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House of Representatives
Washington, DC 20515-2109

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August 22, 2013

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

I am writing to respectfully request that you revise *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (Attorney General's Guidelines) in order to enhance accountability and transparency in the use of confidential informants by the Federal Bureau of Investigation (FBI).¹ In particular, in the interests of further safeguarding the FBI's Confidential Human Source programs against waste, fraud, and abuse and protecting the general public against authorized and unauthorized informant crime, I strongly believe that the *Attorney General's Guidelines* must require the FBI to provide Congress with regular and meaningful information regarding the administration and operation of its confidential informant programs.

As recently reported by *USA Today*, citing a January 31, 2012 internal report prepared by the FBI Directorate of Intelligence Division, the FBI authorized its confidential human sources to commit more than 5,600 crimes for calendar year 2011 at an average of over 15 crimes per day.² In particular, the referenced *Federal Bureau of Investigation Annual Otherwise Illegal Activity Report* (Annual Otherwise Illegal Activity Report) provides that the fifty-six field offices of the FBI approved a "grand total" of 5,658 instances of "Tier I" and "Tier II" "otherwise illegal activity" in 2011.³ The *Attorney General's Guidelines* broadly define "Tier I Otherwise Illegal Activity," in part, as "any" activity "that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting

¹ *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (online at <http://www.justice.gov/oip/docs/ag-guidelines-use-of-fbi-chs.pdf>).

² *Exclusive: FBI Allowed Informants to Commit 5,600 Crimes*, USA Today (August 4, 2013) (online at <http://www.usatoday.com/story/news/nation/2013/08/04/fbi-informant-crimes-report/2613305/>).

³ *Federal Bureau of Investigation Annual Otherwise Illegal Activity Report* (online at <http://www.documentcloud.org/documents/742049-fbi-oia-report.html>).

without authorization” and involving “the commission, or the significant risk of the commission, of any act of violence by a person or persons other than the Confidential Human Source,” corrupt conduct by an elected public official, “the manufacturing, importing, exporting, possession, or trafficking of controlled substances,” and other criminal circumstances.⁴ Moreover, “Tier II Otherwise Illegal Activity” is very generally defined as “any other activity that would constitute a misdemeanor or felony under federal, state, or local law if engaged in by a person acting without authorization.”⁵

As you may recall, the preparation of the *Annual Otherwise Illegal Activity Report* stems from a so-called “record keeping” requirement set forth in the *Attorney General’s Guidelines*, following their most recent revision by former Attorney General Alberto R. Gonzales on December 13, 2006. Specifically, the *Attorney General’s Guidelines* require that “[a]t the end of each calendar year, the FBI shall report to the Assistant Attorneys General of the Criminal Division and the National Security Division the total number of times each FBI Field Office authorized a Confidential Human Source to engage in Otherwise Illegal Activity, and the overall nationwide totals.”⁶ Regrettably, however, the *Attorney General’s Guidelines* do not currently direct the FBI to provide this report to Congress. In addition, the *Attorney General’s Guidelines* do not presently require the FBI to include any meaningful information in its annual report regarding the precise nature and severity of the crimes that have been authorized by FBI agents; rather, the FBI must merely itemize the total number of authorized “otherwise legal activity” falling under the broad “Tier I” and Tier II” categories. Furthermore, the annual reporting requirement does not mandate that the FBI account for any illegal activity committed by its confidential informants that is unauthorized and subsequently comes to the attention of the FBI. Accordingly, the guidelines governing the use of confidential human sources by the Department of Justice and specifically, the FBI, significantly limit the ability of Congress to fulfill its proper oversight role and examine the extent and specific types of crimes committed by FBI confidential informants.

Importantly, the deficiency of the current guidelines in this regard has been underscored by recent events involving the FBI’s use of confidential informants. As you may be aware, documents filed on behalf of two criminal defendants in Suffolk Superior Court in Massachusetts in August of 2011 gave rise to a series of disturbing reports surrounding the relationship of the FBI Boston Division with Mark Rossetti, an individual who managed a widespread criminal enterprise in New England while also allegedly operating as an FBI confidential human source.⁷ As a result, I requested that the House Committee on Oversight and Government Reform commence an investigation into the FBI’s management of Mr. Rossetti as a confidential informant.⁸ With the cooperation of Chairman Darrell Issa, Ranking Member Elijah E. Cummings, and Sen. Charles E. Grassley, the more than yearlong inquiry facilitated an

⁴ *Supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Reputed Mob Boss is Called FBI Informant* (August 12, 2011) (online at http://www.boston.com/news/local/massachusetts/articles/2011/08/12/reputed_mob_boss_rossetti_is_called_fbi_informant/).

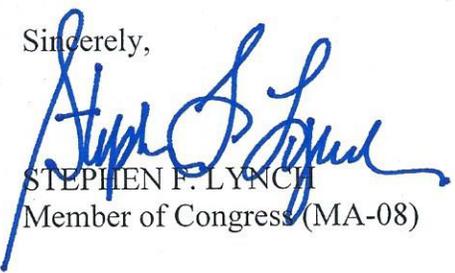
⁸ Hearing Request Letter from Rep. Stephen F. Lynch to Chairman Darrell Issa (Aug. 19, 2011).

internal review of the FBI's Rossetti case files by an FBI Inspection team, confirmed Mr. Rossetti's previous status as a longtime FBI confidential informant, and culminated in the completion of a draft report prepared by the FBI Inspection Division regarding Mr. Rossetti's operation as a confidential informant and his engagement in unauthorized illegal activity. Unfortunately, many of our concerns regarding accountability and transparency in the use of confidential informants by the FBI have not yet been addressed given that the draft report, which our staff only had the opportunity to review at FBI Headquarters in August of 2012, has not yet been finalized by the Department of Justice.

It is in light of these concerns that I strongly urge you, pursuant to your general authority under 28 U.S.C. § 509 and 5 U.S.C. § 301 to exercise the functions of the Department of Justice and prescribe regulations for the government of its employees, to revise the *Attorney General's Guidelines* by requiring that the FBI submit a regular and comprehensive report to Congress on its use of confidential human sources.⁹ Similar to the legislation that I have re-introduced in the 113th Congress, H.R. 265, the *Confidential Informant Accountability Act of 2013*, such a requirement could mandate that the FBI, on a biannual basis, submit a report to the congressional committees of jurisdiction that details all serious crimes, both authorized and unauthorized, committed by its confidential informants during an appropriate and preceding six-month time period.¹⁰ Specifically, the biannual report could contain a description of the total number of each type and category of crime and list the quantity of controlled substances involved in the case of drug crimes and the amount of money involved in the case of theft or bribery crimes. In addition, I would suggest that the FBI also report to Congress on whether the illegal activity was authorized or unauthorized and identify the state in which each crime took place. In order to safeguard the identity of individual informants and preserve the integrity of law enforcement investigations, the biannual report would not have to include individual informant names, control numbers, or other personal identification information.

As you know, the use of confidential informants is an essential investigatory tool that often times, provides our law enforcement agencies with valuable and otherwise unattainable criminal intelligence. However, due diligence demands that we conduct regular and meaningful oversight of our confidential informant programs in order to enhance their operation and efficiency and better ensure the safety of the general public. Periodic and mandatory congressional review of the FBI's use of confidential human sources would play a vital role towards this end. Thank you for your consideration.

Sincerely,



STEPHEN F. LYNCH
Member of Congress (MA-08)

⁹ 28 U.S.C. §509 (Functions of the Attorney General) and 5 U.S.C. §301 (Departmental Regulations).

¹⁰ H.R. 265, the *Confidential Informant Accountability Act of 2013* (online at <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.265:>).