U.S. Department of Justice

Antitrust Division

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MEMORANDUM FOR ANTITRUST DIVISION CRIMINAL ATTORNEYS

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SUBJECT: ANTITRUST DIVISION CRIMINAL DISCOVERY POLICY

On January 4, 2010, the Deputy Attorney General David W. Ogden issued Guidance for Prosecutors Regarding Criminal Discovery (hereafter referred to as "DAG Guidance Memorandum"). As set forth in the DAG Guidance Memorandum, "the guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice."[1]

The same day, the Deputy Attorney General issued a directive requesting that each component develop its own office discovery policy for criminal matters. The Division, with the assistance of the Office of Criminal Enforcement, and the Chiefs of the Field Offices and the National Criminal Enforcement Section, as well as input from other Department litigating components, has developed the following Criminal Discovery Policy (the "Policy"), effective March 31, 2010. It is my hope that this Policy will assist Division attorneys in maintaining a level of familiarity with Circuit and district court precedent and local rules, and also further the interest of establishing uniform discovery practices within the Division.

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[1] DAG Guidance Memorandum, at 1. The DAG Guidance Memorandum is available online on USABook and some of its key provisions can be found in Section E below.

You should thoroughly review and meticulously follow the guidance set forth in the DAG Guidance Memorandum and this Policy in the course of your criminal matters. This Policy does not cover every issue you will face in making discovery decisions, and instead is meant to provide a framework for making these decisions and to direct you to additional resources to consult in the course of the discovery process. In particular, the Policy notes that you should consult with the Division's Criminal Discovery Coordinators and Professional Ethics Officers in evaluating your discovery obligations in specific matters. The Policy also explains that it continues to be the practice of the Division to provide discovery beyond what the rules, statutes, and case law mandate in many circumstances.

The DAG Guidance Memorandum and this Policy make clear that careful review and consideration of discovery issues should be a high priority for you as an attorney serving in the Department of Justice and in this Division. Your efforts toward complete and timely compliance with discovery obligations significantly facilitate the achievement of the overriding goal in the pursuit of criminal prosecution: reaching a fair and just result in every case.

OVERVIEW

The Policy is designed to aid compliance by Division attorneys with disclosure obligations, identify discovery-related issues common to the practice of all Division attorneys, and ensure that Division attorneys have adequate resources, training, and guidance to enable them to make appropriate disclosure decisions, either on their own or in consultation with the chief and assistant chief of their office or section and the leadership of the Division. This guidance is intended to be sufficiently flexible to give Division attorneys discretion where permitted by law and to account for the fact that they operate in numerous jurisdictions that have different discovery laws and practices.

It is the practice of the Division to provide discovery beyond what the rules, statutes, and case law mandate. When faced with a close call as to whether material needs to be disclosed, you should always err on the side of disclosure. In some situations, materials that do not have to be disclosed should be withheld because of important considerations, such as the need to protect a witness or safeguard investigations of other people or other crimes. However, attorneys should provide discovery beyond what is legally required whenever and wherever possible. Expansive discovery may facilitate plea negotiations or otherwise expedite litigation. Moreover, in the long run, expansive discovery will foster and support a reputation for candor and fair dealing by Division attorneys.

Discovery training has been – and will continue to be – vital to the Division's mission to do justice and to maintain the highest level of professional and ethical conduct. You are strongly encouraged to participate on a regular basis in discovery training available at the National Advocacy Center ("NAC") and through live and recorded training programs provided by the NAC, the Department's Professional Responsibility Advisory Office ("PRAO"), Division Criminal Discovery Coordinators, and others.

This Policy does not cover every issue a Division attorney will be faced with in making discovery decisions, but it is meant to provide a framework for making these decisions.[2] Each Division office or section that does criminal work has a Criminal Discovery Coordinator who is available to assist you in properly meeting discovery obligations and determining whether and when disclosure is required. State rules of professional conduct also impose ethical obligations regarding discovery in criminal cases, and Division attorneys are bound by these rules to the same extent and in the same manner as private attorneys. *See* 28 U.S.C. §530B. If you have questions regarding applicable ethics rules, consult with one of the Division's Professional Responsibility Officers (John Powers, Marvin Price, or Howard Blumenthal).[3]

The Government's disclosure obligations are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*[4] and *Giglio*.[5] You should carefully review and comply with USAM 9-5.001, which details Department policy regarding disclosure of exculpatory and impeachment information and provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*. For the purposes of this Policy, "discovery" or "discoverable information" includes information required to be disclosed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM 9-5.001.

This Policy is organized into two parts. Part I of the Policy describes the discovery process and provides guidance to Division attorneys on what should be gathered for review, what needs to be disclosed, when it needs to be disclosed, and how it should be disclosed. Part II of the Policy describes a number of matters that Division attorneys should discuss with case agents and others to ensure that discoverable information is appropriately identified and preserved throughout the course of the investigation and provides guidance concerning specific situations in which issues concerning discovery may occur.

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[2] The guidance contained herein is subject to legal precedent, court orders, and local rules. It is prospective and is not intended to have the force of law or create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

[3] Difficult discovery issues may also be submitted to the Court *ex parte* for decision. Rule 16(d)(1); *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006); *United States v. Napue*, 834 F.2d 1311, 1317-19 (7th Cir. 1987).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963), followed by *United States v. Bagley*, 473 U.S. 667, 682 (1985), and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), explains the Government's duty to disclose evidence favorable to an accused and material to guilt or punishment.

[5] *Giglio v. United States*, 405 U.S. 150 (1972) (information tending to impeach government witnesses must be disclosed to the defendant).

PART I: IDENTIFYING DISCOVERABLE INFORMATION AND DISCLOSURE

A. Local Criminal Rules, District and Circuit Decisions, Court Orders, and USAO Discovery Policies

Division attorneys practice in various districts throughout the United States. Local criminal rules and the standard practice of United States Attorneys' Offices ("USAOs") often vary from one district to the next, especially if the districts are in different Circuits. As a result, Division attorneys should always:

- Check the local criminal rules for the district where the case is filed and fully comply with these rules.

- Consult with the local USAO about district or Circuit decisions concerning discovery, which may be different from those in other venues. For example, there is a split in the Circuits as to whether agent notes must be disclosed (*compare United States v. Clark*, 385 F.3d 609, 619 (6th Cir. 2004) (notes of post-arrest interview must be disclosed) *with United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997) (notes not required to be disclosed unless different from report)).

- Fully comply with any final court order regarding discovery.

Generally speaking, Division attorneys should follow the local USAO policy on discovery unless the attorney, after consultation with the USAO, prefers to provide more or earlier disclosure than called for by USAO policy. If, for a significant reason related to the circumstances of a specific case, the attorney thinks that there is a basis for providing less or later discovery than called for by USAO policy, the attorney must consult with the chief or assistant chief of the office and obtain his or her approval to follow this approach. The attorney must also consult with the chief or assistant chief of the office if he or she thinks there is a conflict between the staff's disclosure obligations in a particular case and what is mandated to be produced by USAO policy. If the chief or assistant chief of the office is unable to reconcile the attorney's views of the staff's disclosure obligations with the policy of the local USAO, the chief or assistant chief should consult with the Director of Criminal Enforcement or the Deputy Assistant Attorney General in charge of the Division's Criminal Program about this conflict.

B. Providing Disclosure Beyond the Requirements of Fed. R. Crim. P. 16 and 26.2, *Brady*, *Giglio* and Jencks

As noted above, in many cases Division attorneys should consider giving broader and earlier discovery than is required because it promotes our truth-seeking mission and helps us achieve a speedier case resolution when the defense realizes the strength of our evidence. This practice also provides attorneys with a margin of error where, in good faith, an attorney may have erroneously overlooked material that is discoverable. However, when considering providing

discovery beyond that required by discovery obligations or providing discovery sooner than required, attorneys should always consider countervailing considerations such as "protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case." DAG Guidance Memorandum, at Step 3.A. If the attorney chooses this expansive approach, the defense should be advised that the attorney is electing to produce discovery beyond what is required under the circumstances of the case, but is not committing to any discovery obligation beyond the discovery obligations set forth in Fed. R. Crim. P. 16 and 26.2, *Brady*, *Giglio*, and Jencks.

It is not unusual in Division investigations for staffs to obtain hundreds of boxes of documents and extremely large electronic productions, which makes a thorough review of all of these materials for possible discoverable information difficult and time consuming. In these situations, Division attorneys should consider providing the defense access to all of the materials to eliminate the possibility that there will be a later discovery by Division staff of something that could arguably be discoverable information that was not disclosed. In addition, attorneys should also consider providing indexes of the materials being disclosed. Doing so may promote resolution of the case prior to trial and convince the judge to deny various defense requests based on the defense's contention that the Government is purposely dumping a huge number of documents on the defense in an effort to obfuscate – not further – meaningful disclosure.[6]

Division attorneys should not refer to this expansive disclosure "open file" discovery. The definition of "file" is imprecise, and the Division attorney's definition may be different from that of the defense or even the court. Furthermore, if an inadvertent omission were to occur, defense counsel may complain that the Division attorney misrepresented the scope of discovery produced.

C. Timing of Disclosures

Division attorneys should make sure that they are knowledgeable about controlling law in the Circuit and district in which the case is filed governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame (in some districts this may be very soon after the indictment), unless a court order has been entered delaying discovery.

Typically, immediately following indictment Division attorneys should begin making

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[6] Whenever this Policy suggests certain options that a Division attorney "should consider," whether to adopt the options is left to the discretion of the attorney litigating the case, in consultation with the chief, assistant chief, or Criminal Discovery Coordinator.

Rule 16 discovery material available without waiting to receive a formal request from the defense. To accomplish this, the attorney must begin addressing discovery prior to indictment. A letter should be sent to the defense acknowledging our obligation under Rule 16 and setting forth a timetable for disclosure. Attorneys should ensure that they disclose Rule 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Rule 16(b)(1). In any event, attorneys must make disclosure of Rule 16 discovery material within a reasonable time before trial.

Exculpatory (*Brady*) information must be disclosed reasonably promptly after discovery. It is important to keep in mind that *Brady* is a rule of disclosure not admissibility, so evidence disclosed pursuant to *Brady* is not necessarily admissible at trial. Impeachment information contemplated by *Giglio* will typically be disclosed at a reasonable time prior to trial depending on the decision as to who will be called as witnesses. *See* USAM 9-5.001. Disclosure of *Brady* and *Giglio* evidence is a Constitutional obligation, and therefore this material must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles*, 514 U.S. at 432-33.

The timing of disclosure of Jencks materials varies significantly from district to district, and may vary within a district based upon which judge is assigned to the case. Division attorneys should consult with the local USAO about how soon before trial Jencks materials are typically produced and comply with the local practice for that district or the judge handling the case, unless there is a significant reason related to the circumstances of a specific case not to do so and an alternative approach is approved by the chief or assistant chief of the office or section.

Attorneys should always keep in mind that there is a continuing duty to disclose discoverable information. In some situations, discoverable information may be inadvertently overlooked or mistakenly characterized as not discoverable. Furthermore, some defense theories only become apparent at trial and an unanticipated theory may make it more likely that certain information should be disclosed pursuant to *Brady*. In these instances, attorneys should promptly disclose the discoverable information to the defendant and, if the discovery of additional discoverable information occurs at trial, also to the court.

D. Scope of Prosecution Team

Division attorneys must seek all exculpatory and impeachment information from members of the prosecution team. This duty to search also includes information required to be disclosed under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act. The "prosecution team" includes "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." *See* USAM 9-5.001 and DAG Guidance Memorandum, at Step 1.A. Attorneys should err on the side of inclusiveness when identifying the members of the "prosecution team" because this decision will determine from whom we should seek potential discoverable information. This approach is more likely to avoid future litigation over *Brady/Giglio* issues and surprises at trial.

In determining who should be considered part of the prosecution team, an attorney must determine whether the relationship is close enough to make the person or entity part of the prosecution team and thus warrant inclusion for discovery purposes. When in doubt, consult with your chief, assistant chief, or Criminal Discovery Coordinator. Examples are:

- Joint investigations – the prosecution team could include attorneys from USAOs and other litigating components of the Department;

- Regulatory agencies – the prosecution team could consist of employees from agencies such as the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the U.S. Trustee, etc., which are non-criminal investigative agencies; and

- State/local agencies – a police officer is a part of the "prosecution team" if the attorney is directing the officer's actions in any way, or if the officer/trooper participated in the investigation or gathered evidence that ultimately led to the charges.

Considerations in determining whether an agency, USAO, or litigating component should be considered part of the "prosecution team" include:

- Whether the Division attorney/case agent conducted a joint investigation or shared resources relating to the investigation with the other agency, USAO, or litigating component;

- Whether the agency, USAO, or litigating component played an active role in the Division attorney's case;

- Whether the Division attorney knows of, and has access to, discoverable information held by the agency, USAO, or litigating component;

- Whether the Division attorney has obtained other information and/or evidence from the agency, USAO, or litigating component;

- The degree to which information gathered by the Division attorney has been shared with the agency, USAO, or litigating component;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

E. What to Review and How to Conduct the Review

Once it is determined who is part of the prosecution team and therefore which materials are in the custody and control of the Division attorney, the DAG Guidance Memorandum (Step 1: "B. What to Review," and Step 2: "Conducting the Review") provides the following guidance concerning what types of materials should be reviewed and how the review should be conducted:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[7] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[8] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

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[7] *Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying sources files.*

[8] *Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM 9-5.100.*

Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. In cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim/witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (see, e.g., Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For

example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential Giglio issues, and they should follow the procedure established in USAM 9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining Giglio information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants: All potential Giglio information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- *Prior inconsistent statements (possibly including inconsistent attorney proffers, see United States v. Triumph Capital Group, 544 F.3d 149 (2d Cir. 2008))*
- *Statements or reports reflecting witness statement variations (see below)*
- *Benefits provided to witnesses including:*

  – Dropped or reduced charge
  – Immunity
  – Expectations of downward departures or motions for reduction of sentence
  – Assistance in a state or local criminal proceeding
  – Considerations regarding forfeiture of assets
  – Stays of deportation or other immigration status considerations
  – S-Visas
  – Monetary benefits
  – Non-prosecution agreements
  – Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
  – Relocation assistance
  – Consideration or benefits to culpable or at risk third-parties

- *Other known conditions that could affect the witness's bias such as:*

  – Animosity toward defendant
  – Animosity toward a group of which the defendant is a member or with which the

defendant is affiliated
– Relationship with victim
– Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)

- *Prior acts under Fed. R. Evid. 608*
- *Prior convictions under Fed. R. Evid. 609*
- *Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events*

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[9] should be memorialized by the agent.[10] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as Giglio information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with

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[9] *"Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside a formal interview, however. Substantive, case-related communications are addressed above.*

[10] *In those instance in which an interview was audio or video recorded, further memorialization will generally not be necessary.*

witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed. R. Crim. P. 16(a)(1)(B). See, e.g., United States v. Clark, 385 F.3d 609, 619-20 (6th Cir. 2004) and United States v. Vaffee, 380 F. Supp. 2d 11, 12-14 (D. Mass. 2005).

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

F. Form of Disclosures

Typically, Division attorneys should turn over discoverable information in its original form. However, there may be instances where this is not advisable, such as when such information is contained in attorney notes, internal agency documents, confidential source documents, etc., or when disclosure would create security concerns. Also, in some cases, particularly where discovery is voluminous, electronic production of documents (possibly in a text-searchable format) rather than hard copies may be the best method for producing discovery.

If discoverable information – including particular language where pertinent – is disclosed in a letter to the defense, attorneys should take great care to ensure that the full scope of pertinent information is provided.

G. Additional Guidance About What to Disclose

Division attorneys bear ultimate responsibility for disclosure decisions, but may utilize agents, paralegals, agency counsel, and computerized searches in the review of pertinent information. *See* DAG Memorandum, at Step 2 (Section E above). As noted above, disclosure of materials obtained during the investigation should be as broad as possible to avoid situations in which withheld materials are later determined to be relevant to the government's case in chief or to the preparation of the defense. That said, as also noted above, the government's discovery policy is not "open file" discovery, and this term should never be used to describe it.

Division attorneys must inform the defense if the agent's rough notes are materially inconsistent with the final memorandum of interview ("MOI") (also referred to as a report of interview ("ROI")), and thus constitute *Brady* or *Giglio*. This may be done by letter or by providing the defense with a copy of the rough notes. DAG Guidance Memorandum at Step 1.B.7 (Section E above) has a detailed discussion of what may constitute *Giglio* and should be consulted on this issue. Division attorneys must review their own notes, if any, of witness interviews to ensure all necessary *Brady* or *Giglio* disclosures are made.

Division attorneys should disclose all MOIs of testifying trial witnesses, even though – if the witnesses are not law-enforcement witnesses who prepared the MOIs – the MOIs are not technically Jencks material unless signed or otherwise adopted by the witness. For this reason, when disclosing MOIs, the MOIs should not be described to opposing counsel as Jencks material. MOIs should be redacted to remove any non-discoverable information that concerns other cases or investigations. To prevent improper use of MOIs at trial, Division attorneys should consider filing a motion with the court seeking to restrict defense counsel from impeaching a witness with a MOI that the witness has never seen and from seeking to admit MOIs into evidence.

An agent's MOI *is* Jencks material if the agent is going to testify about the subject matter contained in the MOI. Therefore, Division attorneys must disclose these MOIs as the Jencks material of the testifying agent.

Division attorneys should consider disclosing all relevant MOIs – including MOIs of non-testifying witnesses. Disclosure of all relevant MOIs eliminates the need to review them for *Brady* and *Giglio,* avoids inadvertent non-disclosure of material that may be pertinent to some unanticipated defense or inconsistent with evidence as it develops at trial, and preserves the option of calling the witness. If certain relevant MOIs are not disclosed, they must be carefully reviewed for *Brady* and *Giglio*, and all *Brady* and *Giglio* information must be fully disclosed in a letter to the defense.

Division attorneys should always keep in mind that *any* information – written or unwritten – known to *any* member of the prosecution team that constitutes *Brady* or *Giglio* must be

disclosed. Numerous types of information may constitute *Brady* or *Giglio*, and the types of information discussed in this Policy are by no means a complete list. When in doubt about whether certain types of information constitute *Brady* or *Giglio*, the attorney should consult with the chief, assistant chief, or Criminal Discovery Coordinator.

1. Expert witness discovery

Division attorneys should research Circuit case law and consult with the local USAO to determine if outside expert witnesses are considered part of the prosecution team. *See, e.g., United States v. Stewart*, 433 F.3d 273, 297-99 (2d Cir. 2006) (expert not part of prosecution team despite broad role, including testimony). Government employee experts will always be considered part of the prosecution team.

If experts are deemed part of the prosecution team, the Division attorney normally should ask the expert to provide the government with all case-related materials and any other information in his or her possession that could be exculpatory or impeachment material. In all cases, once a defense request has been made for expert disclosure, Division attorneys should consider disclosing all materials that any testifying expert witnesses gave to the government.

Division attorneys may need to disclose draft expert reports: (1) pursuant to the Jencks Act if, under applicable Circuit precedent, a draft report qualifies as a statement that has been "adopted or approved" by the expert witness; and (2) pursuant to *Brady* or *Giglio* if there are material differences between the draft and the final report. Correspondence from the expert to the government normally should be disclosed as Jencks material, absent any *Brady* or *Giglio* material (which would necessitate earlier disclosure). Division attorneys normally should compile and disclose to the defense evidence upon which the expert relied.

2. Sentencing

Division attorneys should disclose exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt. This information must be disclosed no later than the court's initial presentence investigation. *See* USAM 9-5.001(D)(3).

3. Disclosures when guilty plea expected

Division attorneys should be aware that case law varies on whether *exculpatory* information must be disclosed to the defense even when a guilty plea is expected. *Compare Orman v. Cain,* 228 F.3d 616, 620 (5th Cir. 2000) (absent clear rule by Supreme Court, state courts may decline extending *Brady* obligation to guilty pleas because rule is intended to protect integrity of trials), *with United States v. Avellino,* 136 F.3d 249, 255-58 (2d Cir. 1998) (knowing and voluntary guilty plea subject to challenge if *Brady* violation occurs; government's obligation

to disclose *Brady* material is pertinent to determination of whether or not to plead guilty).[11] However, the Supreme Court has held that impeaching information (*Giglio*) is not required to be produced when a guilty plea is expected. *See United States v. Ruiz*, 536 U.S. 622, 623 (2002) (government not required to disclose *impeaching* information prior to entering into a plea agreement with defendant). Division attorneys should consult with the local USAO about the state of the law for that district and what procedures are followed with respect to disclosure of exculpatory information before a guilty plea is entered.

Additionally, Division attorneys who are personally aware of substantial evidence that directly negates the guilt of a party who is expected to plead guilty must notify the party of the evidence before a guilty plea is entered. *See* USAM 9-11.233.

4. Cases involving a wiretap

Section 2517 of Title 18 governs the disclosure of the contents of wire, oral or electronic communications that were intercepted pursuant to court order. Division attorneys should review this section thoroughly upon obtaining the court authorization for the interception and before making any disclosures. Disclosure orders must be on file prior to submitting any information obtained from the interception to a grand jury and before indictment.

If you intend to rely on intercepted communications at a detention or preliminary hearing, the Division attorney must, at least ten (10) days before the hearing, serve the defense with a copy of the interception application and the court's authorization order. If you do not comply with the ten-day rule, the intercepted communications will not be received into evidence.

H. Case-related Communications Through Email and Electronic Discovery

Because of the duty imposed upon attorneys to disclose discoverable material, Division attorneys should exercise great care in communicating with agents through email,[12] especially where those communications involve trial or investigative strategy, witness statements, witness

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[11] *See also McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (voluntariness of guilty plea can be challenged on *Brady* grounds if government withholds evidence of factual innocence); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988) (voluntariness of guilty plea can be challenged on *Brady* grounds); *United States v. Nagra*, 147 F.3d 875, 881-82 (9th Cir. 1988) (applying *Brady* analysis but finding no *Brady* violation despite government's non-disclosure of false statements made by government agents to defendant before pleading guilty because no proof that "but for" this information defendant would have gone to trial); and *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994) (under limited circumstances, *Brady* violation can render defendant's guilty plea involuntary).

[12] For the purposes of this Policy, the term "email" includes any form of written electronic messaging using devices such as computers, telephones, and BlackBerries, including, but not limited to, emails, text messaging, instant messages, tweets, and voicemail messages that are automatically converted to text (*e.g.*, Google voice, Spinvox, etc.).

credibility, or trial exhibits. *See* DAG Guidance Memorandum, at Step 1.B.5 (Section E above).

Email may be the most efficient and appropriate method for Division attorneys to communicate with one another and with other Division personnel regarding case strategy, case organization, and case-related tasks; to seek approval or legal advice from supervisors or other designated attorneys in accordance with Division policy; to give legal advice; or to request that an agent, paralegal, or other Division personnel conduct certain research, analysis, or investigative action in anticipation of litigation. Such emails are "potentially privileged" and thus, *may* be protected.

An email from an agent that contains substantive case-related information raises additional legal issues, particularly when the email contains a brief discussion of an actual or potential trial witness or other factual information about the substance of the investigation. Division attorneys and agents should avoid using email to communicate substantive case-related information whenever possible. Similarly, Division attorneys should avoid exchanging emails with witnesses or victims, and should discourage email communication from witnesses or victims.

Because these type of communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, attorneys should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email. Email may be used to communicate purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances.

Any attorney who communicates through email should be mindful that those communications may be discoverable and disclosable to the defense and the courts. Attorneys should always keep in mind that, if email is used to communicate substantive case-related information with agents, witnesses, or victims, then the email must be printed and maintained in the case file.

Division attorneys are also increasingly involved in obtaining electronic discovery from subjects, witnesses, and others. Electronic discovery in criminal investigations is a complex area beyond the scope of this guide. All Division attorneys should be thoroughly familiar with the Division's "Best Practices Manual for Conducting Electronic Discovery in Criminal Investigations" (June 2005). This manual is a comprehensive discussion of the many issues involved in electronic discovery and is available online on the Division's intranet under Criminal Policy Documents.

I. Obtaining *Giglio* Information from Investigative Agencies

Division attorneys should be thoroughly familiar with USAM 9-5.100, "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses" ("Giglio Policy"). Pursuant to the Department's Giglio Policy,

specified investigative agencies such as the Federal Bureau of Investigation and the Department of Justice Office of the Inspector General are required to inform prosecutors with whom they work of "potential impeachment information" as early as possible prior to an agent providing a sworn statement or testimony in any criminal investigation or case. Potential impeachment information is "impeaching information that is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness's character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased." *See* USAM 9-5.100 and DAG Guidance Memorandum, at Step 1.B.7 (Section E above).

Although the specified investigative agencies – and therefore its agents – are obligated to inform Division attorneys of potential impeachment information, a Division attorney may also decide to request potential impeachment information from the investigative agency. USAM 9-5.100 sets forth procedures for those cases in which an attorney decides to make such a request.

To formalize the process of obtaining potential impeachment information, the assistant chief of each Division office and section that does criminal work has been designated a Requesting Official to deal directly with the appropriate Agency Official at the investigative agency. In this capacity, the Requesting Official coordinates all formal requests to investigative agencies to search for potential impeachment information on possible law enforcement witnesses. Timeliness is essential to get the information required in time for the testimony.

Once the formal request to the investigative agency is made, the Agency Official will advise the Division's Requesting Official of any information pertaining to:

- A finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;
- Any past or pending criminal charge brought against the employee; and
- Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

Any allegation that was not substantiated, not credible, or resulted in exoneration is not considered to be potential impeachment information and need not be provided by the agency unless:

- The Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued;

- The allegation was made by a federal prosecutor, magistrate judge, or judge;
- The allegation received publicity;
- The Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or
- Disclosure is otherwise deemed appropriate by the agency.

The Requesting Official will immediately provide any potential impeachment information to the Division attorney. Special care must be taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses. Where appropriate, the attorney should seek an *ex parte in camera* review by the court regarding whether the information must be disclosed and/or should seek a protective order to limit the use and further dissemination of information by defense counsel. At the conclusion of the case, if the information was not disclosed to the defense, all materials received from the investigative agency regarding the allegation, including any and all copies, must be expeditiously returned to the investigative agency. *See* USAM 9-5.100

J. Maintaining Records of Disclosure

One of the most important steps in the discovery process is keeping accurate records regarding disclosures. Division attorneys should carefully document adherence to the requirements to disclose discoverable information so that there will be evidence that the attorney has appropriately discharged those duties. Attorneys should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other practices discussed above, and incomplete records can undermine the extensive work that went into fully complying with all discovery obligations.

It is critical that Division attorneys be prepared to identify in court the date when specific discovery was provided. It is not uncommon for defense counsel to claim non-disclosure during trial, and Division attorneys must be ready to rebut these claims. In all cases, Division attorneys should:

- Describe discovery by cover letter to the defense. The cover letter normally should list the Bates numbers of the material disclosed.
- When discovery is provided on disc, a copy of the disc normally should be maintained and designated as "read-only" so there is a static copy of what was disclosed.

In addition to making a record of what was disclosed to the defense, Division attorneys should also prepare a non-disclosure list in advance of trial. During trial, Division attorneys should consult this list to monitor whether developments at trial have rendered any of the withheld evidence discoverable. If so, additional disclosures should be made.

PART II: SPECIFIC DISCOVERY PRACTICES – CONDUCTING THE INVESTIGATION

In all cases, as early as possible before indictment, Division attorneys should work with investigators and the local USAO to plan how discovery obligations will be addressed. Attorneys (in coordination with the local USAO) are responsible for ensuring that all agents working on criminal matters are aware of the Department's, Division's, and USAO's discovery-related policies and practices governing the investigation.

Because of the central importance of witness interviews to Division cases, Division attorneys should carefully review the policy and procedures concerning witness interviews discussed in the DAG Guidance Memorandum at Step 1, Section B.8 (Section E above). Agents should prepare MOIs for every substantive interview session conducted that is not otherwise memorialized, with the exception of witness preparation meetings, which generally need not be memorialized. Agent and attorney notes and original recordings should be preserved, and attorneys should confirm with agents that substantive interviews should be memorialized and notes should be preserved. Attorneys should remind agents that material variances in a witness's statements should be memorialized – even if they are within the same interview – and they should be provided to the defense as *Giglio* information.

While trial preparation meetings generally do not need to be memorialized, Division attorneys should be particularly attuned to new or inconsistent information disclosed by a witness during a pre-trial preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM 9.5.001, even if the information is first disclosed in a witness preparation session. Similarly, as discussed above, if the new information represents a variance from the witness's prior statements – including prior statements in the same preparation session – attorneys should consider whether the variance is material and whether memorialization and disclosure is necessary.

Importantly for Division investigations – which typically involve possible corporate defendants – Division attorneys should pay particular attention to agent notes of interviews of current and former employees and other agents of a corporate defendant. These notes may contain information that must be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed. R. Crim. P. 16(a)(1)(B). Division attorneys should also be mindful of the fact that – even if a statement of the defendant was not memorialized at the time the statement was made – Rule 16 requires disclosure of the *substance* of any relevant oral statement made by the defendant in response to interrogation by any person then known to him to be a government agent, if the government intends to use this statement at trial. *See* Fed. R. Crim. P. 16(a)(1)(A).

Division attorneys should be particularly sensitive to discovery obligations in large investigations that may result in cases being brought in multiple districts or Circuits, with different rules and procedures governing discovery. In these types of investigations, attorneys should consider initially providing expansive discovery because later cases may be brought in districts with stricter discovery requirements than the district in which the initial case is filed. Furthermore, Division attorneys should be aware that – even though separate conspiracies may be charged for similar illegal conduct in an industry – there may be materials obtained with respect to one conspiracy that should be produced as discoverable materials with respect to a separate conspiracy.

FOIA EXEMPTION (b)(5) -- ATTORNEY WORK PRODUCT

Division attorneys should also keep in mind that offers by a local or state agency, company, or other entity to allow Division personnel access to files for copying material relevant to the investigation means that the staff has also been provided access to possible *Brady*, *Giglio*, or other discoverable materials. Therefore, these files should be reviewed for possible discoverable materials in addition to evidence of criminal conduct.

Division attorneys should send a letter to each case agent requesting that all discovery materials (discussed in Part I, above) be gathered and reviewed. The letter should be sent sufficiently in advance of indictment so that the gathering and review process can be completed before the indictment is returned. If the nature of the case makes that timing impossible, the letter should be sent as soon as practicable. Division attorneys are responsible for monitoring agent compliance to ensure that discovery can be made available in accordance with the discovery requirements discussed above.

Division attorneys should give the office or section victim-witness coordinator a list of victims prior to indictment and should work closely with the victim-witness coordinator to ensure that all of the requirements of the Victim Witness Protection Act of 1982 and related legislation are fully satisfied.

Finally, Division attorneys should ensure that the defense also fully complies with its discovery obligations. In addition to disclosing Rule 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Rule 16(b)(1), attorneys should request – and seek to enforce – reciprocal discovery to the fullest extent allowable under the Federal Rules of Criminal Procedure, local criminal rules, and final court orders.

CONCLUSION

In conclusion, the purpose of this Policy is to provide Division attorneys a framework for making discovery decisions. It does not – and could not – answer every question about discovery obligations because those obligations are typically fact-specific. However, attorneys are encouraged to make use of the numerous resources at their disposal to assist them in evaluating their discovery obligations. These resources include chiefs and assistant chiefs, the leadership of the Division, Criminal Discovery Coordinators, Division Professional Responsibility Officers, experienced career prosecutors throughout the Division, and online resources available on the Department's and Division's intranet websites. By following this Policy and taking advantage of these resources, Division attorneys are more likely to satisfy their discovery obligations in every case and thereby achieve a fair and just final result in every criminal prosecution.