

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

February 22, 2017

Mr. Thomas E. Brandon
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Dear Mr. Brandon:

The Committee has long conducted oversight over the ways law enforcement agencies use informants and undercover tactics to build cases. In the last Congress, the Committee held a hearing to examine the Drug Enforcement Administration's confidential source program.¹ One of the lessons learned at that hearing was that the DEA failed to conduct adequate oversight over its confidential informants, including lacking adequate controls over funds paid to those sources.

A new story in *The New York Times* raises similar questions about the Bureau of Alcohol, Tobacco, Firearms, and Explosives' oversight over its own informants.² The story discusses an operation purportedly run by ATF informants, but "not authorized under Justice Department rules," through which the informants are trafficking cigarettes and pocketing the proceeds.³ The funds generated by this operation, according to the report, are then put into a "management account" used to finance additional investigative activity.⁴ This "management account" is "an off-the-books way to finance undercover investigations and pay informants without the usual cumbersome paperwork and close oversight."⁵ According to the report, the two informants admitted in court documents to "receiving more than \$1 million apiece," though it is unclear whether "that was profit or reimbursement for expenses paid on behalf of the government."⁶

The ATF's operation generated a federal racketeering lawsuit, in which tobacco farmers seek damages for the ATF informants' alleged self dealing.⁷ The suit alleges the informants

¹ *Oversight of DEA's Confidential Source Program, Hearing before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (Nov. 30, 2016).

² Matt Apuzzo, *A.T.F. Filled Secret Bank Account With Millions From Shadowy Cigarette Sales*, N.Y. TIMES, Feb. 22, 2017, <http://nyti.ms/2lFra1u>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

“swindled” the farmers “out of \$24 million.”⁸ Because the informants claim in the litigation they were operating on behalf of ATF, “a judge recently added the United States government as a defendant,” but the Department is working to keep much of the proceedings secret from the public.⁹

The ATF’s tobacco diversion investigation programs have been the subject of scrutiny for many years. In a 2009 report, the Department of Justice’s Office of the Inspector General (OIG) made several recommendations to introduce better processes in the ATF’s tobacco diversion investigations.¹⁰ At the time of that report, the Department’s OIG estimated that “tobacco diversion costs over \$5 billion in revenue from unpaid excise taxes annually.”¹¹

Among the methods the ATF uses to build tobacco diversion cases is “churning,” described by the Department’s OIG as allowing the ATF “to use the financial proceeds obtained through an undercover operation to further that specific investigation.”¹² “This authority,” the OIG’s report continues, “is intended to offset the expenses incurred in long-term, complex undercover investigations so the operations may continue.”¹³

The Department’s OIG examined the ATF’s use of income-generating undercover operations, including churning, and found a “serious lack of oversight by ATF at both the headquarters and field office levels.”¹⁴ In fact, the OIG found one churning operation “that was never authorized by ATF Headquarters or the Department.”¹⁵ Examples in the OIG’s report included permitting an informant to retain \$4.9 million of \$5.2 million gross profit generated by sales of tobacco to targets of the investigation.¹⁶ While ostensibly to reimburse the informant for his “business expenses,” the OIG found the ATF “did not ensure the reasonableness of the expenses claimed, nor did ATF require the informant to provide adequate documentation to support or justify those expenses.”¹⁷ In fact, “the more than \$4.9 million covered more than just the business expenses” and included “100 percent of the confidential informant’s total business operating overhead and more than \$2.3 million in profit.”¹⁸

⁸ *Id.*

⁹ *Id.*

¹⁰ INSPECTOR GEN., DEP’T OF JUSTICE, NO. I-2009-005, THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES’ EFFORTS TO PREVENT THE DIVERSION OF TOBACCO 36 (2009) (recommending (i) assessment of the scope of tobacco diversion in each field division, (ii) consideration of re-instituting a program coordinator for tobacco diversion in each field office, and (iii) establishment at Bureau headquarters of a national tobacco diversion point of contact for the field offices), *available at* <https://oig.justice.gov/reports/ATF/e0905.pdf>.

¹¹ *Id.* at 8.

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ INSPECTOR GEN., DEP’T OF JUSTICE, AUDIT REP. 13-36, AUDIT OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES’ USE OF INCOME-GENERATING, UNDERCOVER OPERATIONS i (2013), *available at* <https://oig.justice.gov/reports/2013/a1336.pdf>.

¹⁵ *Id.* at ii, 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The OIG's report made recommendations to strengthen oversight over income-generating operations, while detailing additional examples of the ATF's shortcomings in requiring documentation for churning operations.¹⁹ The OIG recommended increased guidance and monitoring for churning operations, improved tracking of tobacco used in diversion investigations, and strengthening confidentiality protections for informants and undercover agents.²⁰

The *New York Times* story raises questions whether the ATF heeded the OIG's four-year-old recommendations. The story reports that, after the paper made inquiries about the ATF informants' actions in summer 2016, the Department disclosed this operation to the OIG, and that office "'expressed serious concerns'" and has begun investigating.²¹ Making matters worse, the tobacco farmers—who allege they were defrauded by those working on behalf of the ATF—are now being pursued for the informants' failure to pay taxes on their own profiteering: "All those secret tobacco sales, it turns out, should have been taxed. And the government wants its money."²²

The Committee has questions about the ATF's management of its confidential informants and income-generating operations generally, as well as the claims raised in the story specifically. To assist the Committee in better understanding these issues, please produce the following items as soon as possible, but no later than noon on March 10, 2017:

1. All ATF rules and guidelines referring or relating to the use of so-called "management accounts" by the ATF's agents or others when investigating tobacco diversion.
2. ATF Order 3380.1, titled "Alcohol and Tobacco Enforcement Programs."
3. Any memoranda accompanying ATF Order 3380.1, including, but not limited to, any memoranda issued in April 2011.
4. All documents referring or relating to the facts and investigation (the Investigation) giving rise to *U.S. Tobacco Cooperative Inc. v. Big South Wholesale of Va. LLC*, No. 5:13-CV-00527-F (E.D.N.C., filed July 23, 2013), including, but not limited to:
 - a. The ATF's investigative plan for the Investigation;

¹⁹ *Id.* at iii (detailing \$193,000 in expenses for a warehouse owned by an informant with no documentation; \$226,394 for rent of between three to twelve vehicles "where no documentation existed in the case file to justify the expense as reasonable and operationally necessary"; and payment of "\$30,000 (60 percent of the retail price) to lease a 2011 Chevrolet Tahoe for 1 year").

²⁰ *Id.* at 45-46.

²¹ Apuzzo, note 2, *supra*.

²² *Id.*

- b. The ATF's Undercover Review Committee's approval of the investigative plan, as well as any written concurrence by the Department of Justice for the Investigation;
 - c. All documents referring or relating to deposits or expenditures made into or from accounts to further the Investigation, including any deposits into the "management fund";
 - d. All approvals for any expenditures made from accounts to further the Investigation, including any deposits into the "management fund";
 - e. All Monitored Case Program reports referring or relating to the Investigation; and
 - f. Documents sufficient to show the identities of any non-ATF employee who had approval to deposit or withdraw any funds from any accounts related to the Investigation.
5. All documents referring or relating to any discipline, reprimand, warning, or other employment action taken by the Department, including the ATF, against any individuals related to the Investigation, including Thomas Lesnak.
6. All documents and communications referring or relating to the OIG's review of the Investigation.
7. The overall number of churning investigations conducted by ATF from July 2011 – present, as well as:
 - a. The number of churning investigations reviewed by the Department; and
 - b. The number reviewed by ATF's Undercover Review Committee prior to submission to the Department.
8. All audit reports for any ATF investigation involving churning from January 1, 2009 – present.
9. All case-closing audit reports for any ATF investigation involving churning from January 1, 2009 – present.
10. All policy guidance issued since the Department's OIG's 2013 report on income-generating operations, including referring or relating to the following:
 - a. Churning;
 - b. Tobacco tracking;
 - c. Monitored Case Program requirements;

- d. Expenditure approval;
- e. Accounting of funds in investigations using churning; and
- f. Confidentiality of informants and undercover agents.

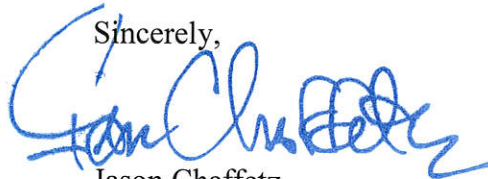
Please also provide a briefing to Committee staff on these issues no later than 5:00 p.m. on March 17, 2017.

When producing documents to the Committee, please deliver production sets to the Majority staff in Room 2157 of the Rayburn House Office Building and the Minority staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request. Please note that Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena, or testimony, promptly submit the attached notice of appearance to the Committee.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X.

Please contact Cordell Hull of the Committee staff at (202) 225-5074 with any questions about this request. Thank you for your attention to this matter.

Sincerely,



Jason Chaffetz
Chairman

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Jefferson B. Sessions III, Attorney General

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
115TH CONGRESS**

NOTICE OF APPEARANCE OF COUNSEL

Counsel submitting: _____

Bar number: _____ **State/District of admission:** _____

Attorney for: _____

Address: _____

Telephone: (_____) _____ - _____

Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for _____ in (select one):

All matters before the Committee

The following matters (describe the scope of representation):

All further notice and copies of papers and other material relevant to this action should be directed to and served upon:

Attorney's name: _____

Attorney's email address: _____

Firm name (where applicable): _____

Complete Mailing Address: _____

I agree to notify the Committee within 1 business day of any change in representation.

Signature of Attorney

Date