put ATF agents on notice as to which operations were covered and that presentation of examples was warranted.

Lastly, ODAG staff informed us that the Department was not initially satisfied that ATF and all other DOJ law enforcement components had in place

¹² In a "home invasion" undercover operation, ATF agents provide an opportunity for suspects to commit an armed robbery of a drug "stash house." ATF's manual on home invasion operations highlights the significant risk of violence in this undercover technique as follows:

The [home invasion] technique developed by ATF, or what's referred to in some judicial districts as a "stash house robbery," is no different in theory than any other proactive law enforcement sting operation, with one exception – violence. . . .

[T]his opportunity to rob a drug stash house is only appealing to people who know the value of a quantity of cocaine, have the means or connections in the criminal community to sell it and are willing to use violence – and even to kill – to obtain it.

Suspects provided with this opportunity are willing to go into a situation where they may have to kill, or may possibly be killed, for profit. . . . [T]he targets of ATF home invasion investigations show up with pistols, shotguns, assault rifles, knives, hand cuffs, flex cuffs, stun guns, masks, ballistic vests, and fake police uniforms.

ATF Home Invasion Operations, FY 2013 1st Edition, 5-6.

¹³ See, e.g., *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014); *United States v. Black*, 733 F.3d 294 (9th Cir. 2014) (Noonan, J, dissenting); *United States v. Hudson*, 3 F. Supp. 3d 772 (C.D. Cal. 2014), *rev'd on other grounds*, *United States v. Dunlap*, 2014WL6807733 (9th Cir. 2014).

policies that were sufficient to meet the Baseline Risk Assessment Memorandum's requirement to assess with prosecutors on an on-going basis whether an investigation's benefits outweigh its risks and whether the investigation is accomplishing its goals, though ODAG is now satisfied that is the case. Specifically, ATF advised the OIG that its agents are expected to confer with prosecutors during the course of investigations to evaluate benefits and risks and that ATF supported ODAG's efforts to encourage such dialogue. According to ODAG, however, ATF's submissions to the RAWG initially failed to adequately describe ATF's consultation policies and practices. ATF subsequently supplemented its submissions with additional information establishing the consultation requirement to ODAG's satisfaction.

In light of the revisions described above, ODAG staff has advised the OIG that it believes that ATF's law enforcement policies currently comply with the Department's policies and guidelines. Officials at ATF told us that ATF shares ODAG's view.

In sum, officials at both ATF and ODAG have advised the OIG that they have completed reviews of ATF policies on law enforcement operations to ensure that they are in compliance with Department policies and guidelines. Based on the information that ATF and ODAG provided to the OIG regarding these reviews, we found that the Department has concluded the evaluation of ATF's policies that we requested.

Recommendation One is closed.

B. Recommendation Two: ATF Case Review Procedures

We recommended that the Department examine ATF's case review procedures to verify that they are consistent with procedures adopted in other Department law enforcement components to ensure that matters involving "sensitive circumstances," "special requirements," and "otherwise illegal activity" (collectively "sensitive matters") are sufficiently evaluated. We also recommended that the Department assess ATF's implementation of these procedures to ensure that they are effective and consistently applied. We made these recommendations after determining from our review of ATF's oversight of Operations Fast and Furious and Wide Receiver that the case review procedures employed in those investigations were not adequate to detect serious flaws, including ones that implicated public safety and relations with Mexico.

During this follow-up review we evaluated the Department's written status updates to this recommendation and obtained additional information from ODAG and ATF. The Department's updates highlighted three initiatives to assist ATF to better manage risks related to sensitive matters and to ensure consistency with other DOJ law enforcement components: (1) the work of the RAWG; (2) revisions to ATF's Orders on confidential informants and undercover operations; and (3) the establishment of ATF's MCP.

According to ODAG staff, during its oversight of the RAWG it examined and compared selected policies of the Department's law enforcement components, including ATF's case review procedures for sensitive matters. With the exceptions noted in Recommendation One, which have been resolved, ODAG determined that ATF's review procedures are consistent with Department policies and guidelines and with practices in other DOJ law enforcement components. This includes the risk-management requirements established in the Baseline Risk Assessment Memorandum.

The Department also reported that ATF has revised its Orders concerning confidential informants and undercover operations to improve its oversight practices. For example, ATF formed separate review committees for confidential informants and undercover operations respectively that are staffed with senior ATF officials and at least one DOJ Criminal Division prosecutor. These committees evaluate circumstances that present heightened risks to ATF, such as use of an informant for longer than 6 years, certain types of undercover operations, or authorization for undercover employees to commit otherwise illegal activity. ATF's revisions to its Order on confidential informants also included adding stricter controls on authorization of OIA.

According to the Department, the MCP is another method that ATF uses to improve its oversight of sensitive matters. ATF has established risk-based criteria for including cases in the MCP. These encompass various activities that ATF has determined pose or are associated with substantial risks, such as the trafficking or straw purchasing of more than 50 firearms, use of wiretaps in ATF-led investigations, or matters involving a documented nexus to international crime.¹⁴ For cases that qualify for inclusion in the MCP, the MCP imposes reporting requirements on ATF Field Divisions. Agents must prepare a written "initial submission" and either 30-day or 90-day "updates" that are sent to ATF Headquarters staff for review. In order to assist agents with their disclosure responsibilities, ATF has developed report templates that agents complete to satisfy their initial and periodic reporting requirements. Agents also are required to participate in case briefings. Specifically, the case agent and first-line supervisor assigned to a monitored case report at least monthly to field division management, as does the Special Agent-in-Charge to the supervising Deputy Assistant Director of Field Operations at ATF Headquarters. The ATF Director and Deputy Director also receive briefings each month on select monitored cases from field staff and the supervising Deputy Assistant Director from Headquarters' Office of Field Operations.

¹⁴ According to the ATF Order that governs the MCP, risk assessment is a critical component of the MCP. It provides that ATF "must establish with certainty that we have critically reviewed apparent and foreseeable risks, that our plans to mitigate those risks are sound" and that "[t]o achieve this, there must be full disclosure, complete candor, and transparency regarding all investigative and administrative developments in any investigation – and in particular in any monitored case. . . ." ATF Order 3200.1.

In addition to the information we obtained from the Department's status updates regarding the RAWG and our review of ATF's revision of its Orders and the policy outlining the requirements of the MCP, the OIG requested detailed information from ATF about its oversight procedures. We inquired about a variety of issues, including procedures for conducting case file reviews, inspection criteria, implementation of the MCP, and the responsibilities of ATF's Undercover Branch. We obtained documents about these issues and also conducted interviews.

We believe that the efforts described in the Department's status updates and in the information that ATF provided to us in response to our requests demonstrate significant progress to improve ATF's review procedures for sensitive matters. The RAWG scrutinized the policies of the Department's law enforcement components involving oversight of sensitive matters, including ATF's policies on undercover operations, confidential informants, and otherwise illegal activity, to ensure that they met the Department's risk management requirements. ATF's revision of its Orders on confidential informants and undercover operations conformed them to Department policies and guidelines. The MCP creates a reporting framework that improves communication between ATF Headquarters and its field divisions on cases that warrant greater supervision.

However, our interviews with ATF staff and examination of documents identified four areas of concern regarding ATF's oversight of sensitive matters that warranted ATF's attention before we can close Recommendation Two.¹⁵ These address: (1) the amendment of ATF's MCP report templates and MCP Order to better account for risk; (2) ATF inspection procedures; (3) authorization practices concerning confidential informant OIA; and (4) the role of polygraphs in ATF's evaluation of allegations of unauthorized illegal activity by confidential informants.¹⁶

With respect to the MCP report templates, we were concerned that they did not capture sufficient risk-related information, and in that respect did not fulfill the purposes underlying both the MCP and ODAG's Baseline Risk Assessment Memorandum.¹⁷ Our review determined that the MCP initial submission template includes sections for reporting basic information about the monitored case, including the name of the case agent and supervisors, date the

¹⁵ The issue of ATF's failure to include the "significant risk of violence" as a "sensitive circumstance" in its undercover operations policies also is applicable to Recommendation Two. We discussed that issue above in the context of Recommendation One.

¹⁶ The OIG also is evaluating the MCP in its pending review of ATF's undercover storefront operations and may provide additional recommendations concerning the MCP in that report.

¹⁷ ATF's Order that governs the MCP provides for "regular risk assessment" through required reporting and other monitoring activities. ATF Order 3200.1 at Section 5.c. The Baseline Risk Assessment Memorandum similarly specifies procedures that law enforcement components and prosecutors must implement to ensure that risks are adequately evaluated on an ongoing basis.

investigation was opened, and a summary of the investigation. It also includes 15 additional sections that cover various topics, some of which may not apply in each case, such as "narcotics evidence," "international," "storefront investigations," and "confidential informants." Many of these sections request numerical information about the investigation. The update submission template is an abbreviated version of the initial submission and omits the majority of the topical sections. Both templates request information about "potential issues, challenges, or concerns" that may affect the investigation.

We believed that ATF should revise its reporting templates and MCP Order to account for the ODAG memoranda described in Recommendation One. First, we recommended that ATF attach both memoranda as exhibits to the Order, and consider amending the Order to include references to them. The ODAG memoranda set forth important requirements and guidance regarding risk assessment and mitigation and agents who have cases in the MCP should be knowledgeable about them. The Order currently attaches two other ODAG guidance documents as exhibits (these concern criminal discovery and disclosure obligations), along with other materials, including the criteria for including cases in the MCP and reporting templates. We believed that the ODAG memoranda are sufficiently relevant to the purposes of the MCP that they merited at least comparable treatment.

Second, we recommended that ATF modify the MCP reporting templates to expressly address risks that are discussed in the ODAG memoranda, including risks to public safety, and confidential informant authorized and unauthorized illegal activity. We advised ATF that possible improvements to the templates could include the following:

- Add a section entitled "Risk Assessment" that separately describes risks to public safety, agent safety, mitigation measures to address such risks, and whether the U.S. Attorney's Office has been briefed on the risks;
- Revise the section on "U.S. Attorney's Office" to include a description of any concerns that the U.S. Attorney's Office raised about the investigation or proposed operations and how the Field Division addressed those concerns;
- Revise the section on "Participants" to include a description of whether any partner agencies have expressed concerns about the investigation or proposed operations and how the Field Division addressed those concerns;
- Revise the section on "Firearms" to inquire as to whether ATF's Firearm Transfers policy has been violated or whether the Field Division has received allegations of the same ("Firearm Transfers," November 3, 2011, incorporated into Section 77 of ATF Order 3310.4C);
- Revise the section on "Confidential Informants" to include the name of the handling agent; whether the informant is authorized for otherwise illegal

activity, and if so, the terms of the authorization (type of illegal activities, duration, location); evidence or allegations of informant unauthorized illegal activities; whether the informant has disregarded agent instructions; and any special controls that the Field Division has instituted to monitor the informant's activities; and

- Revise the section on "Storefront Investigations" to account for safety and risk factors identified in ATF's Storefront Investigations manual and in its Storefront guidance ("Revisions to Storefront Policy and Guidance," March 21, 2013), including site selection, security assessments, and oversight.¹⁸

In addition, we recommended that ATF consider modifying the "update submission" template as follows:

- Revise the section on "Overall Investigation Summary" to identify; (1) any changes in the goals or other aspects of the investigation that deviate from the terms of any prior authorizations (such as changes in the location of an operation) or otherwise impact the risks associated with it; (2) the progress made to achieve the investigation's goals, and an estimate of when the goals will be fully achieved; and (3) new significant information concerning any of the reporting sections included in the initial submission, with specific reference to any information that would impact the risk associated with the investigation.

ATF staff informed the OIG that it agreed that the MCP templates should be updated to account for the risk-assessment concepts described in the ODAG memoranda, and that it found nothing objectionable about the notion of incorporating compliance checklists into its MCP reporting templates as we have suggested. ATF further agreed that the issues we identified above for tracking in the templates are important ones and informed us that the issues were under active consideration by the agency.

Since that time, ATF attached both ODAG memoranda on risk assessment as exhibits to the MCP Order, as we recommended. In addition, in January 2016, ATF furnished the OIG with revised templates that addressed many of our concerns. For example, the revised "initial submission" template requires the production of information about concerns expressed by the U.S. Attorney's Office or partner agencies and whether a confidential informant has been authorized to conduct otherwise illegal activity. The "update submission" template includes sections for describing investigative results, any challenges or concerns affecting the investigation, and whether the goals of the investigation have changed. ATF also informed the OIG that it anticipates making additional changes to the templates that will address concerns we identified regarding

¹⁸ The OIG expects to make recommendations in its final report on select ATF storefront operations for revisions to ATF's Storefront Investigations manual. ATF currently has a moratorium on storefront investigations.

firearms transfers and storefront operations. The OIG will continue to monitor ATF's progress in this area.

In addition to the MCP, ATF's inspection process provides another method to oversee sensitive matters. As with other Department law enforcement components, ATF has an Inspection Division that inspects Headquarters offices and field divisions for compliance with policy and regulations. ATF Order 8100.2B. At the start of our review we found that ATF was performing inspections of eight subject matter areas, and had developed inspection checklists for each area.¹⁹ In response to our review and recommendations from ODAG, ATF in February 2015 added three areas and modified its inspection procedures to include interviews of agents regarding operational planning and the use of confidential informants.²⁰ According to the Chief of ATF's Inspection Division, each Field Division conducts a self-inspection covering these topics every year, while the Inspection Division seeks to inspect each field division once every 3 years. The Chief also stated that budget limitations and reengineering efforts disrupted ATF's inspection cycle between 2010 and 2012, and that the Inspection Division was still "catching up" to its goal of visiting each field division once every 3 years.

As with the MCP report templates, our review determined that the Inspection Division's procedures and criteria are not sufficiently risk-based and focused on sensitive matters. For example, we found that the Inspection Division was not inspecting various activities that carry substantial risk, such as undercover operations, and did not weight its selection of case files for review based on the presence of risk factors. We also found that the inspection checklist for confidential informants did not evaluate OIA or issues related to unauthorized illegal activity, such as notifications required under the Attorney General's Guidelines. We believe that ATF should revise its inspection procedures to better address risks to the agency. These modifications should proceed from a comprehensive assessment that identifies such risks.²¹ In January 2016, ATF advised the OIG that it was developing new information collection procedures to better identify investigations that present heightened operational risk and that warrant enhanced inspection scrutiny. ATF intends to update the OIG about its progress as its work in this area continues, and the OIG will continue to monitor its progress.

¹⁹ These are: N-Force Investigation and Documentation Analysis, Evidence Vault, Confidential Informant, Agent Cashier Funds, Referral of Information, N-SPECT Inspection and Documentation Analysis, Travel Miscellaneous, and Issued Property.

²⁰ The new subject matter areas are: firearms training, operational planning, and the Monitored Case Program.

²¹ We described risk identification and mitigation procedures in our report, *Federal Bureau of Investigation's Integrity and Compliance Program* (November 2011). We recognize that much of this underlying work may already have been completed through ATF's development of the MCP and participation in the RAWG.

We also determined that ATF needed to enhance agent education and oversight concerning informant OIA. We reviewed select authorizations for OIA and found that in some cases approvals were not made by ATF officials of sufficient seniority. For less serious types of OIA, known as Tier II OIA, the applicable Attorney General Guidelines require authorization from an agent who is a "senior field manager." We found in a limited number of cases that authorizations for Tier II OIA were being provided from supervisors below this level of seniority. In addition, our interviews with agents revealed that some were not familiar with OIA. We did not identify instances where agents obtained improper authorizations of Tier I OIA.

We raised our concerns regarding the authorization for OIA and agent knowledge of the relevant requirements with ATF. In response, the Assistant Director for Field Operations issued guidance to all ATF Special Agents-In-Charge (SACs) in November 2014 that reminded them that all agents must understand the definition of OIA and that described the Tier II OIA approval process. ATF also modified the form it uses to authorize Tier II OIA to ensure that the authorization is provided by either a SAC or Assistant Special Agent-In-Charge (ASAC).

Another oversight practice related to OIA that we determined ATF needed to address concerned the use of polygraphs on confidential informants. We found that ATF did not have a policy regarding use of polygraphs on informants. Moreover, an experienced ATF polygrapher told us that "we avoid giving polygraphs to [confidential informants] whenever we can." We were concerned by this because polygraphs can play a useful role in informant oversight, especially in circumstances where an allegation arises that the informant has engaged in unauthorized illegal activity. The FBI's handbook on human sources provides that "[p]olygraph examinations should be considered a useful tool and should be considered for use when circumstances warrant." After we brought this issue to ATF's attention, ATF amended its confidential informant policies to acknowledge the availability of polygraph examinations for informant suitability reviews and other circumstances as appropriate.²²

Lastly, Recommendation Two also requested that the Department assess ATF's implementation of its procedures concerning sensitive matters to ensure that they are effective and consistently applied. According to ODAG staff, the RAWG required ATF and other DOJ law enforcement components to furnish training materials to ODAG demonstrating that they are training their personnel to implement the protocols set forth in the Baseline Risk Assessment Memorandum. Those protocols address risks common in the sensitive matters we identified in the recommendation, such as OIA. ODAG evaluated ATF's materials and determined that they were satisfactory. ATF also provided these

²² ATF's Order on Confidential Informants now provides that: "[s]pecial agents are reminded that polygraph services are available upon request for any Initial Suitability Determination, Semiannual Suitability Review, or at any time deemed necessary by the controlling agent." ATF Order 3252.1A.

materials to the OIG, and we believe that they are consistent with the goals set forth in the Recommendation.

In light of the foregoing we have determined that Recommendation Two is resolved. ATF should provide a written response to this assessment within 90 days. This recommendation can be closed when ATF makes additional revisions to the MCP report templates to further improve evaluating risk and develops inspection procedures that evaluate leading risks to the agency as identified from a comprehensive risk assessment. In light of the foregoing, ATF does not need to provide additional information on authorization of Tier II OIA and polygraphs of informants.

C. Recommendation Three: Gun Trafficking Enterprise Investigations

We recommended that the Department work with ATF to develop guidance on how to conduct enterprise investigations against gun trafficking organizations consistent with lessons learned from Operation Fast and Furious. We made this recommendation to ensure that ATF agents understood how to build such cases in light of ATF's firearms transfer policy, which took effect in November 2011.

ATF codified its firearms transfer policy in an agency order in March 2013. The order differentiates between two types of firearms transfers: "controlled" and "uncontrolled." ATF Order 3310.4C Section 77.a(6). In a "controlled firearms transfer" the government actively participates in the firearms transfer, such as attaching a tracking device to a firearm owned by a licensed firearms dealer, and may or may not own the firearms. ATF's order prohibits agents from allowing firearms in a controlled delivery to leave their control. In an "uncontrolled firearms transfer" the government learns of a suspicious firearms transaction but does not actively participate in the transfer, and none of the firearms are owned by the government. *Id.* When an agent has a legal basis to make an arrest or seize the firearm in an uncontrolled firearms transfer, there are four options. According to the order:

[T]he agent, considering primarily public and officer safety, must take all reasonable steps to prevent the firearm's criminal misuse by: (1) intervening to stop the transfer (if the transfer has not yet occurred); (2) arresting the suspect; (3) taking the firearm into law enforcement custody; and/or (4) conducting continuous on-site physical surveillance to identify additional suspects or locations before taking enforcement action. If continuous on-site physical surveillance is used, such surveillance may not cease until enforcement action is taken.

Id.

Officials from the Department and ATF informed the OIG that they concur with Recommendation Three. The Department's initial update regarding Recommendation Three cited ATF's "Frontline" strategy. According to ATF,

Frontline is a “business model” that uses planning, performance assessments, and increased reliance on criminal intelligence to advance the agency’s law enforcement mission. (ATF Frontline Manual, 2013 1st Edition at vii to x). The Department and ATF also furnished training materials in 2014 for our examination that addressed issues in firearms prosecutions. However, our review of the Frontline strategy and training materials did not identify information that provided guidance to agents on how to develop enterprise/conspiracy cases and that also took ATF’s firearms transfer order into account.

On July 6, 2015, ATF provided the OIG with new training materials which provide instruction on how to develop enterprise/conspiracy cases involving firearms while abiding by ATF’s firearms transfer order. The materials provide that the agency’s firearms transfer policy is not intended to prohibit complex investigations, and furnishes examples of investigative techniques that can be used in such investigations. It also instructs agents to “communicate and coordinate” with prosecutors, law enforcement partners, and within ATF “regarding potential criminal acquisition of firearms, trafficking, and acts of violence.” According to ATF, the training is mandatory for all agents and task force officers and had to be completed by September 30, 2015.

We believe that ATF has taken the steps necessary to satisfy this recommendation. Therefore, Recommendation Three is closed.

D. Recommendation Four: Policy Review of Other Law Enforcement Components to Account for Lessons from Operations Fast and Furious and Wide Receiver

We recommended that the Department review the policies and procedures of its law enforcement components other than ATF to ensure that they are sufficient to address the concerns we identified in the conduct of Operations Fast and Furious and Wide Receiver, particularly regarding oversight of sensitive and major cases, the authorization and oversight of otherwise illegal activity, and the use of informants in situations where the law enforcement component also has a regulatory function. We made this recommendation in order to minimize the risk that the mistakes made in Operations Fast and Furious and Wide Receiver would be repeated by the DEA, FBI, and USMS.

We determined that ODAG, through its oversight of the RAWG, evaluated the policies of the Department’s law enforcement components regarding the three issues we highlighted in the recommendation to ensure that the policies satisfied the risk management requirements contained in the Baseline Risk Assessment Memorandum. As part of this review ODAG also initiated an assessment to determine whether additional firearms transfer policies are required in the Department besides the policy established by ATF in 2011.

Despite the important and beneficial work of the RAWG, we identified three areas where we believe the Department needs to make improvements. These concern: (1) policies that address firearms transfers for components

other than ATF; (2) the failure of DEA's informant policies to incorporate requirements from the Informant Guidelines, especially concerning informant otherwise illegal activity; and (3) DEA's use of informants who are regulated by DEA, such as physicians and pharmacists, or are employed by an entity that is regulated by DEA, such as a drug manufacturer.

1. Firearms Transfers

We found that with the exception of ATF, the policies of the Department and its law enforcement components did not sufficiently address risks associated with firearms transfers. As we described above, in response to problems identified in Operations Fast and Furious and Wide Receiver, ATF established a policy on firearms transfers in November 2011 that addresses both "controlled" and "uncontrolled" firearms transfers. We determined, however, that neither DEA, FBI, nor the USMS instituted similar policy changes or provided guidance to their personnel. During our interviews, staff from these components provided various justifications for the lack of express policies that address firearms transfers, including that their agents did not engage in the troubling practices described in the OIG's report, and that the risks related to firearms transfers were sufficiently managed through other policies, such as ones concerning undercover operations.

We found these arguments unpersuasive. Because agents from the DEA, FBI, and USMS routinely deal with violent criminals with access to trafficked firearms, we believe that it is readily foreseeable that agents from these components could learn of uncontrolled firearms transfers, such as from an informant or wiretap, in circumstances where probable cause exists to seize the firearms or arrest the perpetrators. With limited exceptions, the firearms transfers in Operations Fast and Furious and Wide Receiver were "uncontrolled."²³ An important lesson from the errors in Operations Fast and

²³ We also found that the DEA and USMS did not have policies that addressed when to contact ATF about uncontrolled firearms transfers. Staff from both agencies informed us that it was their practice to confer with ATF on matters involving firearms transfers because firearms are within ATF's jurisdiction. DEA brought to our attention its policies on the "Debriefing of Confidential Sources," which provide that if the non-drug related information provided from a confidential source "concerns a serious criminal offense (e.g. a felony), or a crime which is planned to be committed, then action will be taken to coordinate with supervisory personnel of the responsible law enforcement agency, and/or with federal or state prosecutor [sic]." These policies also reference DEA's "Guide to Source Debriefing," which identify possible questions regarding firearms, ammunition, and explosives. Our review of DEA's policies determined that they were not sufficiently explicit and comprehensive to address the problems we identified in our report on Operations Fast and Furious and Wide Receiver. For example, DEA agents may learn of firearms transfers in ways other than from a source debriefing. We had similar concerns with the USMS. USMS policy also does not mention firearms transfers or ATF; rather, it generally requires referral to the "appropriate federal, state, and/or local law enforcement authorities" of information about suspected criminal activity that is outside of USMS jurisdiction. FBI policy provides for referral of firearms matters to ATF in circumstances where the FBI otherwise lacks primary jurisdiction to investigate.

Furious and Wide Receiver was that agents should have the benefit of clear policies that specify how they are to address firearms transfers of any variety.

While we recognize that it is not possible to devise written policies that address every investigative contingency, we recommended in our report on Operations Fast and Furious and Wide Receiver that the Department review the policies and procedures of its law enforcement components other than ATF to ensure that they are sufficient to address the concerns we identified in the conduct of those operations. Although we do not believe it is necessary for the components to copy ATF's firearms transfer policy verbatim, owing to their differing missions and jurisdictions, or to have a policy that solely applies to firearms, ensuring that the concerns identified in our prior report requires, at a minimum, that they have written policies specifying the level of supervision required when circumstances involving uncontrolled firearms transfers arise, and that decisions not to seize firearms cannot be left in the first instance to line agents or task force officers absent exigent circumstances. In the absence of such clear guidance, the risks to public safety, as well as the Department's own law enforcement efforts, are substantial. We found that the Criminal Division's Office of Enforcement Operations (OEO) firearms guidance for prosecutors' use in investigations that involve wiretaps is one example of a possible model policy.²⁴

²⁴ OEO examines wiretap applications before they are sent to a Deputy Assistant Attorney General in the Criminal Division for authorization. In approximately January 2014, OEO established risk mitigation guidelines for law enforcement officers engaged in investigations that involve wiretaps. The guidelines provide the following instructions regarding firearms that may be given to law enforcement personnel monitoring wiretaps:

This [wiretap] investigation targets an organization whose members are believed to possess and traffic in firearms. In the event that there is a legal basis to make an arrest or seize firearms and the [wiretap] interceptions provide sufficient actionable intelligence concerning the possession or transfer of firearms, the investigative agency should take reasonable efforts to prevent the firearm's criminal misuse. Reasonable steps to prevent the firearm's criminal misuse may include: (1) intervening to stop the transfer; (2) arresting the suspects; (3) taking the firearms into law enforcement custody; or (4) disclosing the information to an appropriate investigator or law enforcement officer. In determining whether there exists a sufficient legal basis to make an arrest or seize the firearms, the investigative agents will rely upon their training, knowledge, and experience to balance the interests of public safety with the rights of persons who may be acquiring firearms for lawful purposes. The investigative agency will use its discretion in determining what methods to employ in deciding whether to seize or prevent the transfer of firearms, taking into consideration the safety of agents and law enforcement sources, public safety, the type of firearms and the potential danger that the illegal firearms pose, and the objectives of the investigation. Interdiction or other forms of early intervention may be necessary to prevent the criminal acquisition, trafficking, and misuse of firearms. Perfecting a criminal prosecution must never be more important than protecting public safety.

Use of this guidance by prosecutors is not mandatory, however, and different U.S. Attorney's Offices may opt to provide other instructions.

We believe that the RAWG's work contributed significantly to framing the Department's approach to risk management in law enforcement operations; however, we determined that the Department's risk mitigation policies did not require the law enforcement components to expressly address firearms transfers in their policies, and themselves were incomplete because they did not specifically address uncontrolled firearms transfers. Former Deputy Attorney General Cole told us that the Department's approach to firearms transfers had evolved since 2011 from a focus on ensuring proper control over firearms during undercover operations, to a recognition that the Department needed to more broadly evaluate its management of risks, especially those associated with dangerous commodities that include but are not limited to firearms.²⁵

The former Deputy Attorney General established a written policy in December 2013 that dealt with training and authorization procedures for activities that could include controlled firearms transfers, but it did not require components to adopt written policies specifically concerning such transfers and left unaddressed how agents should deal with uncontrolled transfers. The Baseline Risk Assessment Memorandum, which resulted from the RAWG's work, requires Department law enforcement components to provide agents and first-line supervisors with training to "[e]nsure that any dangerous commodity or item (such as a firearm, body armor, explosives, etc.) does not leave law enforcement control" The policy also requires a review and approval process for OIA by undercover agents and informants that safeguards against dangerous commodities or items leaving law enforcement control. However, ODAG did not require components to establish written policies that expressly address firearms transfers, which we believe is important to best inform agents of their responsibilities. Due to the level of risk, the firearms transfer issues we identified in our report merit express treatment in agent investigative policies. Moreover, in light of the pivotal role that the U.S. Attorney's Office in the District of Arizona played in the issues that we analyzed in Operations Wide Receiver and Fast and Furious and prosecutors' responsibility for helping to direct law enforcement operations generally, we also believe that prosecutors should be fully alerted to the risks associated with firearms transfers.

²⁵ For example, former Deputy Attorney General Cole sent an e-mail in March 2011 to the five U.S. Attorneys along the Southwest Border instructing them "not to design or conduct undercover operations which include guns crossing the border. If we have knowledge that guns are about to cross the border, we must take immediate action to stop the firearms from crossing the border, even if that prematurely terminates or otherwise jeopardizes an investigation." He also requested that the U.S. Attorneys inform the local SACs of the policy. We discuss these communications in greater detail at page 99 of our Fast and Furious report. The Executive Office of the United States Attorneys further distributed Cole's email to all then-U.S. Attorneys. However, the policy statement outlined in the Cole email was not made part of the U.S. Attorney's Manual or other Department reference materials. We did not find evidence that any component within DOJ other than ATF established written policies to reflect the former Deputy Attorney General's instructions, or that the Department specified a policy on uncontrolled firearms transfers involving the border. ATF's firearms transfer policy also does not mention the U.S. border. We believe the Department should consider widely disseminating its views on these issues and making this information readily accessible by Department staff.

The Department has responded positively to our concerns on firearms transfers, though some work remains to be completed. During our follow-up review DEA issued a policy on risk assessment and mitigation that included guidance on firearms transfers, and revised it in January 2016 to comply more directly with our recommendation by specifying that agents were required to consult with a supervisor when confronted with firearms transfers. ODAG has informed us that the FBI and USMS also will be modifying their policies similarly, and that this work will be completed expeditiously. Once these revisions are completed we believe that the Department should consider bringing them to the attention of prosecutors through the issuance of guidance.²⁶ We will continue to monitor this process to ensure that the recommendations based on the problems uncovered in our prior review are fully addressed.

2. DEA's Informant Policies

Our second area of concern involved the failure of DEA's informant policies to incorporate requirements from the Informant Guidelines. For example, DEA's policies did not include authorization procedures mandated by the Guidelines for certain highly sensitive informants. Although the Department's Criminal Division approved DEA's policies in 2004, we found that the Department did not begin reevaluating the omission of Guidelines requirements until 2014, after the OIG and the Government Accountability Office (GAO) initiated reviews. The GAO itemized these omissions in a recent report that evaluated agency policies concerning informant vetting and oversight of OIA, and monitoring processes to ensure compliance with the Guidelines.²⁷ Some of these omissions are discussed in the OIG's interim report on DEA's confidential informant program.

Apart from the absence of particular Guidelines provisions from DEA's informant policies, we also were surprised to find that these policies did not include any section dedicated to OIA. In contrast, the agent manuals of the ATF and FBI (and OIG) all contain multipage sections specifically devoted to the issues that are derived from the Informant Guidelines.²⁸ DEA staff initially informed us that it believed that its policies governing drug purchases, which

²⁶ Ideally, this guidance would be readily available in Department reference materials used by prosecutors, such as the the U.S. Attorney's Manual, USABook, and USANet (which currently contains ATF's firearms transfer policy). We believe that, at a minimum, any such guidance would alert Department prosecutors to the fact that firearms transfers involve significant risks to public safety, that the Department's law enforcement components have policies that address such transfers, and that prosecutors should consult with agents about those policies in circumstances where such transfers are likely or become known.

²⁷ See Government Accountability Office, *Confidential Informants: Updates to Policy and Additional Guidance Would Improve Oversight by DOJ and DHS Agencies* Appendix IV (September 2015).

²⁸ As we discuss below, the USMS advised us that it does not authorize OIA.

require development and authorization of an operational plan, sufficed to address informant risks related to OIA.²⁹

However, in response to concerns raised by the OIG and GAO about discrepancies between DEA's policies and the Informant Guidelines, including the absence of express policies on OIA, ODAG and DEA decided to update DEA's informant policies to account for all Guidelines requirements. On June 30, 2015, ODAG informed the OIG in a memorandum that the review of DEA's policies was ongoing and that it will "ensure that DEA's policies comply with the [Attorney General's] Guidelines and are presented in a manner that is consistent with the [Attorney General's] Guidelines in both form and function." In addition, according to ODAG, the review will "clarify the requirements necessary to approve Otherwise Illegal Activity (OIA). . . ." ³⁰

3. Use of Informants Subject to DEA Regulation

We recommended that the Department review the other law enforcement components' policies and procedures regarding the use of informants who also are subject to regulation by the same component. As described in our report, we found that ATF's use of regulated Federal Firearms Licensees in Operations Fast and Furious and Wide Receiver raised significant concerns over potential conflicts of interest between ATF's regulatory and criminal enforcement functions, and whether ATF agents created at least the appearance that they encouraged unlawful acts. ATF recognized these issues and revised its confidential informant policies in November 2011 to prohibit use of informants

²⁹ Our concern that DEA agents lacked sufficient guidance on OIA was compounded by our discovery of a memorandum from DEA's Office of General Counsel that incorrectly took the position that "routine" informant purchases of narcotics are not OIA. The memorandum was circulated to several senior leaders in DEA, including the chief of DEA's informant unit, before it was sent to GAO in response to questions GAO had raised with DEA about its informant program. ODAG and DEA officials have acknowledged that the memorandum was in error.

³⁰ The GAO also raised concerns about the USMS' omission of Informant Guidelines requirements from its policies. See, e.g., GAO Report at 14-16. We interviewed USMS staff about the role of the Informant Guidelines in USMS operations. According to the Deputy Assistant Director of Investigative Operations for the USMS, the USMS does not utilize "confidential informants" within the meaning of the Informant Guidelines. Under the Informant Guidelines, a "confidential informant" is "any individual who provides useful and credible information to a [Justice Law Enforcement Agency (JLEA)] regarding felonious criminal activities, and from whom the JLEA expects or intends to obtain additional useful and credible information regarding such activities in the future." Guidelines at I.B.6. According to the Deputy Assistant Director, while the USMS sometimes compensates persons for information in fugitive investigations, the USMS does not maintain ongoing relationships with these persons that would cause the USMS to expect or intend to collect additional information from them in the future. He also advised the OIG that the USMS never authorizes OIA for persons who furnish the USMS with information. However, we did not find a USMS policy that memorializes this practice. Staff from the USMS Office of General Counsel advised the OIG that the USMS is preparing a policy that prohibits authorization of OIA. In addition, the USMS is amending its policies to incorporate all Informant Guidelines requirements. According to the USMS, it does not anticipate use of the new policies, however, because it does not utilize confidential informants. We agree with the USMS that its decision to add policies concerning OIA and that address the potential for future informant use is advisable.

from industries that ATF regulates, except in extraordinary circumstances.³¹ ATF Order 3252.1.

We determined that the Department and DEA did not sufficiently respond to that part of Recommendation Four that addresses the DEA's use of informants who also are subject to being regulated by it.³² Unlike ATF, the DEA does not have policies that specifically address the handling of such informants. Although the DEA requires heightened scrutiny of informants whose utilization "is likely to raise complex legal issues," we believe this language is far too vague to put agents on notice that informants who are also regulated by the DEA raise issues that require special consideration. We further determined that the DEA did not evaluate whether it needed to make policy changes to address the concerns we raised in our report. In the same June 30, 2015, memorandum discussed above, the ODAG informed the OIG that the ongoing review of the DEA's informant policies "will ensure that the Agent's Manual addresses the use of registrants as confidential sources and includes policies governing such use."

4. Steps Necessary to Close Recommendation Four

In conclusion, we found that the Department's response to Recommendation Four was mixed. The work of the RAWG resulted in the Department's review of component policies on issues that overlapped with ones we identified in Operations Fast and Furious and Wide Receiver, such as oversight of sensitive cases and informant OIA, and led to the issuance of important guidance documents. However, we found that the law enforcement components other than ATF did not adequately assess the lessons of Operations Fast and Furious and Wide Receiver, and that the Department did not give sufficient attention to the need for policies on uncontrolled firearms transfers. The Department is working to address these concerns. DEA has issued new policy that addresses firearms transfers, and the FBI and USMS have indicated to ODAG their intention to add new policies to address this issue as well.

Therefore, Recommendation Four is resolved. In order to close this recommendation, the Department should provide the OIG with information demonstrating that:

1. Controlled and uncontrolled firearms transfers are expressly addressed in FBI and USMS policies.³³ Similar to the policies implemented by ATF and

³¹ Examples of such circumstances include use of employees of licensees where the Federal Firearms Licensee is suspected of illegal activity, and of licensees who are arrested and charged and agree to cooperate with law enforcement. ATF Order 3252.1 sec. 31a & b.

³² Businesses, health professionals, and pharmacies that handle or administer controlled substances must register with DEA and comply with regulations enforced by the agency.

³³ Once these revisions are completed, we suggest that the Department consider providing guidance to prosecutors related to controlled and uncontrolled firearms transfers and include it in Department reference materials, such as the U.S. Attorney's Manual, USABook, and USANet. We suggest that the Department consider the same for firearms transfers involving the U.S. border.

DEA, the FBI and USMS policies should provide for sufficient supervisory input and approval before a decision is made not to seize firearms in an uncontrolled transfer. The Department may wish to consider integrating firearms transfers into policies that address other dangerous commodities and items, such as explosives, though we believe it is important that applicable policy expressly reference "firearms" given the issues we found in our Fast and Furious report;

2. The DEA and USMS have established policies that address when to contact ATF about uncontrolled firearms transfers;

3. The Department completes its review of DEA's informant policies; and

4. DEA has amended its Agent's Manual to address the use of registrants as confidential informants.

In addition, prior to release of this report, we supplemented our recommendations to request the Department to evaluate how to better utilize the lessons learned from the OIG's reports when they address issues that have relevance to other Department components. We believe that an issue as significant as the failings in Operations Fast and Furious and Wide Receiver should have prompted thorough policy reviews within the Department's other law enforcement components, especially with regard to uncontrolled firearms transfers. Although our report was focused on ATF, it has significant ramifications for the Department's other law enforcement components, and Recommendation Four was directed squarely at evaluating the sufficiency of the policies and procedures of those other components. Similarly, as we explained at the start of this report, the OIG has written extensively in the past about the importance of oversight of confidential informants and the management of OIA within the FBI, yet the Department permitted the DEA to have informant policies that did not expressly address the issue.³⁴ During our review we raised our concerns with ODAG staff. We informed the Department that we believed that new procedures were necessary.

In response, the Department's Justice Management Division (JMD) issued a policy in December 2015 that requires JMD to review all future OIG recommendations to determine whether they could be beneficial to multiple DOJ components. Under the policy, each quarter JMD will compile a list of a new OIG recommendations for ODAG's examination and will identify those that ODAG may want to consider applying to multiple components. ODAG will determine which recommendations should be applied broadly and what additional actions are necessary. We believe that JMD's policy is a positive development. The OIG will seek information in the future about how the new procedure is working.

³⁴ See note 2.

E. Recommendation Five: Law Enforcement Coordination

We recommended that the Department maintain a regular working group involving leadership from its component law enforcement agencies to ensure appropriate coordination among them on significant law enforcement policies and procedures, case deconfliction mechanisms, and major investigations and law enforcement initiatives. Our review of Operation Fast and Furious identified numerous instances where information was not adequately shared between law enforcement agencies.

In response to this recommendation, ODAG staff informed the OIG that the Department has instituted quarterly meetings between the Deputy Attorney General, the Directors of the Department's four law enforcement components, the Assistant Attorney General for the Criminal Division, and a member of the Attorney General's Advisory Committee of U.S. Attorneys. In a memorandum dated January 10, 2013, former Deputy Attorney General Cole advised these Department leaders that he and the Attorney General had determined that regular group meetings would be beneficial "to discuss significant law enforcement policies, procedures, and initiatives." The first such meeting occurred in February 2013 and concerned the activities of the RAWG. Since that time, the Department has organized five other coordination meetings.

In addition, ODAG staff informed us that the Department has instituted regular meetings of the operational chiefs from the Department's four law enforcement components.³⁵ Initially, these meetings took place concurrently with the meetings of the RAWG. The first non-RAWG related meeting occurred in March 2014 and concerned issues related to the Southwest Border. ODAG intends for these meetings to occur approximately bi-monthly. Issues addressed during the meetings have included crime in the Upper Midwest and interagency coordination. According to ODAG staff, the operational chiefs set the agenda topics for these meetings unless the Attorney General or Deputy Attorney General identifies an issue that should take precedence.

Recommendation Five is closed.

F. Recommendation Six: Review of Wiretap Applications

We recommended that the Department require that high-level officials who are responsible for authorizing wiretap applications conduct reviews of the applications and affidavits that are sufficient to enable those officials to form an independent judgment that the applications meet the statutory criteria found in the Federal Criminal Code. See 18 U.S.C. § 2518. We made this recommendation after we found that Deputy Assistant Attorneys General (DAAG) in the Department's Criminal Division were, except in limited circumstances, not reviewing the applications and affidavits and instead were

³⁵ These meetings included, for example, DEA's Chief of Operations, and ATF's Assistant Director for Field Operations.

relying upon cover memoranda prepared by Criminal Division staff attorneys. We concluded from our review of the wiretap affidavits in both Operations Fast and Furious and Wide Receiver that they contained information that would have caused an experienced prosecutor who was focused on the question of investigative tactics to have questions about ATF's tactics. We found that none of the DAAGs assigned to review the wiretap applications and affidavits in the two operations raised any concerns about them.

The Department's status update in December 2012 described efforts that the Criminal Division has taken to implement Recommendation Six. Approximately 2 months following issuance of the OIG report, the Assistant Attorney General for the Criminal Division issued a memorandum directing all Criminal Division DAAGs to consult the wiretap application and affidavit and "not rely solely on the cover memoranda prepared by OEO in making [their] wiretap determinations." The Department provided the OIG with a copy of the memorandum. It reminded the DAAGs that, in the week after the OIG issued its report on Operations Fast and Furious and Wide Receiver, the Assistant Attorney General met with them "and directed that we immediately implement [the OIG] recommendation."

We believe that the Criminal Division has taken steps sufficient to ensure that DAAGs in the Criminal Division perform an independent assessment of wiretap applications and affidavits. Recommendation Six is closed.

IV. CONCLUSION

We believe that the Department and ATF have made significant progress to implement the recommendations from our report on Operations Fast and Furious and Wide Receiver that apply to ATF and the Criminal Division. We are able to close four of the six recommendations. However, we found that the Department's law enforcement components other than ATF had not taken sufficient steps to institute policies to avoid repetition of the errors we identified in our report. In response to our concerns DEA added a policy that addresses firearms transfers and, according to the Department, the FBI and USMS will do the same in the near future. We also found that DEA failed to address our concerns regarding informant otherwise illegal activity and informants who are also regulated by DEA, which were two issues we highlighted in our report. We believe that the Department needs to better ensure that lessons learned as a result of OIG reports are evaluated by other Department components when they have relevance to them, and we have made a new recommendation that the Department develop new procedures to attain this outcome. The Department agreed with the new recommendation and has instituted procedures to implement it.

ATTACHMENT



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 10, 2016

MEMORANDUM

TO: Michael Horowitz
Inspector General
Office of the Inspector General

FROM: Heather Childs
Chief of Staff and Associate Deputy Attorney General
Office of the Deputy Attorney General

SUBJECT: Department's Response to Report of the Office of the Inspector General:
*A Review of the Department of Justice's and ATF's Implementation of
Recommendations Contained in the OIG's Report on Operations Fast and
Furious and Wide Receiver*

We appreciate the review undertaken by the Department of Justice (Department) Office of the Inspector General (OIG) entitled *A Review of the Department of Justice's and ATF's Implementation of Recommendations Contained in the OIG's Report on Operations Fast and Furious and Wide Receiver*. The OIG report primarily addresses the six recommendations that OIG made to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the Department in its previous report entitled *A Review of ATF's Operation Fast and Furious and Related Matters*. After a thorough review, you have closed four of the six recommendations and designated two as resolved. As detailed more fully below, the Department is gratified that four recommendations have now been closed and is committed to working with OIG to close the two resolved recommendations.

The Department took very seriously the misconduct uncovered in Operations Fast and Furious and Wide Receiver, and we are pleased OIG has recognized the significant changes we have made in both our law enforcement and litigating components to address public safety risks that may arise during law enforcement investigations and operations. As you know, the Attorney General promptly moved to form a Risk Assessment Working Group (RAWG) to evaluate and recommend enhancements to the Department's procedures for assessing such risks. The RAWG was comprised of representatives of the Department's law enforcement components, members of the Attorney General's Advisory Committee, the Executive Office for United States Attorneys, the Criminal Division, the Office of the Attorney General, and the Office of the Deputy Attorney General. The working group was tasked with addressing the difficult issues law enforcement agents face when making operational decisions, with a particular focus on the use of sensitive investigative techniques. As part of this process, the RAWG carefully reviewed the various tools

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and techniques utilized by the Department in pursuit of federal criminal investigations and prosecutions, including the Department's guidelines and procedures for risk assessment and decision making in law-enforcement investigations and operations.

The working group met on a monthly basis for over a year. During these meetings, senior leaders from the law enforcement agencies and experienced prosecutors discussed real-life examples of risks encountered in the field as well as broader policy issues related to risk assessment and mitigation. As a result of the working group's efforts, in March 2013, then-Deputy Attorney General (DAG) James Cole issued guidance for United States Attorneys and the heads of the criminal litigating components clarifying the prosecutor's role in reviewing law enforcement operations that involve sensitive investigative techniques.¹

In December 2013, the work of the RAWG culminated in a memorandum (RAWG Directives) to the Department's criminal litigating and law enforcement components setting out baseline risk assessment policies and principles that apply to all criminal investigations and operations. As noted in your report, the memorandum established 55 protocols in the following areas: assessment of risk during the course of an investigation; initiation and oversight of sensitive investigative activities; use of confidential informants; authorization of otherwise illegal activity (OIA) by undercover agents or informants; and investigations in which project generated income is contemplated. Additionally, the memorandum directed the criminal litigating and law enforcement components to review their own policies and procedures relevant to operations, investigations, and prosecutions to ensure that those policies reflected the baseline principles outlined in the memorandum.²

The Department appreciates the opportunity to respond to the OIG's review and is committed to working with the OIG to close out the two resolved recommendations, both of which are addressed below.

Recommendation Two: The Department should examine ATF's case review procedures to verify that they are consistent with procedures adopted in other Department law enforcement components to ensure that matters involving "sensitive circumstances," "special requirements," and "otherwise illegal activity," are sufficiently evaluated. The Department should assess ATF's implementation of these procedures to ensure that they are effective and consistently applied.

The Department is pleased that the report recognizes the significant progress ATF has made with respect to Recommendation Two, which involves ensuring that ATF's case review procedures are consistent with other Department components and assessing the challenges unique to ATF's specialized mission. We understand that your office is satisfied that ATF's core case review policies are consistent with Department-wide policies, but that you will continue to

¹ Memorandum from James M. Cole, Deputy Attorney General to All United States Attorneys, et. seq., *Sensitive Investigative Techniques Requiring Committee Review* (March 11, 2013).

² Memorandum from James M. Cole, Deputy Attorney General to All United States Attorneys, et. seq., *Baseline Risk Assessment and Mitigation Policies for Law Enforcement Operations in Criminal Matters* (December 7, 2013).

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monitor implementation of certain ATF case review procedures, particularly with respect to challenges unique to ATF. We understand that ATF looks forward to continued coordination with your office to ensure the effectiveness of current policies, and to further enhance case review policies and procedures when necessary.

Recommendation Four: Policy Review of Other Law Enforcement Components to Account for Lessons from Operations Fast and Furious and Wide Receiver.

As explained in your report, in order to close this recommendation, the Department should take four steps. We address each of these in turn below.

1. Controlled and uncontrolled firearms transfers are expressly addressed in FBI and USMS policies. Similar to the policies implemented by ATF and DEA, the FBI and USMS, policies should provide for sufficient supervisory input and approval before a decision is made not to seize firearms in an uncontrolled transfer. The Department may wish to consider integrating firearms transfers into policies that address other dangerous commodities and items, such as explosives, though we believe it is important that applicable policy expressly reference "firearms" given the issues we found in our Fast and Furious report.

The Department has taken a number of steps to both clarify our position that federal agents and prosecutors should not knowingly allow firearms to illegally cross the border and to ensure that the Department's law enforcement agents have clear guidance on the necessary steps to take when they encounter potentially illegal firearms transfers. Through the RAWG, the Department worked with the federal law enforcement components to ensure that federal agents have guidance on the necessary steps to take when they encounter potentially illegal firearm transfers, or the transfer of other potentially dangerous items. It is important to note that, although the RAWG was organized in part as a response to the misconduct in Operations Fast and Furious and Wide Receiver, the RAWG's charge was broader: to address risk – both operational and public safety risk – in the law enforcement agencies' policies and training. Given the complexity of federal criminal investigations, the Department determined that it was crucial to give law enforcement agents the tools necessary to mitigate risk throughout the entirety of a criminal investigation, and not just with regard to firearms transfers.

As such, the RAWG Directives – which were issued by DAG Cole to all law enforcement components and published in USABook – specifically direct the law enforcement components to ensure that their policies include the following principle:

A mechanism to ensure that agents understand how to properly identify public safety risks and to undergo steps that can be undertaken to mitigate those risks. Specifically, agencies should ensure that case agents and first-line supervisors have received training to . . . [e]nsure that any dangerous commodity or item (such as a firearm, body armor, explosives, etc.) does not leave law enforcement control and, with respect to drugs, ensure drugs do not leave law enforcement control absent specific approval from the appropriate headquarters' official.³

³ Memorandum from James M. Cole, Deputy Attorney General to All United States Attorneys, et. seq.,

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In addition, to address the specific instance encountered in Operation Fast and Furious – where agents may hear of potentially dangerous situations involving firearms while listening to a wiretap – the Department issued instructions for law enforcement personnel monitoring wiretaps:

If the investigative agency concludes that a threat exists and the government is in possession of information that could potentially interrupt or prevent an act of violence from occurring, agents should make reasonable efforts to prevent the act of violence from taking place.⁴

The guidance continues by explicitly discussing an example involving firearms transfers:

This T-III investigation targets an organization whose members are believed to possess and traffic in firearms. In the event that there is a legal basis to make an arrest or seize firearms and the T-III intercepts provide sufficient actionable intelligence concerning the possession or transfer of firearms, the investigative agency should take reasonable efforts to prevent the firearm's criminal misuse.⁵

In addition to the two directives described above, the RAWG examined each law enforcement agency's policies to ensure that they have specific policies on spotting and addressing risk management related to the transfer of dangerous items. As noted in your report, ATF established a policy on firearms transfers in November 2011 that addresses both "controlled" and "uncontrolled" transfers. Since then, the Drug Enforcement Administration (DEA) has published an interim-policy on *Enforcement Risk Assessment and Mitigation Guidelines* that will be incorporated into the Agents' Manual. This policy specifically addresses firearms and directs Special Agents and Task Force Officers to consult their supervisors when determining what investigative methods to use when deciding whether to seize or prevent the transfer of firearms.

Additionally, the USMS and FBI currently have policies that give specific guidance to agents on how to mitigate risk when they encounter situations that may pose a risk to public safety during law enforcement operations. The USMS has mitigation procedures specific to fugitive apprehension and arrests, which are the USMS's two main areas of operation. The FBI Domestic Investigations and Operations Guide (DIOG) has a robust section dedicated to the affirmative duty to act on evidence of illegal activity; the DIOG also contains a comprehensive chart that assists agents in navigating the amount of predication necessary and supervisory approval required before undertaking various investigative techniques. While these policies do not uniquely address firearms, they do provide agents with important risk mitigation guidance, consistent with the FBI's broad law enforcement mission.

Baseline Risk Assessment and Mitigation Policies for Law Enforcement Operations in Criminal Matters, at pg. 2 (December 7, 2013).

⁴ Guidance Regarding Risk Mitigation for Law Enforcement Officers Engaged in Investigations that Involve Wiretaps, Office of Enforcement Operations, Criminal Division (January 2014).

⁵ *Id.*

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The Department believes that these policies adequately address the Department's risk mitigation principles in light of each law enforcement component's mission and in light of the fact-specific complexities presented when an agent learns of information that could possibly result in an illegal or dangerous firearm transfer. However, the Department appreciates OIG's efforts to ensure that the specific mistakes made in Operations Fast and Furious and Wide Receiver are addressed, including uncontrolled firearms transfers. Accordingly, the Department is committed to working closely with the FBI and the USMS to ensure that their policies provide such specific guidance to the field. To this end, the USMS has already begun drafting and adopting a policy similar in form and substance to the policy implemented by DEA. This process should be completed in the coming weeks. Because the FBI's mission is more varied and their policies more complex, the FBI is working on a way to address firearms specifically without undermining the robust risk assessment policies already in place in the DIOG. When this process is complete, we expect it will address OIG's concerns related to "uncontrolled firearm transfers" as articulated in the report.

2. The DEA and USMS have established policies that address when to contact ATF about uncontrolled firearms transfers.

The Department is committed to working with OIG as well as DEA and USMS to ensure that both components have policies that explicitly address when to contact ATF about criminal activity within ATF's jurisdiction. As noted above, the USMS is already in the process of updating its policies to address uncontrolled firearms transfers, which will include language specifically directing agents to contact ATF regarding discovered criminal activity within ATF's jurisdiction.

3 & 4. The Department completes its review of DEA's informant policies; and DEA has amended its Agent's Manual to address the use of registrants as confidential informants.

Consistent with the roles and responsibilities established by the Attorney General Guidelines, in December 2014, then-DAG Cole directed DEA and the Criminal Division to conduct a comprehensive process to review and revise the DEA Agents' Manual to ensure that DEA's policies comply with the AG Guidelines and are presented in a manner that is consistent with the AG Guidelines in both form and function. This review is ongoing, and when completed, the revised policies will include provisions governing the registration of high level, privileged, and media-related confidential sources. The revised policies will also clarify the requirements necessary to approve OIA and will require agents to document the information necessary to apply the principles of risk assessment and mitigation when authorizing and executing OIA.

When this process is complete, it will also address OIG's recommendation that DEA amend the Agent's Manual to address the use of registrants as confidential informants.

The Department appreciates the opportunity to respond to the OIG's review and is committed to working with the OIG to close out the two resolved recommendations.

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