



**U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division**

**Review of Shooting Incidents
in the Department of Justice
I-2004-010**

September 2004

EXECUTIVE DIGEST

The Office of the Inspector General (OIG) evaluated how the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); and the United States Marshals Service (USMS) (collectively referred to in this report as “the components”) reported, investigated, and reviewed shooting incidents involving their Special Agents or Deputy Marshals. We assessed whether the components adhered to the Department’s *Policy Statement on Reporting and Review of Shooting Incidents*, September 21, 1995 (Resolution 13), which was established to ensure objective, thorough, and timely reviews of shooting incidents involving federal law enforcement officers (LEOs). We also assessed whether the components complied with their own internal shooting incident policies and whether they complied with requirements to report specific types of shooting incidents to the Department of Justice’s (Department) Civil Rights Division (CRD) and to the OIG.¹

RESULTS IN BRIEF

In performing the Department’s law enforcement mission, the Department’s components conduct operations such as executing search warrants and arresting fugitives and other suspects. When performing their duties, federal LEOs carry firearms and are authorized to use deadly force if necessary to protect themselves and the public. Although firearm discharges (other than for training) are infrequent, Resolution 13 requires that every shooting incident be reported, investigated, and reviewed “to determine the reasonableness of the application of deadly force in accordance with DOJ policy and the law and to provide component senior management with appropriate analyses, observations, and recommendations concerning operational training, and other relevant issues, including the need for referral for further administrative or disciplinary review.” To carry out Resolution 13, the Department’s components have established different procedures to ensure timely reporting and to attempt to conduct objective, thorough, and timely investigations and reviews of shooting incidents.

Our review of 103 of the 267 shooting incidents that occurred in fiscal years (FYs) 2000 through 2003 found that the components did not

¹ The portion of the ATF responsible for enforcing federal laws related to firearms, explosives, and arsons was transferred from the Department of the Treasury to the Department of Justice on January 24, 2003. Prior to this transfer, the ATF was not required to adhere to Resolution 13.

consistently report, investigate, and review shooting incidents according to their own procedures.

We also found significant differences in the way the components conducted the criminal and administrative investigations of shooting incidents. For criminal investigations, the ATF, the DEA, and the USMS relied on state and local law enforcement agencies to conduct the investigations. In contrast, the FBI conducted its own criminal investigation in every case, sometimes by delegating the criminal investigation to the field office to which the LEO involved was assigned. For administrative investigations, the ATF and the USMS assigned headquarters teams to conduct the investigation in every case. In contrast, the FBI and the DEA delegated the administrative investigation of some shooting incidents to the field office to which the LEO involved was assigned.

While we found that the rights of LEOs involved in shooting incidents were generally well protected, we noted that the issue of criminal responsibility was not always clearly resolved. In some cases, declinations of criminal prosecution were not obtained from state or federal authorities as required by the components' policies, and some LEOs were compelled to provide administrative statements before the issue of criminal responsibility had been fully resolved.

The components' shooting incident review processes differed as well. The components' Review Boards applied the standard for the reasonable use of deadly force differently.² The ATF, the DEA, and the FBI focused on the moment that the LEOs decided to discharge their firearms. In contrast, the USMS took into account the circumstances leading to the incident. These different applications of the standard for the reasonable use of deadly force can lead to different conclusions about similar shooting incidents. We also found that some shooting incidents that should have been reported to the CRD or the OIG under Department and component policies were not. In addition, we found that the components' Review Boards did not refer cases for discipline in the same way, which affected the discipline imposed. Finally, the components did not systematically share the lessons learned from shooting incident reports, and the Department did not aggregate shooting incident data to identify improvements to enforcement operations.

² The components' policies on the standard for the use of deadly force are all based on the Department's *Policy Statement on Use of Deadly Force*, Resolution 14, approved by the Attorney General on October 17, 1995. Resolution 14 stated: An LEO "may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." The Department issued a revised deadly force policy on July 1, 2004, which contains the same standard for the use of deadly force.

Reporting of Shooting Incidents by LEOs. Each component requires LEOs to immediately notify their supervisors when they discharge a firearm.³ Supervisors are required to prepare a written report containing specific information on the incident and submit it to headquarters within one day. These initial reports provide managers the information necessary to ensure that an appropriate investigation is initiated. In the 103 incidents we reviewed, the LEOs immediately reported 100 of the shooting incidents. In three instances, the LEOs either made a late report or admitted to discharging their weapons only after the discharge had been under investigation for a month or while testifying at the suspect's trial.⁴

We also found that some supervisors did not report shooting incidents to headquarters as required by their component's regulations. The ATF requires a written report within 12 hours of an incident. The DEA and the USMS require a report within 24 hours. The FBI requires an "immediate" report by electronic communication. We used a standard of one day for our review. We reviewed the files on 97 shooting incidents for copies of the written report to headquarters; 11 did not contain the required written report and in 1 file the report was undated.⁵ For the 85 incident files that contained dated initial written reports, we found that 54 (64 percent) of the reports were submitted within one day but that 31 (36 percent) were submitted late. On average, ATF and FBI supervisors submitted the written reports in one day, while DEA supervisors averaged two days and USMS supervisors averaged three days.

We asked USMS and DEA shooting incident investigators about the delays. The USMS investigators stated that the USMS's organizational structure – 94 decentralized district offices – delayed its reporting process. The DEA policies, provided by the DEA shooting incident investigators, require at least three reports following a shooting incident. Overall we could not validate that timely initial written reports were made in 43 of the 97 shooting incidents.

³ The components' policies require an LEO who discharges a firearm to report it immediately and to provide information in support of immediate first aid and law enforcement. This initial report is not intended to be a statement by the LEO involved of the circumstances surrounding the shooting incident.

⁴ Because delays made conducting shooting incident investigations in these cases impracticable, two of the three incidents were investigated under the components' discipline process for failure to report a firearms discharge.

⁵ Three of the 103 incidents were not considered in our analysis because the LEOs did not report them as required. Another three, from the FBI, were not considered because FBI policy allows field supervisors up to ten business days to report unintentional discharges in which no one is injured or killed. In the three cases subject to the 10-day rule, there was no initial report in one case, one report was timely, and one was late.

Reporting to the CRD and the OIG. In addition to internal reports, the components must report shooting incidents involving potential violations of federal civil rights statutes to the CRD and incidents involving potential misconduct to the OIG. In 2000, the CRD established written agreements with the DEA and the FBI that require them to report incidents that result in injury or death.⁶ We examined the DEA's and the FBI's reporting of shooting incidents to the CRD under those agreements, and we found that the DEA reported 8 of 11 reportable shooting incidents and the FBI reported 14 of 15 reportable shooting incidents. The DEA did not report three incidents to the CRD because under the DEA's procedures, its Office of Professional Responsibility (OPR) is responsible for reporting potential civil rights violations to the CRD, but the DEA's shooting incident investigators only forward to the OPR those cases that they determine might involve misconduct. The investigators did not forward three incidents to the OPR because, although they involved injury or death, the investigators did not identify any potential misconduct. Consequently, the DEA did not report the three shooting incidents to the CRD. The FBI could not explain why one of its cases was not reported.

The ATF and the USMS had no written agreements with the CRD to report shooting incidents. However, the USMS Chief Inspector told us that the USMS would report any shooting incidents involving a potential violation of civil rights. Also, the ATF Special Agent in Charge, Investigations Division, Office of Inspections, told us that the ATF would report any shooting incident involving the allegation or suggestion of a civil rights violation to the appropriate United States Attorney's Office. In the 23 ATF and 22 USMS incident files we reviewed, we found no evidence (e.g., declinations of prosecution, memoranda, e-mails) of any reports to the CRD. We found that the CRD did consider two USMS cases we reviewed, but not because they were reported by the USMS. In one USMS shooting incident, the CRD received an allegation of a civil rights violation from the suspect's family, and in another case, a United States Attorney consulted with the CRD before deciding not to prosecute a Deputy Marshal. The ATF case files contained no evidence that any of the 23 ATF cases resulted in a civil rights complaint against an ATF Special Agent.

We also found that the DEA and the FBI did not report many reportable shooting incidents to the OIG. Of the 57 incidents from all

⁶ See DEA - Cover letter from Section Chief Criminal Section, CRD, to Deputy Chief Inspector DEA OPR, September 12, 2000, and attachment: *Procedures for referral and investigation of DEA incidents suggesting possible criminal civil rights violations*. The DEA agreement also lists incidents other than shootings that must be reported. See also FBI - Letter from Section Chief Criminal Section, CRD, to Inspector Deputy Assistant Director June 26, 2000.

components that were reportable to the OIG, we documented that the components submitted formal reports on 35 of the incidents.⁷ The ATF and the USMS informed the OIG of all of their reportable incidents (4 for the ATF and 20 for the USMS), but the DEA reported only 4 of its 16 reportable incidents and the FBI reported only 7 of 17 reportable incidents. The FBI and the DEA did not report incidents that they initially determined were unintentional discharges. However, excluding discharges initially reported as unintentional from the reporting requirement can lead to a failure to report a significant incident if the evidence developed in the investigation shows that the discharge may have been intentional.

To ensure that shooting incidents are properly reported to the OIG, on July 27, 2004, the Assistant Inspector General of the Investigations Division sent a memorandum to the ATF, the DEA, and the FBI describing requirements for the reporting of firearms discharges. The reporting requirements for the ATF, the DEA, and the FBI are now the same as those established for the USMS in 1998.

The Components' Shooting Investigations. Resolution 13 requires that shooting incident investigations avoid any appearance of a conflict of interest or impropriety, present all the relevant information necessary for an accurate and objective analysis, and be conducted expeditiously. Components' senior management is permitted to decide "[w]hether a shooting inquiry will be conducted by investigators assigned to the field office where the incident occurred or by investigators assigned to a component headquarters Office of Inspection or other headquarters element..." We found that the ATF and the USMS delegate the fewest investigations. All 23 intentional and unintentional firearms discharges by ATF Special Agents were investigated by an Office of Inspection team, and all 22 shooting incidents involving Deputy Marshals were investigated by the USMS Office of Internal Affairs (OIA). In contrast, the DEA and the FBI delegated many shooting incident investigations. The DEA allowed 22 of its 37 shooting incidents that did not result in significant or life threatening injuries, deaths, or other significant liabilities to be investigated by the DEA field office to which the Special Agent was assigned. The FBI's delegation decisions were not based on the seriousness of the incident, but rather on the extent of the Special Agent in Charge (SAC) or Assistant Special Agent in Charge (ASAC) participation in the planning and operational events of the

⁷ We removed from our analysis the three incidents that were not investigated because the LEOs did not report them as required. We removed another 43 incidents that were not reportable to the OIG because, in the case of the ATF, they occurred before that agency transferred to the Department on January 24, 2003, or, for the DEA and the FBI, because the incidents occurred prior to the issuance of Attorney General Order 2492-2001. After removing these cases, 57 were reportable to the OIG.

incident. Of the 39 FBI cases we reviewed, 2 were investigated by headquarters, 21 were investigated by Inspectors in Place (IIP), and 16 were assigned to the SAC.⁸

During the criminal investigation of shooting incidents, Resolution 13 also requires “the recognition and accommodation, as appropriate under the circumstances, of multiple interests and jurisdictions following a shooting incident.” We reviewed 124 individual cases arising from 103 shooting incidents (some incidents involved more than one LEO). The ATF, the DEA, and the USMS told us that they always request state or local law enforcement agencies with jurisdiction to conduct the criminal investigations and only conducted a criminal investigation themselves if the state and local agencies declined the request. We found that local law enforcement agencies conducted the criminal investigations in 62 of the 85 cases involving LEOs of the ATF, the DEA, and the USMS.⁹ However, the FBI conducted a criminal investigation into all 39 cases involving its Special Agents, and state or local agencies conducted a parallel investigation in 12 of the 39 cases we reviewed. FBI investigators told us that they would not discourage a local investigation and would cooperate with state or local investigators, but that they do not request local criminal investigations and that they conduct an FBI criminal investigation in every case.

The ATF, DEA, and USMS shooting investigators said that they rely on local investigations because the states have the primary authority and responsibility to investigate and prosecute assaults, homicides, or other felonies occurring in their jurisdictions, and allowing local authorities to carry out their duties may preclude the need for an extensive federal investigation. We asked the FBI shooting investigators why the FBI conducts its own criminal investigations. They stated that, for cases involving injury or death, the FBI’s agreement with the CRD requires it to investigate any potential violation of civil rights and that policy has been extended, by practice, to every shooting incident. Further, the FBI investigators stated that the FBI had the resources to conduct investigations in all cases. We found that the DEA has a similar agreement with the CRD, however, and meets the requirement by submitting the local criminal investigations to the CRD.

⁸ An IIP is an inspector serving in a field office who can be assigned by the Chief Inspector to investigate a shooting incident in another field office or in the same field office to which the IIP is assigned. “During a shooting incident investigation [FBI policy states] that the IIP will report directly to the Chief Inspector of the Office of Inspections.”

⁹ State or local law enforcement declined to investigate 23 ATF, DEA, or USMS shooting incidents that did not involve injury or death or that occurred on federal property.

After the criminal investigation is complete, each component requires investigators to obtain a declination of prosecution from state or federal prosecutors or otherwise to ensure that there is no criminal action pending before completing the administrative investigation of a shooting incident. Because declinations of prosecution are recorded in the case files, we were able to evaluate the components' compliance with their policies. We found that the ATF did not obtain the required declination of prosecution in 4 cases, the DEA and the FBI did not obtain the required declination of prosecution in 1 case each, and the USMS did not obtain the required declination of prosecution in 17 cases.

The ATF investigators acknowledged that they had not obtained the required declinations in four cases due to an administrative oversight; these four ATF cases involved shooting incidents where the suspect was not injured or killed. The DEA investigators said that a declination of prosecution was not obtained in one case because it involved a suspect who eluded arrest until he was apprehended by local law enforcement one week after the shooting incident. The suspect reported that he received a minor wound during the shooting incident, but local law enforcement did not take further action. The FBI could not explain why one of its cases was not reported to the CRD for the required declination of prosecution. The USMS told us that its policy of obtaining declinations of prosecution in every case "needed to be more actively enforced."

During criminal investigations, LEOs have a constitutional right to remain silent. But once the criminal investigation is complete, the components can compel LEOs to provide statements for the administrative investigation and can discipline the LEOs if they refuse to comply. If a government agency compels an employee to provide a statement, it may use the information from that statement to take administrative action against the employee, but it may not use the information against the individual in a criminal prosecution.¹⁰ In the 124 cases we reviewed, the components compelled 30 administrative statements. The ATF and the DEA compelled statements only when they needed information to complete the administrative investigation, but the FBI and the USMS compelled an administrative statement in every case in which the LEO declined to give a voluntary statement, and, in some cases, compelled statements even though voluntary statements had already been made.

Our review of the case files also found that the components followed substantially different practices for compelling administrative statements in similar situations. In four FBI shooting cases, investigators compelled

¹⁰ However, an employee who makes a false statement in the compelled interview *may* be criminally prosecuted for the false statement.

administrative statements (without declinations of prosecution) from Special Agents involved in the shooting incidents for use in the criminal cases against the suspects involved in the shooting incidents. In similar DEA shooting incidents, the DEA did not compel the Special Agents involved to provide administrative statements to support the prosecution of the suspects. Instead, the DEA consulted with the Assistant United States Attorney, and the Special Agents testified before the federal grand jury considering the charges against the suspects. In the DEA and FBI cases, the suspects were charged under 18 U.S.C. § 115 with assaulting the Special Agents. Although these assaults may be related to shooting incidents, both FBI and DEA policies require that the charges of assaulting the LEOs be investigated separately, not as a part of the shooting incident administrative investigation. The FBI case files included no explanation for the FBI's decision not to conduct a separate criminal investigation and to rely instead on compelled administrative statements.

The Components' Review Board Process. Components established Review Boards to examine the facts and quality of the shooting investigation, determine the need for training improvements, and refer cases for discipline. Resolution 13 requires that Review Boards be independent and objective; that their decisions and recommendations be free of the control or direction of component management; and that their members be able to assess the facts without distortion. We found that the composition of some Review Boards was less consistent with independent and objective reviews and that the Review Boards applied the standard for the reasonable use of deadly force differently.

Two of the components' Review Boards included members from outside the component. The ATF Board included outside members from two other law enforcement agencies. Board members told us that including representatives from peer organizations helped ensure the independence and objectivity of the ATF Boards in which they participated. The FBI's Review Board also includes an outside member from the CRD and a Department attorney. We found that the ATF, FBI, and USMS Review Boards included representatives from several levels of their organization. We found, however, that the DEA's Review Board is composed of three high-ranking individuals who report directly to the DEA Deputy Administrator and who are responsible for the operations being reviewed. Because the DEA Review Board represents only the senior level of the DEA, we believe the composition of the DEA's Review Board might not be consistent with the Resolution 13 requirement for an independent review.

We also found that the components' Review Boards applied the standard for the reasonable use of deadly force differently. Of the 124 cases

we reviewed, Review Boards considered 121 cases and, in 14 cases, determined that the use of force was unreasonable. In 11 of the 14 cases (7 DEA cases and 4 FBI cases), the discharge of the firearm was unintentional. In three cases, all involving USMS Deputy Marshals, the Review Board found that an intentional discharge was unreasonable. The ATF, the DEA, and the FBI Review Boards focused on the moment the LEOs decided to discharge their firearms. In contrast, the USMS Review Board took into account the circumstances that led to the incident. These different approaches can lead to different conclusions about similar sets of facts. For example, the ATF, DEA, and FBI approach would find reasonable the actions of an LEO who failed to properly identify a suspect and consequently shot an innocent civilian if, at the moment the LEO fired, he or she believed that the civilian was the suspect and was acting in a threatening manner. The USMS's approach would find the same actions to be unreasonable because the LEO had not taken steps to properly identify the individual.

The Review Boards documented their findings and recommendations in different ways. Resolution 13 requires Review Boards to make “appropriate, timely recommendations to senior management ... including, if necessary, referral to appropriate entities for disciplinary review.” All of the Review Boards prepared memoranda for senior management presenting their findings on each case. Our review of 124 case files found that, for almost all of the cases we reviewed, the memoranda prepared by the FBI and USMS Review Boards effectively documented their findings and were thorough. However, we found that the memoranda prepared by the ATF and DEA Review Boards did not always provide senior management with detailed analyses, observations, and recommendations concerning operational training and discipline as required by Resolution 13 or the ATF Orders in effect at the time.¹¹

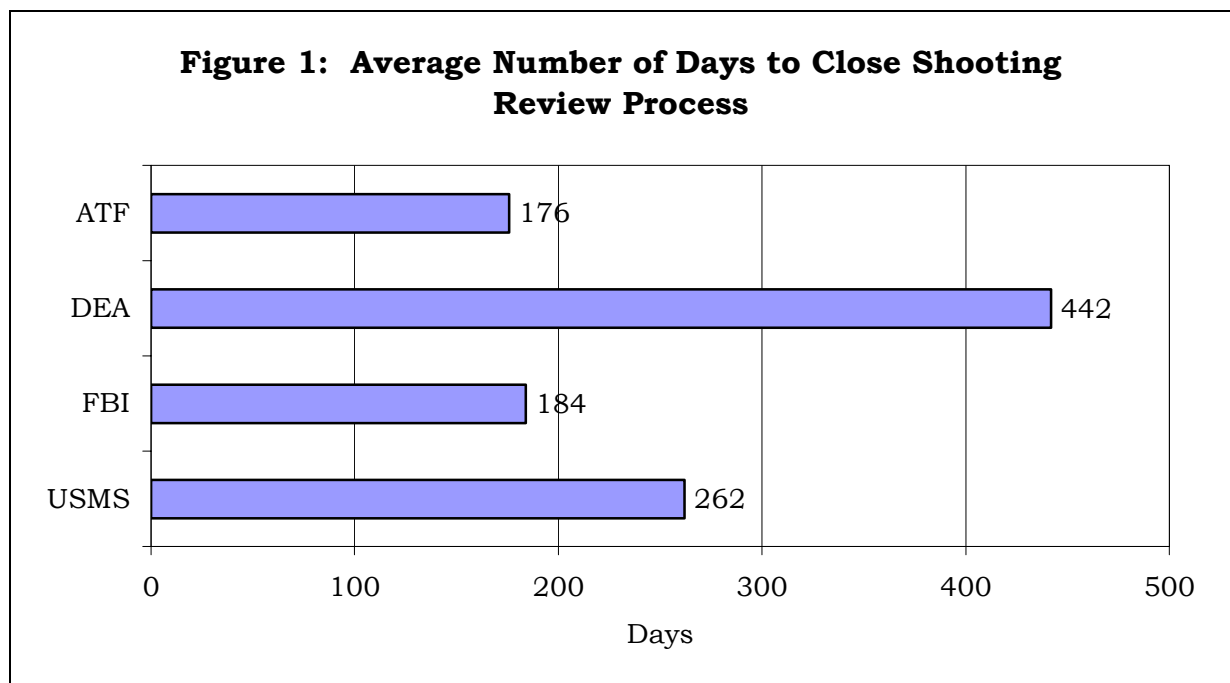
Further, we found that the Review Boards referred cases for discipline differently.¹² The USMS Review Board forwarded its cases to the USMS Human Resources Office and allowed the Human Resources Office to make any discipline referrals; the DEA Board referred cases for discipline without making specific discipline recommendations; and the FBI Review Board

¹¹ ATF Order 0 8200.3 in effect from April 22, 1996, until November 3, 2000, and superseding ATF Order 0 8200.3A, which took effect on November 3, 2000, and is still in effect requires that the Review Board's report include findings “relative to the following issues: use of force, compliance with [ATF] policies and directives, and determinations of wrongful or inappropriate actions of those involved in the shooting incident. The [Review Board] will also make recommendations relative to needed changes to policy, directives, equipment, training, supervision, and safety issues identified in the [report].”

¹² The ATF did not find the actions of any of its Special Agents to be unreasonable and did not refer any cases for discipline.

referred cases for discipline with specific recommendations for discipline. The way in which cases were referred affected the actual discipline imposed by the components. For example, the FBI Review Board made specific recommendations for discipline in each case it referred to the FBI OPR and followed a policy of recommending a 3-day suspension for all unintentional discharges. Consistent with those policies, the FBI Review Board recommended a 3-day suspension (later increased to a 5-day suspension by the deciding official) for a Special Agent who unintentionally discharged one round into a dying suspect. In a similar case, a DEA Special Agent unintentionally discharged her firearm, wounding a suspect and her partner. The Review Board referred the case to the DEA Board of Professional Conduct and the Special Agent received a Letter of Caution.

Timeliness of Shooting Incident Reviews. Resolution 13 states that prompt reporting, investigation, and review of shooting incidents are important, although it does not establish specific standards for completing shooting reviews. We reviewed the case files on 100 incidents to determine how long the shooting review process took from the date of the shooting incident to the date that a letter was sent to inform the LEO of the Review Board’s decision. We found that the ATF and FBI averaged 176 and 184 days, respectively, and the USMS averaged 262 days to complete its shooting reviews. The DEA took 442 days (Figure 1).



Source: OIG analysis of components’ shooting incidents.

We recognize that the amount of time taken to complete an investigation depends on the complexity of the incident and factors beyond

the control of the component. However, the files we reviewed did not generally contain sufficient information to enable us to conduct a detailed analysis of the reasons for the time taken. All of the components allow for extensions of the time required for the report of the administrative investigation, but the case files we reviewed did not contain documentation to indicate that extensions were granted. Nonetheless, much of the difference in the time required to complete shooting reviews appeared to be due to the time it took for each component's Review Board to meet after the completion of the investigations. The average times ranged from 39 days at the ATF to 226 days at the DEA. Only the ATF required its Review Board to meet within a specified time period (60 days after the completion of a shooting incident investigation). The other components did not require their Boards to meet within a specified time period.¹³ According to DEA Office of Inspection staff, the lengthy delays in convening the DEA Review Board were due to difficulties in coordinating the busy schedules of the three high-ranking officials on the Board.

The lengthy review delays had at least two potential negative effects. First, recommendations to senior management regarding operational, training, and safety issues were delayed, which hindered management's ability to make prompt corrections. Second, lengthy delays increased the time that LEOs remained under investigation, which could affect the LEOs' careers because their promotions and transfers could be delayed until the review was complete. The DEA recognized the potential adverse impact on employees and established procedures to reduce the impact of the investigation on promotions and transfers.

Sharing Lessons Learned Among Components. Resolution 13 states that "operational, safety, training or other relevant issues disclosed during the investigative or review process should be promptly communicated to component employees, and must be incorporated in policy manuals and training curriculae, as appropriate." Resolution 13 also requires that components conduct meaningful shooting incident data and trend analyses.

To communicate operational, safety, and training issues to LEOs, the ATF prepared semiannual summaries of its shooting incidents that are available to all employees on the ATF intranet. The DEA prepared annual summaries of its shooting incidents that are available to employees on the DEA intranet. The FBI began to prepare summaries of its shooting incidents during the course of our review, and the effort was ongoing when

¹³ During our review, the USMS Review Board decided to begin meeting on a quarterly basis, beginning on March 1, 2004. Prior to our review, the USMS Board only met when the Chairperson thought there were a sufficient number of cases to review.

we completed our fieldwork. In March 2004, the USMS Review Board suggested to the Director that the USMS begin preparing shooting incident summaries, and the USMS is implementing the Review Board's recommendations.

Only the DEA could demonstrate that it incorporated lessons learned from shooting incidents directly into its training curriculum. The components' training directors and supervisory firearms instructors we interviewed said that their headquarters would notify them of any safety issues disclosed during the investigative or review process and that they would promptly incorporate safety issues in policy manuals and training curricula. We found that only the DEA sends shooting incident files from its Review Board directly to its training academy for operational and training analysis and incorporation into the training curriculum. In contrast, the ATF training staff did not receive the shooting incident files for review and during our interview were unaware that shooting incident summaries were available on the ATF's intranet. The FBI training academy only retained the preliminary reports of shooting incidents. The USMS supervisory firearms instructor, who is a member of the Review Board, was prohibited from discussing shooting incident reviews with anyone outside the Review Board, including students. Consequently, the ATF, the FBI, and the USMS did not ensure that lessons learned from shooting incidents were incorporated into their training curricula. According to one USMS trainer, the lack of a mechanism to incorporate lessons learned from shooting incidents into the training provided at the training academy means that Deputy Marshals must rely on "word of mouth" for lessons learned from shooting incidents, and important details may be lost or inaccurately conveyed.

We also found that the components did not share with each other shooting incident information and that there is no formal process for ensuring that shooting incidents are promptly reported across the Department. Resolution 13 requires components to use statistical techniques to describe, summarize, and compare shooting incident data and to identify long-term patterns and changes that have occurred over time in order to minimize risks to LEOs and public safety. However, during the period we reviewed, the annual number of shooting cases involving the use of deadly force never exceeded 16 in any component. Because the components engaged in similar types of enforcement operations and had similar types of shooting incidents, they could have benefited by sharing with each other shooting incident information.

Sharing information and Department-level aggregation could have enabled the components to identify significant trends earlier. For instance, we compiled the shooting incident data reported for all components over the

last four years and found that more than half involved vehicles. In November 2002, the USMS Review Board observed that Deputy Marshals were frequently involved in shooting incidents while trying to arrest fugitives in stopped vehicles and recommended that the USMS research “devices that could be used to immobilize vehicles.” During that same time, the DEA also identified vehicles as a principal factor in shooting incidents and conducted research on vehicle containment. Had the components shared information and lessons learned with one another, the DEA could have informed the USMS that its research on vehicle containment found “that tire spike strips and an intentional puncture of the subject vehicle’s tire(s) for the purpose of preventing a subject from fleeing proved ineffective and unreliable.”¹⁴ The DEA also could have shared the “active vehicle containment technique” that the DEA developed in response to shooting incidents in order to make it more difficult for suspects to use their vehicles as weapons against the LEOs. Because the components did not share data or discuss shooting incident lessons together, they each addressed similar issues independently.

CONCLUSIONS AND RECOMMENDATIONS

We noted several areas in the components’ shooting review processes that differed significantly. We believe that the results of our review should be examined carefully by the components to identify areas that could be improved and to ensure that shooting incidents are reported promptly, investigated thoroughly, and reviewed by an objective and independent Review Board.

All of the components require a written report within one day so that senior management can make investigative decisions, but, on average, only the ATF and the FBI consistently met the requirement. Further, the FBI and the DEA are required to report shooting incidents involving injury and death to the CRD, and all the components are required to report shooting incidents to the OIG, but neither the CRD nor the OIG was informed of all reportable incidents.

Three of the components – the ATF, the DEA, and the USMS – rely on local law enforcement to conduct the criminal investigations of shooting incidents, but the FBI conducts all its own criminal investigations. Investigators assigned by the components’ headquarters conducted the administrative investigation of every ATF and USMS shooting incident, but the DEA and the FBI delegated the administrative investigation of some shooting incidents to the field office to which the LEO involved was assigned.

¹⁴ DEA Deputy Administrator Memorandum, “Vehicle Containment and Vehicle-Involved Arrest Procedures,” dated August 22, 2002.

While each of the components' Review Boards prepares a memorandum for every shooting incident reviewed, we found that only those prepared by the FBI and USMS boards consistently included analysis and recommendations specific to the incident being reviewed. We also found that each component has different Review Board membership requirements, ranging from only senior-level managers to outside law enforcement to non-supervisory personnel. Outside representation on Review Boards can improve objectivity and independence, and reduce inconsistencies among the components. The ATF approach of including experienced LEOs from peer law enforcement agencies appeared to enhance the independence and objectivity of its Review Board.

The most important difference in the components' review of shooting incidents was the lack of uniform application of the standard for determining the reasonableness of the use of deadly force. The ATF, the DEA, and the FBI Review Boards looked at the reasonableness of the LEO's belief that the suspect posed an imminent threat at the moment deadly force was used. The USMS Review Board considered the reasonableness of a Deputy Marshal's actions as a whole, including the actions that created the necessity for deadly force. As a result, Review Boards made different decisions regarding the reasonableness of the use of deadly force for similar shooting incidents. We believe that Review Boards should apply a uniform Departmentwide standard for determining the reasonableness of the use of deadly force.

Overall, we found that the components varied substantially in the time they took to complete the administrative investigation of shooting incidents. The ATF averaged 176 days; the DEA, 442; the FBI, 184; and the USMS, 262. Much of this difference appeared to be due to the time it took for each component's Review Board to meet after the completion of the investigations. The average times ranged from 39 days at the ATF to 226 days at the DEA. Only the ATF required its Review Board to meet within a specified time period (60 days after the completion of a shooting incident investigation). The other components did not require their Boards to meet within a specified time after the completion of investigations.

Although the areas we identified need to be addressed to ensure the effectiveness of the shooting review process, each component's system had strengths that the other components and the Department could use as benchmarks to improve the shooting review process. Moreover, better sharing and analysis of information on shooting incidents could identify improvements to operational procedures and training.

To better ensure timely, thorough, and objective reporting, investigation, and review of shooting incidents, we recommend that the Department:

1. Establish a working group to consider uniform Department standards for the components' shooting incident reviews. The standards should include requirements regarding:

- A. Content and timeliness of preliminary shooting incident reports and investigations.
- B. Delegation of investigative responsibility, involvement of local authorities in criminal investigations of shooting incidents, and requirements for declination of prosecution.
- C. Composition of the Review Boards, application of the standard for determining the reasonableness of deadly force, and documentation of Review Board decisions.
- D. Aggregation within the Department of shooting incident data and lessons learned, including the preparation and distribution of shooting incident summaries.

With regard to specific component practices, we recommend that the components take the following actions to correct the specific weaknesses identified in this report.

2. ATF Recommendations – We recommend that the ATF:

- A. Establish a formal reporting relationship with the CRD.
- B. Improve the documentation of Review Board findings and recommendations.

3. DEA Recommendations – We recommend that the DEA:

- A. Improve the consistency and timeliness of shooting incident reports.
- B. Ensure compliance with its CRD reporting agreements.
- C. Consider changing the composition of its Review Board and including outside members on its Review Board.

D. Improve documentation of Review Board findings and recommendations.

E. Improve the timeliness of review of shooting incidents.

4. FBI Recommendations – We recommend that the FBI:

A. Ensure compliance with its CRD reporting agreements.

B. Establish specific criteria for when to delegate shooting incident investigations to field offices.

C. Consider requesting local criminal investigation of shooting incidents and avoid duplication of local criminal investigations.

5. USMS Recommendations – We recommend that the USMS:

A. Streamline its shooting incident reporting system to improve consistency and timeliness in reporting shooting incidents.

B. Establish a formal reporting relationship with the CRD.

C. Consider including outside members on its Review Board.

We provided copies of this report to the ATF, the DEA, the FBI, the USMS, and the Office of the Deputy Attorney General (ODAG) and requested responses to the recommendations. The ATF, the DEA, the FBI, and the USMS concurred with all of their respective recommendations, and the ODAG concurred with the recommendation made to the Department as well as all the recommendations made to the individual components. We analyzed each response and have appended the responses and our analyses to this report.

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INTRODUCTION

The use of deadly force is one of the most serious actions an individual law enforcement officer (LEO) can take in carrying out the Department of Justice's (Department's) law enforcement mission. Department policy requires that every shooting incident be reported, investigated, and reviewed to determine the reasonableness of the application of deadly force and to provide management with appropriate recommendations to improve operational training and on other relevant issues, including disciplinary action.

Within the Department, different components conduct law enforcement operations, including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); and the United States Marshals Service (USMS).¹⁵ These enforcement operations include conducting surveillance, executing search warrants, and arresting fugitives and other suspects. In fiscal year (FY) 2003, these components made 86,765 federal arrests while carrying out their law enforcement missions (Table 1).

Table 1: Number of Federal Arrests, FY 2003			
Component	LEOs	Arrests	Enforce Federal Laws Related to:
ATF	2,407	9,239	Alcohol, tobacco, firearms, explosives, and arsons
DEA	4,640	26,594	Controlled substances
FBI	11,751	14,742	Criminal acts and statutes
USMS	3,342	36,190	Fugitive felons
TOTAL	22,140	86,765	

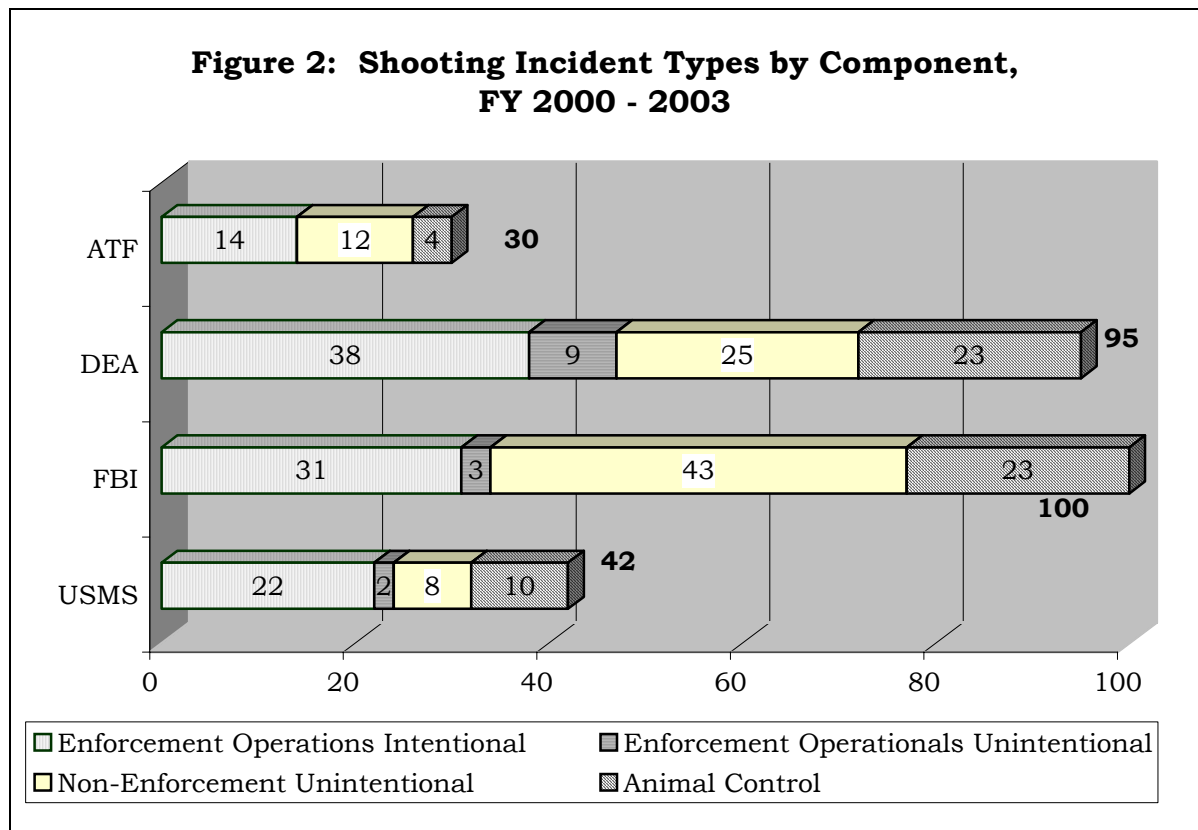
Source: Components' data.

Note: The portion of the ATF responsible for enforcing federal laws related to firearms, explosives, and arsons joined the Department on January 24, 2003.

The LEOs who enforce federal laws generally carry firearms. During FY 2000 through FY 2003, the components reported that 267 shooting

¹⁵ In addition, the Office of the Inspector General (OIG) has law enforcement authority, but Special Agents of the OIG were not involved in any shooting incidents during FY 2000 through FY 2003.

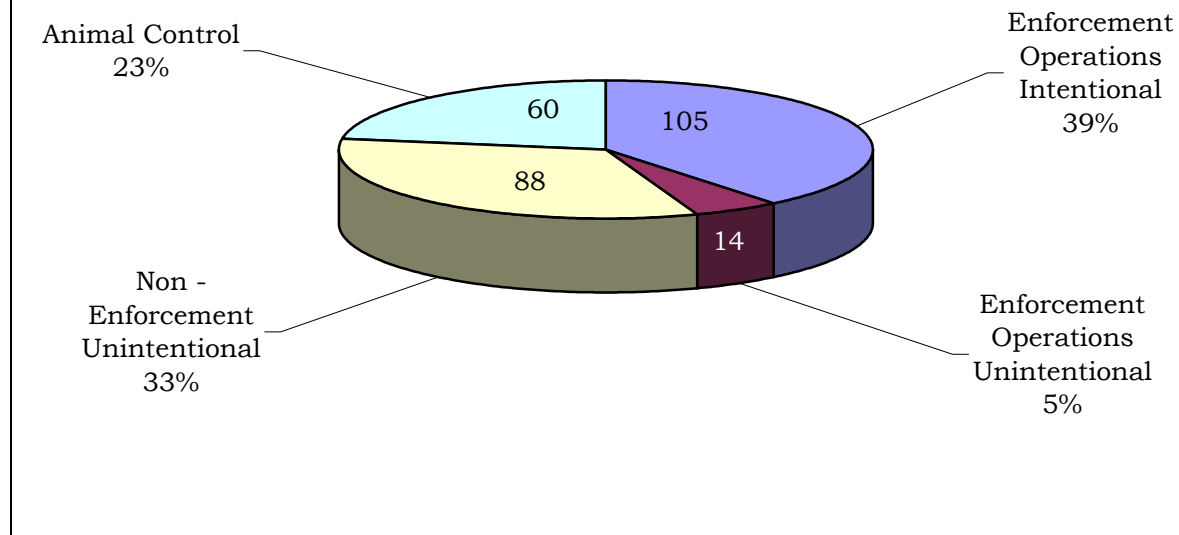
incidents occurred during enforcement and other operations, including training, cleaning weapons, and while acting as Peace Officers.¹⁶ Of these 267 shooting incidents, 105 were intentional discharges at suspects during enforcement operations, 14 were unintentional discharges during enforcement operations, 60 were intentional discharges at animals (e.g., vicious dogs, injured deer), and 88 were unintentional discharges during non-enforcement activities (e.g., training, weapons cleaning). (See figures 2 and 3.)



Source: OIG analysis of components' shooting incident data, logs, and cases.

¹⁶ LEOs can act as authorized "Peace Officers" under state law. The authority of Peace Officers varies by state, but generally includes unplanned law enforcement actions outside of the LEOs' normal duties to protect the public, such as intervening in burglaries, robberies, assaults, and other crimes that LEOs may encounter.

Figure 3: Shooting Incidents by Type, FY 2000 - FY 2003
Total Incidents: 267



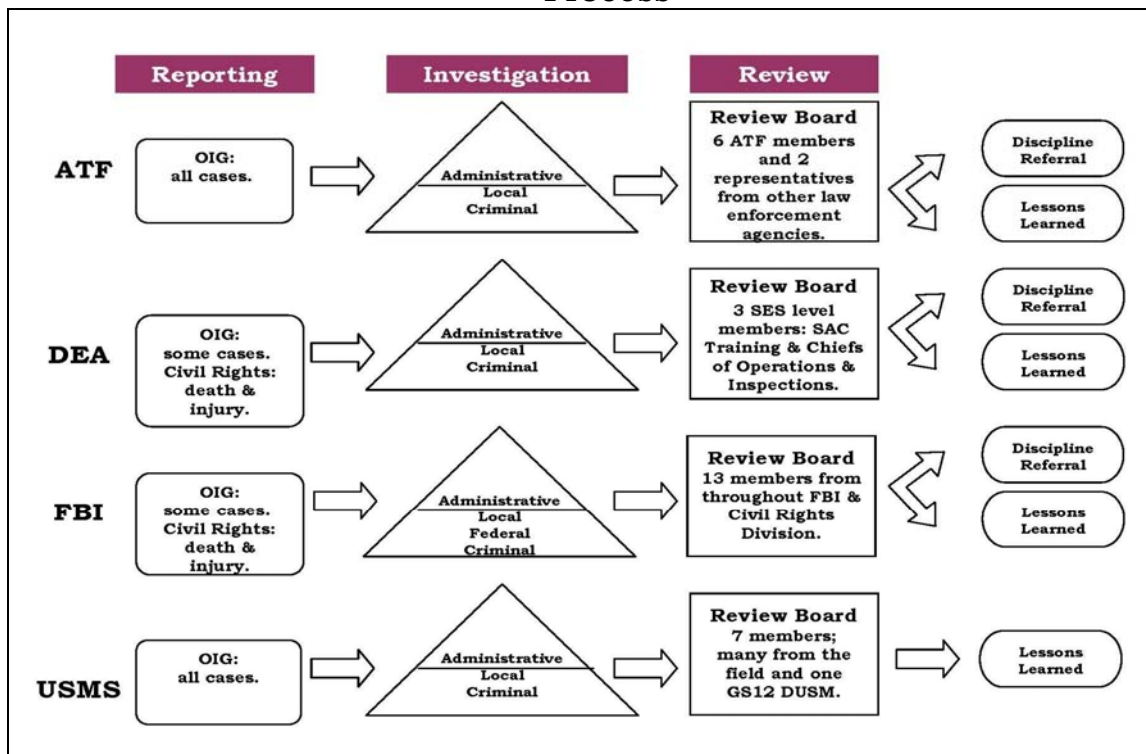
Source: OIG analysis of the components' shooting incident data, logs, and cases.
Note: An incident may involve more than one LEO or suspect.

Shooting Incident Reporting, Investigation, and Review

Department policy requires that every discharge of any firearm by an LEO, other than for training or recreation (e.g., hunting, target shooting), must be reported, investigated, and reviewed. Since September 21, 1995, the ATF, the DEA, the FBI, and the USMS have reviewed shooting incidents using procedures established in accordance with the Department's *Policy Statement on Reporting and Review of Shooting Incidents*, commonly referred to as Resolution 13 (see Appendix I).¹⁷ Resolution 13 requires senior management to assess each firearm discharge to determine whether it was a reasonable use of deadly force and to identify any needed improvements in training, planning, and operational procedures. Resolution 13 established a three-step shooting review process in which each shooting incident is reported, investigated, and reviewed. Each of the components established different procedures to implement the three-step process (Figure 4). After completing the shooting incident review process, the components may discipline the LEO using the components' standard disciplinary process.

¹⁷ The portion of the ATF responsible for investigating firearms, explosives, and arsons was transferred from the Department of the Treasury to the Department of Justice on January 24, 2003. However, the ATF has been subject to the same policies as the FBI, the DEA, and the USMS since 1995.

Figure 4: Shooting Incident Reporting, Investigation, and Review Process



Source: OIG summary of components' policies.

Terms in figure: SES - Senior Executive Service, SAC - Special Agent in Charge, DUSM - Deputy U.S. Marshal.

Reporting. Each component's shooting incident policy requires LEOs to immediately notify their supervisors when they discharge a firearm for any reason other than training or recreation. Supervisors are required to notify officials at headquarters immediately by telephone and to submit a written report within, at most, 24 hours. The initial written report promptly involves a designated senior manager in appropriate oversight of the decisional and investigative process as required by Resolution 13. In addition to internal reporting requirements, components may have to report shooting incidents to other Department entities. Attorney General Order 2492-2001, July 11, 2001 (Order 2492), requires that "all evidence and non-frivolous allegations of criminal wrongdoing and serious administrative misconduct... shall be reported to the OIG."

Components also are required to report incidents involving potential violations of federal civil rights statutes to the Civil Rights Division (CRD), Criminal Section. Below are the reporting arrangements by component.

- The ATF reports shooting incidents to the OIG under Order 2492, but does not have an internal written policy requiring immediate

reporting to the OIG. The ATF does not report shooting incidents to the CRD.

- The DEA policy implements Order 2492 and requires that the OIG be notified of shooting incidents so that the OIG can determine whether it will conduct an investigation of possible criminal or serious administrative misconduct. The DEA also has agreed to advise the CRD of all shooting incidents involving injury or death.¹⁸
- The FBI reports shooting incidents to the OIG under Order 2492, but does not have internal written policies requiring immediate reporting to the OIG. The FBI has agreed to advise the CRD of all shooting incidents involving injury or death.¹⁹
- The USMS implements Order 2492 and requires that any shooting incident “which appears to constitute a violation of law, or Departmental regulations” be reported immediately to the OIG. Firearm discharges “other than by accident” must be reported within 48 hours, and accidental discharges must be reported monthly.²⁰

Investigation. Resolution 13 requires that the components investigate shooting incidents to determine whether the shooting violated any law or policy regarding deadly force or weapons safety. To examine any potential violations of law, the ATF, the DEA, and the USMS generally rely on state and local law enforcement agencies to conduct criminal investigations of shooting incidents, while the FBI conducts its own criminal investigation of each of its shooting incidents. All the components conduct their own administrative investigations to identify violations of policy and needed improvements in training and to support decisions regarding disciplinary action (Figure 5).²¹

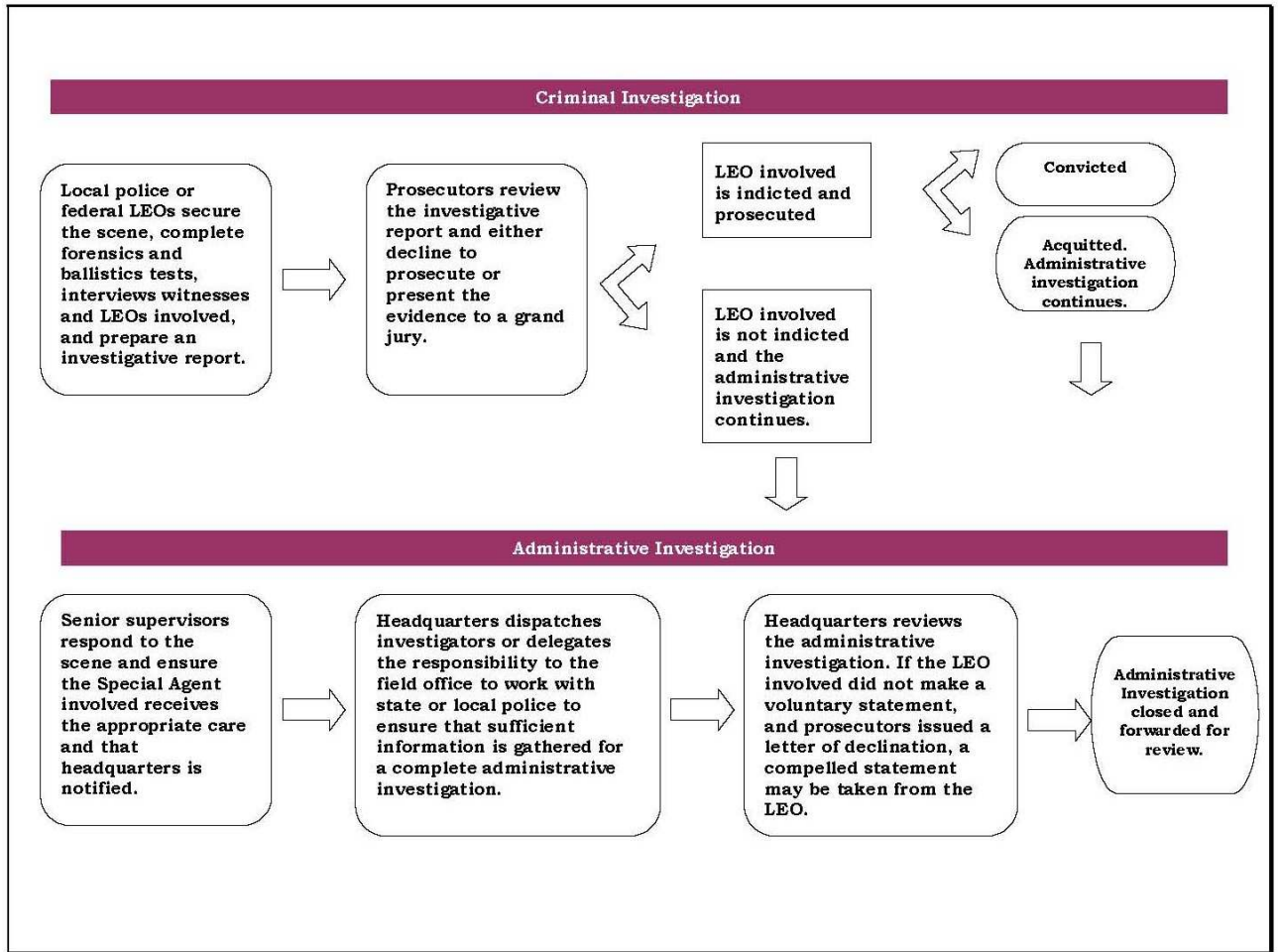
¹⁸ Letter from Section Chief Criminal Section, CRD, to Deputy Chief Inspector, DEA Office of Professional Responsibility, September 12, 2000, *Procedures for Referral and Investigation of DEA Incidents Suggesting Possible Criminal Civil Rights Violations*.

¹⁹ Letter from Section Chief Criminal Section, CRD, to Deputy Assistant Director of Inspections Division, FBI, June 26, 2000.

²⁰ This reporting requirement was established in a memorandum from the Assistant Inspector General for Investigations to the Director of the USMS (*Guidelines for Reporting Misconduct to the OIG*, July 1, 1998). The reporting requirement is now included in USMS policy (USMS Memorandum, *Reporting Requirements: Allegations of Misconduct*, March 21, 2003).

²¹ The OIG has jurisdiction to investigate misconduct in components, but generally it does not conduct administrative reviews of shooting incidents and allows the components to perform the investigations.

Figure 5: Standard Shooting Incident Investigative Steps



Source: OIG summary of components' policies.

Each component has an Office or Division of Inspections responsible for investigating shooting incidents.²² The internal investigators either conduct the investigation, assign other investigative personnel to conduct the investigation, or delegate the investigation to the field office to which the LEO is assigned. Some component policies contain guidance for selecting the investigative team, and other policies list the criteria for determining whether to delegate the investigation.

- ATF policy requires that all incidents involving an intentional firearm discharge by an ATF employee or suspect, as well as unintentional firearm discharges by ATF employees, be investigated by an ATF Inspector.

²² The USMS created its Office of Inspections during our review. See Memorandum from Benigno G. Reyna, Director, USMS, to All USMS Employees, *Establishment of the U.S. Marshals Service Office of Inspections*, March 4, 2004.

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- DEA policy provides that shooting incidents involving death or significant injury usually will not be delegated to the field for investigation, but other shooting incidents can be delegated.
 - FBI policy requires that shooting incident investigations “must be conducted under the direction of the Special Agent in Charge (SAC) when a weapon is discharged by FBI personnel unless circumstances necessitate the inquiry be conducted under the direction of an Inspector in Place [IIP].”²³ The Assistant Director, Office of Inspections, determines who will have responsibility for the investigation through consultation with the SAC and the Assistant Director, Criminal Investigative Division. The determination is based on the extent of SAC or Assistant Special Agent in Charge (ASAC) participation in the planning and operational events of the incident.
 - USMS policy requires that “an Administrative Shooting Review Team (ASRT) will be appointed by the Assistant Director of the Executive Services Division and the Investigative Services Division following each shooting incident. The ASRT may include representatives from other operational divisions.”

The components’ policies also provide guidance for conducting investigations, including what the shooting incident investigation files should include and to whom the completed investigation should be submitted. According to components’ policies, complete investigative files should contain:

- The initial telephonic and written reports of the shooting incident;
- Reports by state or local criminal investigators;
- Medical and autopsy reports;
- Witness statements;
- Photographs and diagrams of the scene;
- Firearms qualification records for all LEOs who fired weapons; and

²³ An IIP is an inspector serving in a field office who can be assigned by the Chief Inspector to investigate a shooting incident in another field office or in the same field office to which the IIP is assigned. “During a shooting incident investigation [FBI policy states that] the IIP will report directly to the Chief Inspector of the Office of Inspections.”

-
- An administrative report prepared by the shooting incident investigators with a synopsis of the background of the underlying case, the operation in which the shooting occurred, and a detailed account of the shooting incident.

The ATF, DEA, and USMS policies require that shooting incident investigations be completed within 30 days of the incident. The FBI policy requires that investigations be completed within two weeks of the incident. All of the component policies allow for extensions.

Both Resolution 13 and the components' policies direct that the investigation balance the importance of conducting an objective, thorough, and timely investigation with the well being of the LEOs for whom shooting incidents are traumatic events. Resolution 13 states:

Shooting incident inquiries should be conducted with due regard for the physical, mental, and emotional well being of involved employees, their families, co-workers, and other persons, including victims and witnesses.

The components' policies state that LEOs involved in shooting incidents will be offered mental health and medical examinations and be given time away from normal enforcement duties. The ATF assigns Special Agents involved in shooting incidents to administrative duties until they are cleared to return to their regular duties. The DEA assigns Special Agents to light duty for a period of five days, which may be extended for an additional five days. The FBI encourages Special Agents to take five days of administrative leave. Deputy Marshals return to work only when directed to do so by their supervisors.

Review. When a shooting incident investigation is complete, Resolution 13 and the components' policies require a Review Board to:

- Provide an independent and objective administrative check and balance on the reporting and investigative process;
- Determine the reasonableness of the application of deadly force in accordance with the Department's deadly force policy and the law;
- Provide appropriate analyses, observations, and recommendations concerning operational training; and
- Close the case or refer the case for further administrative or disciplinary review.

The specific structure, staffing, and decisions of each component Review Board are discussed below.

ATF. The ATF's Assistant Director for Inspections chairs its Shooting Incident Review Board (SIRB). The SIRB members include one of the three Deputy Assistant Directors for Field Operations (East, West, or Central), the Associate Chief Counsel, the Assistant Director for Training and Professional Development, the Chief of the Special Operations Division, and two senior-level managers from other federal law enforcement agencies. In addition to shooting incidents, the SIRB reviews less-than-lethal munitions discharges.²⁴ Board members receive advance copies of all investigations scheduled for review before the meeting. The SIRB determines if each incident was "justified" or "unjustified" and refers unjustified incidents to the ATF's Professional Review Board for discipline.

DEA. The DEA's Shooting and Assault Incident Review Committee (SAIRC) is chaired by the Chief Inspector, Inspections Division, and includes the Chief of Operations (Vice-Chairperson) and the SAC of the Office of Training. The SAIRC reviews all shooting incidents except those investigated as misconduct matters by the DEA's Office of Professional Responsibility (OPR). SAIRC members do not receive material in advance of meetings, but instead receive presentations at the meetings from the inspector responsible for the shooting incident investigation. If the SAIRC does not find the use of force "justified," it may declare the shooting "unjustified," refer the case to the OPR for further investigation of suspected misconduct, or forward the case to the disciplinary Board of Professional Conduct without a finding.

FBI. The FBI's Shooting Incident Review Group (SIRG) includes up to 13 members representing various divisions and positions within the FBI. The Deputy Assistant Director of the Inspections Division is the chairperson, and the Chief Inspector of the Office of Inspections serves as the alternate Chairperson. Other members include representatives from the Criminal Investigative Division, National Security Division, Training Division, Personnel Division, Office of General Counsel, Laboratory Division, and a Field Supervisor from Washington, D.C. (preferably one who has been

²⁴ Both the ATF Special Response Team and the USMS Special Operations Group use 12-gauge shotguns to fire small fabric bags filled with lead shot. These "beanbag rounds" are used as a "less lethal" response where force is authorized but deadly force is undesirable. The ATF reports and reviews the use of beanbag rounds, but the USMS does not. The DEA and the FBI do not use beanbag rounds.

involved in a shooting). The SIRG also includes an outside member from the CRD and a Department attorney.²⁵

The complete investigative case file for each incident to be reviewed is sent to Review Board members in advance of the meeting. The SIRG reviews every shooting incident and decides whether the firearm discharge was justified or unjustified.²⁶ The SIRG also prepares a memorandum to the Assistant Director for Inspections summarizing each case. The SIRG may also make recommendations for discipline, and in those cases, the SIRG memorandum is provided to the OPR for further action.

USMS. The USMS Shooting Review Board (SRB) is chaired by a U.S. Marshal and includes a Chief Deputy U.S. Marshal, a Supervisory Deputy U.S. Marshal, a supervisory or management rank representative from the USMS's Judicial Security Division, a supervisory or management rank representative from the USMS's Investigative Services Division, a USMS Instructor from the Federal Law Enforcement Training Center (FLETC), and a Deputy Marshal. All SRB members are appointed to 2-year terms, which may be extended. All voting members must be LEOs with at least four years of law enforcement experience. The SRB also includes a representative of the USMS Office of the General Counsel as a nonvoting member. In advance of USMS Review Board meetings, members receive electronic copies of the complete investigative case file for each case. The SRB reviews all shooting incidents, except those involving the use of less-than-lethal munitions and determines whether each firearm discharge was authorized or unauthorized. The SRB produces a report for the USMS Deputy Director describing its determination and the basis for the decision in each case.

²⁵ The OIG also participated on the FBI's Review Board, but in April 2004 withdrew from participation because such participation could pose an appearance of conflict of interest if the OIG were required to review the conduct of a specific Review Board.

²⁶ The FBI *Manual of Investigative Operations and Guidelines* requires that the Review Board first decide whether a firearm discharge was intentional or unintentional. We did not find that this is currently the practice of the Review Board.

PURPOSE, SCOPE, AND METHODOLOGY

Purpose

This review evaluated how the ATF, the DEA, the FBI, and the USMS reported, investigated, and reviewed shooting incidents involving Special Agents or Deputy Marshals. We assessed whether the components adhered to the Department's shooting incident review policy, Resolution 13, which requires "appropriate, consistent operational guidelines" to ensure objective, thorough reporting, investigation, and review of shooting incidents involving LEOs. We also assessed whether the components complied with their own internal shooting incident policies.

Scope

We reviewed shooting incidents involving Special Agents or Deputy Marshals that occurred during FY 2000 through FY 2003. We used two criteria to determine which components to include in the review:

- Components subject to Resolution 13 and
- Components that routinely engaged in enforcement activities such as arrests and the execution of search warrants.

The ATF, the DEA, the FBI, and the USMS met these criteria.²⁷ The Federal Bureau of Prisons (BOP) is subject to Resolution 13, but because the BOP does not allow its personnel to leave correctional facilities with firearms except in special situations and does not routinely engage in enforcement activities, we did not include the BOP in this report.²⁸

We reviewed all intentional and unintentional firearm discharges with and without injury or death resulting from the application of deadly force during enforcement operations. Not all of the 267 reported shooting incidents that occurred during FY 2000 through FY 2003 were reported, investigated, and reviewed by the components in the same way. The components' policies define deadly force as the use of any force that is likely

²⁷ The portion of the ATF responsible for enforcing federal laws related to firearms, explosives, and arsons was transferred from the Department of the Treasury to the Department of Justice on January 24, 2003. Prior to this transfer, the ATF was not required to adhere to Resolution 13.

²⁸ The OIG also met these criteria, but did not have any shooting incidents during FY 2000 through FY 2003 and was not included in the review.

to cause death or serious physical injury.²⁹ We considered all firearm discharges occurring when a weapon was drawn to be instances of the use of deadly force. Accordingly, we analyzed operational firearm discharges regardless of whether death or injury resulted or whether the discharge was later determined to be intentional or unintentional. To ensure that we reviewed only cases that were comparable, we excluded:

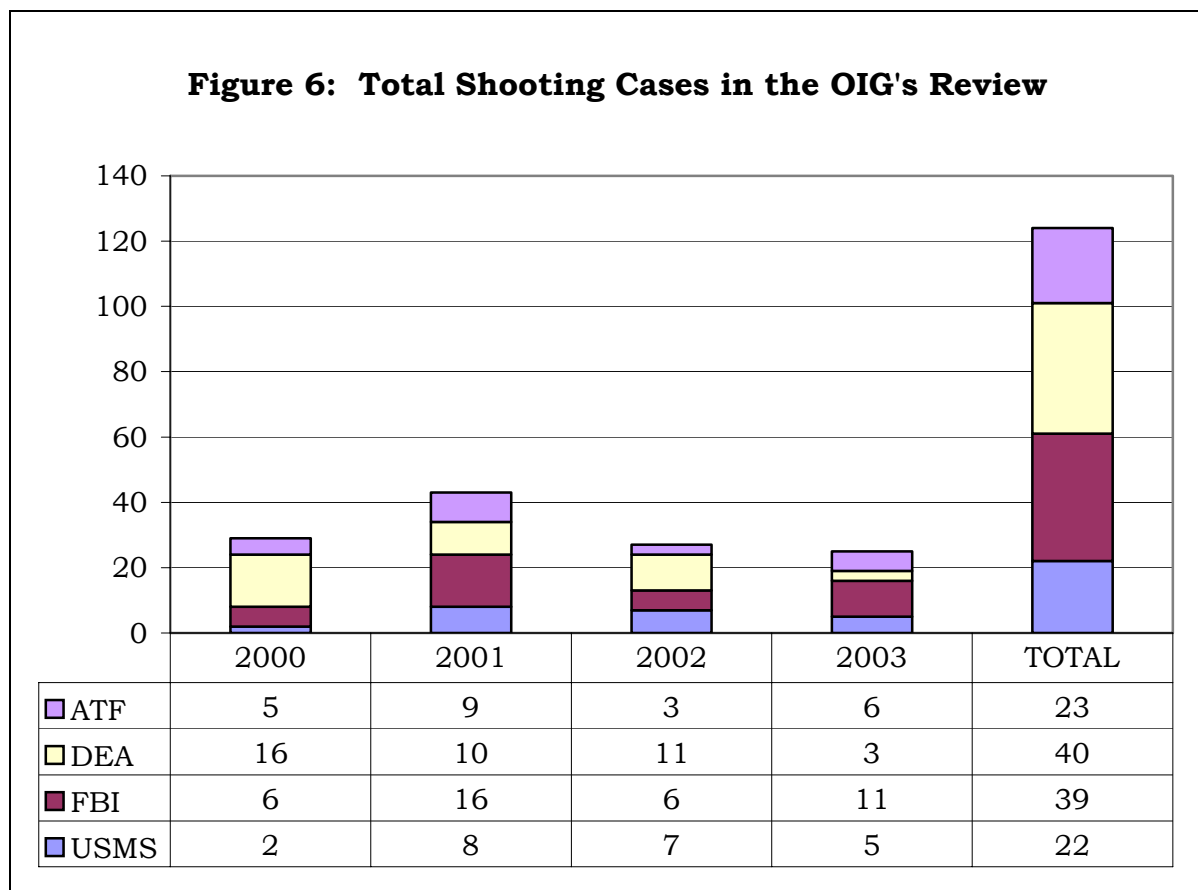
- Incidents that occurred outside of U.S. territory and were therefore subject to the U.S. Department of State’s review policies;
- Incidents in which an LEO fired at an animal;
- Incidents unrelated to law enforcement duties that resulted in the criminal conviction of the LEO;
- Unintentional firearms discharges during training exercises or weapons cleaning;
- Unintentional discharges from handling or clearing seized weapons; and
- Incidents involving less-than-lethal ammunition, such as beanbag rounds.

Of the 267 shooting incidents, 114 fit our criteria. Eleven were still under investigation or review when we concluded our fieldwork on May 21, 2004, and were not included in our analysis. Our report, therefore, is based on 103 incidents.

In conducting our analyses, we distinguished between incidents and cases because some incidents involved more than one LEO. For example, in one incident, seven Special Agents discharged their weapons while trying to serve a warrant on an individual who was barricaded in a house and shooting at the Special Agents and local police officers. The ATF, the DEA, and the FBI do not distinguish between incidents and cases, and create one file for each shooting incident even if multiple LEOs discharged their weapons. In contrast, the USMS creates a separate case file for each Deputy Marshal who discharged a firearm during an incident. We use the term “incident” to describe one event, even if more than one LEO discharged a weapon. We use the term “case” to refer to the individual LEO who

²⁹ The components’ policies are based on the commentary to the Department’s *Policy Statement Use of Deadly Force*, referred to as Resolution 14, approved by the Attorney General on October 17, 1995. The Department issued a revised deadly force policy on July 1, 2004. The new policy does not include a commentary.

discharged a weapon. If multiple LEOs fired during the same incident, multiple cases resulted. After reviewing the components' files, we identified 124 cases within the 103 incidents that met our criteria (Figure 6).



Source: OIG analysis of components' shooting incident data.

The 124 cases we reviewed encompassed a variety of enforcement activities in each of the components, as shown in Table 2.

Table 2: Cases by Type of Activity and Component				
Component	Arrests: warrant/surveillance	Stings: buy/bust or other	Peace Officer	Total Cases
ATF	19	1	3	23
DEA	16	19	5	40
FBI	28	6	5	39
USMS	19	0	3	22
TOTAL	82	26	16	124

Source: OIG analysis of components' shooting incident data.

Methodology

Data Collection

Each component provided the number of shooting incidents that occurred during FY 2000 through FY 2003, the number of full-time LEOs, and all shooting investigative and review policies in effect during the period covered by the review. To obtain information on firearm discharges reported by the components, we collected data from the OIG's Investigations Data Management System (IDMS) database and from the CRD.

Interviews

We conducted in-person interviews with shooting incident investigators and Review Board members from all four components. We also interviewed representatives from the CRD and firearms instructors from the ATF, DEA, FBI, and USMS training academies.

Site Visits

We visited the FLETC in Glynco, Georgia, and the DEA and FBI training academies in Quantico, Virginia, to determine how and to what extent components integrate lessons learned from shooting incidents into their training curricula.

Background Research

Our review of background research on the shooting incident review process included:

- Government Accountability Office, *Use of Force: ATF Policy, Training and Review Process Are Comparable to DEA's and FBI's*. Report number GGD-96-17, March 1996;
- International Association of Chiefs of Police, *Model Policy on Use of Force*, Effective Date August 2001, Reevaluation Date August 2002;
- International Association of Chiefs of Police, *Model Policy on Investigation of Officer Involved Shootings*, Effective Date November 1998;
- International Association of Chiefs of Police, *Model Policy on Reporting Use of Force*, Effective Date February 1997, Reevaluation Date February 1998;

-
- Newspaper articles reporting shootings incidents involving LEOs; and
 - Law Enforcement Executive Forum, *New Challenges for Law Enforcement Professional Standards*, 2003.

File Review

For each component, we reviewed shooting incident and case files involving a firearm discharge during an enforcement operation, recorded the relevant dates for the steps of the process from reporting through discipline referral, evaluated whether the file contained documentation that the component's shooting investigations policy had been followed, and determined if the actions taken were timely.

To assess timeliness, we compared the time taken by the components to complete each step to the components' regulations. To evaluate the timeliness of reports of shooting incidents to the OIG, we averaged the number of days it took for each component to report the incidents.

We did not reinvestigate any of the incidents we reviewed, and we did not reevaluate the decisions made by any of the Review Boards. However, we did compare and contrast the Review Boards' findings on the use of deadly force and recommendations for discipline.³⁰

³⁰ The OIG is conducting a series of reviews on the disciplinary processes of the Department's components. The USMS review, Report Number I-2001-011, was completed in September 2001, and the DEA review, Report Number I-2004-002, was completed in January 2004. The Review of the Federal Bureau of Prisons' Disciplinary System (I-2004-010) was completed in September 2004, and reviews of the ATF and the FBI discipline processes are planned.

RESULTS OF THE REVIEW

We found that the ATF, the DEA, the FBI, and the USMS have different policies and practices for reporting, investigating, and reviewing shooting incidents involving law enforcement officers (LEOs). Although we found that LEOs reported most shooting incidents, the field offices did not always report shooting incidents to headquarters within the time required and did not consistently report shooting incidents to the Office of the Inspector General or the Civil Rights Division. The components also conducted shooting incident investigations differently. The ATF and the USMS conducted a headquarters investigation in every case, while the DEA and the FBI delegated some investigations to field offices. The FBI conducted its own criminal investigations in every case, while the ATF, the DEA, and the USMS requested that local law enforcement agencies conduct the criminal investigations of their shooting incidents. The components used different standards for obtaining declinations of prosecution and for compelling statements during administrative investigations. In addition, the components' Review Boards applied the standard for the reasonable use of deadly force differently and referred cases for discipline in different ways. The components did not systematically share the lessons learned from shooting incident reports, and the Department did not aggregate shooting incident data to identify needed improvements to training.

Reporting to Supervisors, Component Headquarters, the CRD, and the OIG.

Reports of shooting incidents to supervisors. Every component requires LEOs to report all firearm discharges (other than for training or recreation) to their supervisors immediately after they occur because an immediate report by the LEO is essential to begin the investigative process. In the 103 incidents we reviewed, the LEOs immediately reported 100 of the shooting incidents. However, in three cases, LEOs failed to report shooting incidents as required. In those three incidents:

-
- A DEA Special Agent failed to report that he discharged his weapon during an enforcement operation. After a month-long investigation into the unexplained gunfire heard by other LEOs at the scene, the Special Agent admitted to investigators that he had fired his weapon. The Special Agent received a 30-day suspension for failing to report the firearm discharge immediately.
 - A DEA Special Agent failed to report that he discharged his weapon during an enforcement operation. Six months later, while testifying at the suspect's trial, the Special Agent admitted to discharging his weapon. The Special Agent received a 35-day suspension for failing to immediately report the firearm discharge.
 - An FBI Special Agent waited one day to report that he had unintentionally discharged his weapon outside his residence while chasing a burglar. The Special Agent received a 5-day suspension for failing to exercise appropriate firearms safety and failing to report the incident immediately.

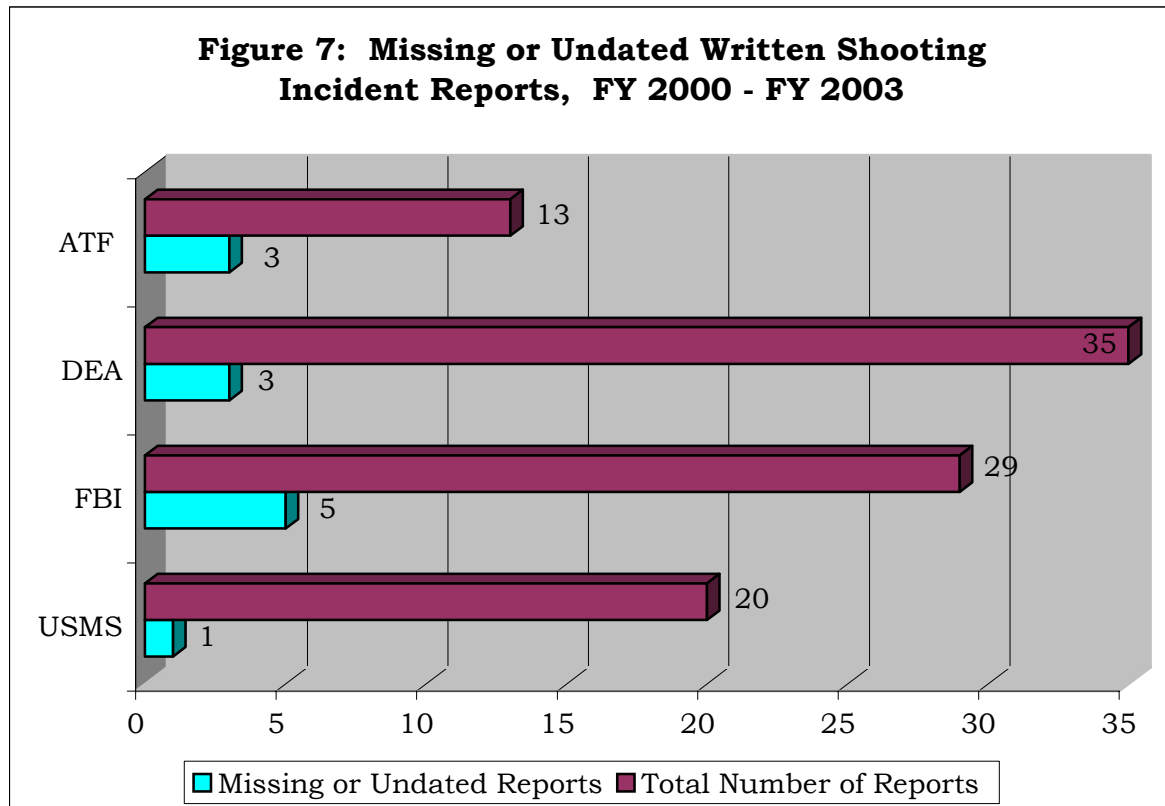
Two of these three incidents were not investigated fully because a shooting incident investigation was no longer practicable when the shooting incident was discovered. According to the DEA Chief of Inspections, failure to report the incidents immediately constituted misconduct. Therefore, the Office of Inspections transferred these two investigations to the DEA's OPR. The OPR conducted misconduct investigations and imposed discipline.

Field office reporting of shooting incidents to headquarters. The components require timely written reports so that senior managers can oversee the investigative process. Following the immediate reporting of a shooting incident by an LEO, each component requires the LEO's supervisor to submit an initial written report on the shooting incident to headquarters within one day.³¹ Of the 103 incidents we reviewed, we were able to analyze 97 for timeliness. We did not consider in our analysis the above three incidents that were not reported as required and an additional three from the FBI because a SAC may classify a shooting incident as unintentional and, if no one is injured or killed, an immediate report is not required.³² We reviewed the files of the remaining 97 incidents for copies of the written

³¹ The ATF and the DEA require a written report within 12 hours of the incident. The USMS requires a written report within 24 hours. The FBI requires an immediate written report by electronic communication.

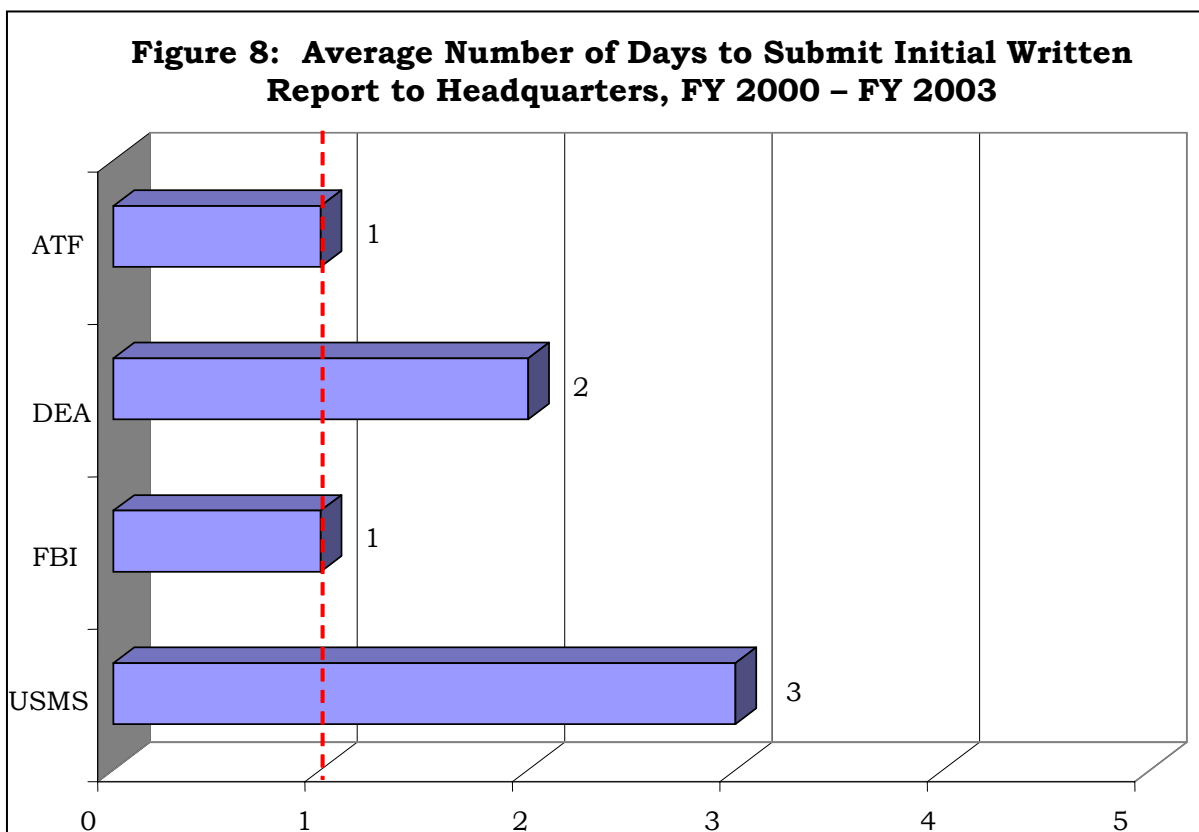
³² The field office has ten business days to report incidents classified as unintentional if no injury or death is involved. In the three cases subject to the 10-day rule, there was no initial report in one case, one report was timely, and one was late.

report to headquarters. Of the 97 incident files, 11 did not contain the required written report, and in 1 file the report was undated. Although these 12 files contained evidence of telephone calls and e-mails informing headquarters of the shooting incidents, these informal communications did not include all the information that the components require in the formal written report (Figure 7).



Source: OIG analysis of components' shooting incident files.

For the 85 incident files that contained dated initial written reports, we examined how long the supervisors took to submit the reports to headquarters. Of the 85 incidents, a formal written report was submitted within one day in 54 of the incidents (64 percent). On average, the ATF and the FBI met the 1-day reporting requirement, while DEA and USMS supervisors took two to three days on average to submit the reports (Figure 8).



Source: OIG analysis of components' shooting incident files.

Note: Reporting time is measured in complete days following the day of the incident.

Reports submitted on the day of the incident were counted as zero days to report, reports submitted on the following day were counted as one day to report, etc.

We discussed the reporting delays with each of the components. The USMS staff stated that the USMS organizational structure was one factor that delayed the reporting process, because the USMS has 94 decentralized district offices, each of which rarely has a shooting incident. The DEA policies, provided by the DEA shooting incident investigators, require at least three reports following a shooting incident:

- Based on an initial telephonic report, DEA headquarters may designate a shooting incident as a “critical incident.” If this happens, the SAC is required to send a “preliminary shooting incident report” to headquarters within six hours. We found these critical incident reports in 26 of the 35 DEA incident files. A critical incident report may not have been required in the remaining nine cases, but we did not find any documentation of the critical incident decisions.
- In every shooting incident, the SAC must send an electronic communication describing the shooting incident to headquarters within 24 hours. We found an electronic

communication from the SAC in 33 of 35 incident files and used this initial written report for our timeliness assessment.

- Finally, the Shooting Incident Investigator must submit a Report of Shooting Incident after completing the investigation. We found a Report of Shooting Incident in 30 of the 35 incident files.

Overall, we identified an initial written report in 85 of the 97 incidents. We found no dated, initial written report in 12 cases, and in 31 of the 85 incidents the initial reports did not meet the 1-day deadline. As a result, in 43 of 97 cases (44 percent) we could not validate that senior managers received the written information in time to use it for oversight of the investigation.

Reporting shooting incidents to the CRD. The Department's CRD has the authority to review and prosecute complaints of violations of federal civil rights statutes, including complaints related to the shooting incidents we reviewed. In 2000, the CRD established written agreements with the DEA and the FBI that require them to report to the CRD shooting incidents resulting in injury or death.³³ The CRD does not have similar written agreements with the ATF or the USMS.

We examined the DEA's and the FBI's compliance with the agreed upon reporting requirements. Since the FBI's agreement went into effect, 15 FBI shooting incidents have resulted in injury or death. The FBI reported 14 of these 15 shooting incidents to the CRD. The FBI could not explain why one of its cases was not reported. Since the DEA's agreement went into effect, 11 DEA shooting incidents resulted in injury or death. The DEA reported 8 of these 11 shooting incidents to the CRD. The DEA did not report three incidents to the CRD. Under the DEA's procedures, its OPR is responsible for reporting potential civil rights violations to the CRD. However, DEA's shooting incident investigators do not forward to the OPR those cases that they determine do not involve misconduct. The investigators never forwarded the three incidents to the OPR because, though they involved injury or death, the investigators did not identify any potential misconduct. Under the procedures in effect at the time, the OPR did not receive separate notice of shooting incidents.

³³ See DEA - Cover letter from Section Chief Criminal Section, CRD, to Deputy Chief Inspector, DEA OPR, September 12, 2000, and attachment: *Procedures for referral and investigation of DEA incidents suggesting possible criminal civil rights violations*. The DEA agreement also lists incidents other than shootings that must be reported. See also FBI - Letter from Section Chief Criminal Section, CRD, to Deputy Assistant Director of Inspections Division, FBI, June 26, 2000.

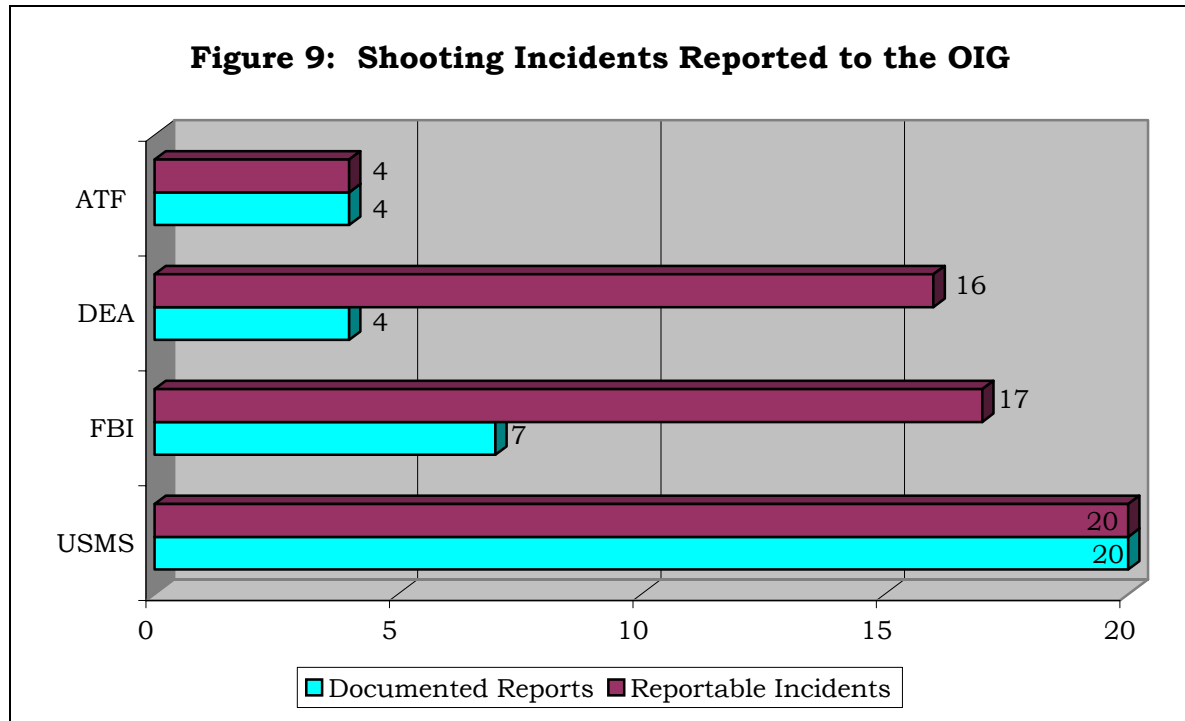
The ATF and the USMS have no written agreements with the CRD to report shooting incidents. However, the USMS Chief Inspector told us that the USMS would report any shooting incidents involving a potential violation of civil rights. Also, the ATF Special Agent in Charge, Investigations Division, Office of Inspection, told us that the ATF would report any shooting incident involving the allegation or suggestion of a civil rights violation to the appropriate United States Attorney's Office. We found no evidence (e.g., declinations of prosecution, memoranda, telephone records, e-mail) in the ATF and USMS incident files of any reports provided to the CRD. We also found that the CRD considered two USMS cases we reviewed, but not because they were reported by the USMS. In one USMS shooting incident, the CRD received an allegation of a civil rights violation from the suspect's family, and in another, a United States Attorney consulted with the CRD before deciding not to prosecute the Deputy Marshal. The ATF case files contained no evidence that any of the 23 ATF cases resulted in a civil rights complaint against an ATF Special Agent.

In addition to the inconsistency among the components in reporting to the CRD, we found that the DEA's and the FBI's agreements with the CRD do not ensure that all incidents with the potential to result in civil rights complaints were reported to the CRD. As noted, the DEA and the FBI agreed to report to the CRD all shooting incidents that resulted in injury or death. However, incidents without injury or death that are not reported to the CRD may still result in allegations of civil rights violations. In one incident we reviewed, a suspect, who was not injured, made a civil rights complaint after local authorities arrested him. The suspect alleged that an FBI Special Agent unnecessarily shot at him as he eluded arrest by the FBI Special Agent. As this case illustrates, firearm discharges that do not cause injury or death may result in complaints of civil rights violations by LEOs that the CRD should review.

Reporting shooting incidents to the OIG. Attorney General Order 2492-2001 (Order 2492) requires components to report to the OIG "evidence and non-frivolous allegations of criminal wrongdoing and serious administrative misconduct by Department employees" so that the OIG may decide whether to exercise its statutory authority to investigate the matter or to delegate the investigation to the component. All shooting incidents have the potential to involve criminal wrongdoing or serious administrative misconduct. Of the 103 incidents we reviewed, 46 were not reportable to the OIG because they occurred before this OIG had the authority to investigate misconduct involving FBI and DEA employees.³⁴

³⁴ Order 2492 gave the OIG the authority to investigate criminal wrongdoing and serious administrative misconduct in the DEA and the FBI on July 11, 2001. The ATF has been required to report shooting incidents to the OIG since it was transferred to the

Of the incidents we reviewed, 57 were reportable to the OIG. We found documentation in the files that the components submitted formal reports in 35 of the 57 reportable incidents (61 percent). The USMS and the ATF reported every incident, but we found no documentation for more than half of the DEA and FBI incidents (Figure 9).

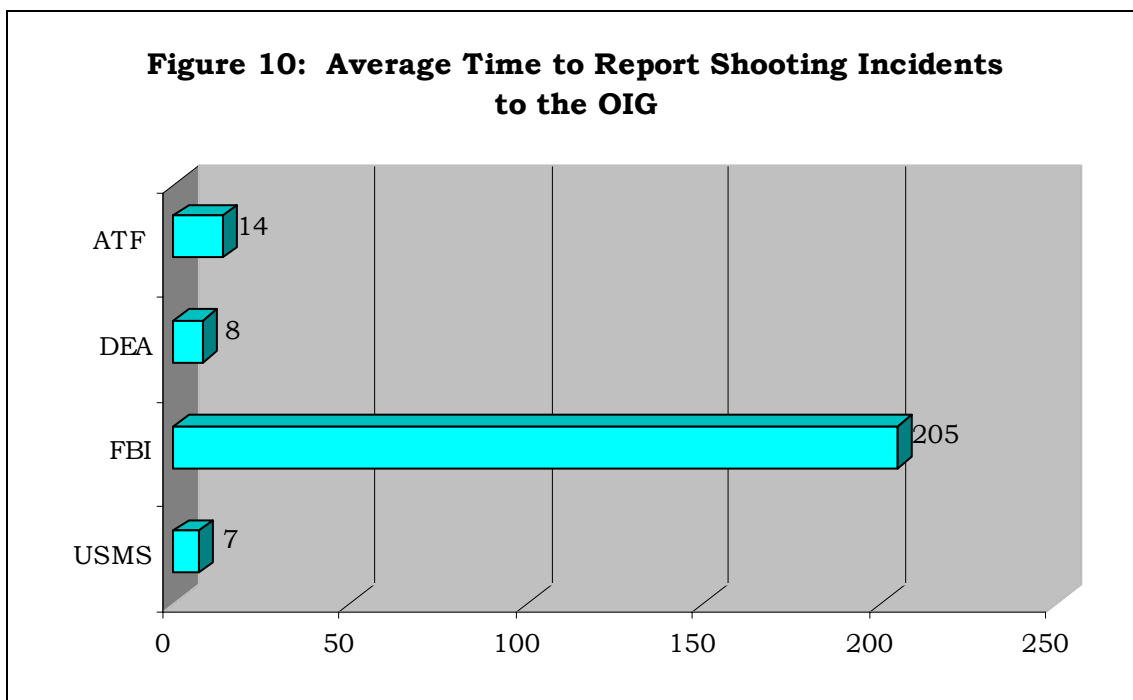


Source: OIG analysis of components' shooting incident data.

The average time that each component took to formally report shooting incidents to the OIG ranged from 7 to 205 days. The ATF, the DEA, and the USMS reported most shooting incidents to the OIG within a few days, but the FBI did not formally report its incidents to the OIG until after the report of the administrative investigation of the shooting incident was submitted to the FBI Review Board (Figure 10).³⁵

Department on January 24, 2003. The USMS has been required to report shooting incidents to the OIG since July 1, 1998.

³⁵ The USMS included copies of formal reports and recorded the delegation of investigative authority received from the OIG in its investigative files. Because the USMS recorded the date it reported to the OIG, we were able to verify that the report date listed by the USMS was within one business day of the date the OIG reported being informed of the case. The ATF's Inspections Division established the practice of reporting all shooting incidents to the Treasury OIG and continued that practice when the ATF moved to the Department on January 24, 2003.



Source: OIG analysis components' shooting incident files and IDMS data.

The USMS reported all shooting incidents as required, and after reviewing the reports, the OIG delegated all of the investigations back to the USMS. Although the ATF, the DEA, and the FBI did not consistently provide timely written reports, the OIG ASACs who are the primary liaisons to each component's internal affairs unit told us that they visit those components' headquarters regularly and review the components' internal shooting incident reports. The ASACs said that they base their decisions to delegate shooting incident investigations on their review of these reports, as well as other interactions with component staff, and annotate the components' files to indicate the OIG decision.

We also found that the components had different interpretations of what constituted a shooting incident reportable to the OIG. The ATF and the USMS reported all shooting incidents to the OIG. In contrast, when the FBI and the DEA determined initially that a shooting incident was unintentional, they did not report it to the OIG. This practice can lead to failing to report an incident that should be reported. In one case we reviewed, which occurred prior to the OIG obtaining jurisdiction to investigate FBI and DEA employees, a DEA Special Agent at the shooting scene stated that he unintentionally discharged his weapon. This case would not have been reported to the OIG under current DEA procedures. However, in a later statement to the local authorities, the Special Agent gave a different version of events and stated that he intentionally discharged his firearm because he feared for his life. Intentional discharges of this kind are now reportable under DEA procedures.

Overall, we found that the components did not report to the OIG 22 of the 57 reportable shooting incidents. Moreover, the FBI did not formally report any of its shooting incidents to the OIG until after the FBI completed its investigation.

All firearms discharges, except those in connection with training or off duty sports and hobbies, must be reported to the OIG. To ensure that shooting incidents are properly reported to the OIG, on July 27, 2004, the Assistant Inspector General of the Investigations Division sent a memorandum to the ATF, the DEA, and the FBI reiterating the existing reporting requirements in order to eliminate any confusion over the requirement to report firearms discharges.

The Components' Shooting Investigations

Resolution 13 does not specify how shooting investigations should be conducted, but requires that all investigations be objective, thorough, and timely. Specifically, Resolution 13 states that investigations must:

- Avoid any appearance of conflicts of interest or impropriety,
- Present all the information necessary for analysis, and
- Be conducted expeditiously.

Resolution 13 also requires that an investigation be “appropriate for the type of incident involved,” but authorizes the components to decide who will conduct the investigation:

The decision whether a shooting inquiry will be conducted by investigators assigned to the field office where the incident occurred or by investigators assigned to a component Headquarters Office of Inspection or other Headquarters element, will be made by designated component Headquarters Senior Management following consultation with field office Senior Management.

The components call the decision to have a field office conduct the investigation “delegating the investigation.”

Delegation of the shooting incident investigation. The criteria for delegating shooting incident investigations vary by component. We found that the ATF has the strictest limitation on delegating shooting incidents. It requires that all intentional and unintentional firearms discharges by ATF employees be investigated by inspectors from the Office of Inspections. In

all 23 ATF cases in our review, ATF headquarters dispatched an Office of Inspections team to conduct the shooting incident investigation.

The DEA generally delegated shooting incidents that did not result in “significant or life threatening injuries, deaths, or other significant liabilities” to the SAC of the DEA field office to which the Special Agent was assigned. We found that the DEA delegated 22 (59 percent) of its 37 shooting cases to the SAC for investigation. Of these 22 cases, 7 resulted in injury or death and 15 did not (9 were intentional discharges and 6 were unintentional discharges during enforcement operations).

According to the FBI *Manual of Investigative Operations and Guidelines*, the decision to delegate an investigation is not based on the seriousness of the incident but rather “on the extent of the SAC or ASAC participation in the planning and operational events of the incident.” Of the 39 FBI cases we reviewed, 16 (41 percent) were delegated to the SAC. In two cases (5 percent), a team was dispatched from headquarters to investigate, and in 21 cases (54 percent), headquarters assigned an IIP to oversee the investigation. The FBI policy distinguishes investigations overseen by an IIP from investigations delegated to the SAC; however, in 6 of the 21 investigations we reviewed, we found that the IIPs directed to investigate were assigned to the same field offices as the Special Agents involved in the shooting incident.

The USMS Office of Internal Affairs (OIA) forms a team to conduct the investigation of each shooting incident involving a Deputy Marshal. USMS case files did not record whether investigators were dispatched from headquarters, assigned from another district, or assigned from within the local district office, but every investigator reported directly to the USMS OIA.

Criminal investigations of shooting incidents. In reviewing 124 individual cases arising from 103 shooting incidents, we found that local law enforcement agencies conducted the criminal investigations of most ATF, DEA, and USMS shooting incidents, while the FBI conducted the criminal investigations of all of its shooting incidents (Table 3).

Table 3: Criminal Investigations of ATF, DEA, FBI, and USMS Shooting Cases by Federal and Local Law Enforcement

	<u>Investigated by:</u>			Cases
	State/Local	Component	Both	
ATF	21	2	0	23
DEA	27	13	0	40
USMS	14	8	0	22
FBI	12	39	12	39
				124

Source: OIG analysis of components' shooting cases.

The ATF, the DEA, and the USMS told us that they always requested that state or local law enforcement agencies conduct the criminal investigations and that they only conducted a criminal investigation themselves if the state and local agencies declined the request. That was reflected in our review of the case files. We found that state and local agencies conducted the criminal investigations in 62 of the 85 shooting cases involving LEOs of the ATF, the DEA, and the USMS. The components conducted the criminal investigations in the remaining 23 cases after local law enforcement declined to investigate.³⁶

The ATF, the DEA, and the USMS shooting incident investigators gave several reasons for having state or local agencies conduct the criminal investigations. First, because state and local agencies have no vested interest in the outcome of an investigation, having them conduct the criminal investigation of the LEOs' actions avoids any appearance of a conflict of interest. The ATF, DEA, and USMS investigators also told us that, in their opinion, local authorities are better able to secure the scene, preserve physical evidence, and interview witnesses. One ATF Shooting Incident Investigator noted that local law enforcement authorities routinely investigate firearms discharges in their jurisdictions. Local authorities are also better able to address any investigative issues that arise away from the scene of the incident or after the initial shooting response ends. This was demonstrated in two of the cases we reviewed.

- A Deputy Marshal observed a man threatening two women and intervened. The man lunged at him and the Deputy fired at the

³⁶ We asked Shooting Incident Investigators from the ATF, the DEA, and the USMS why these 23 shooting incidents were not investigated by state or local law enforcement as required by their components' policies. They explained that state or local law enforcement authorities sometimes declined to investigate shooting incidents that did not involve injury or death, or that occurred on federal property.

man in self-defense, but did not know if he hit him. The man and the two women fled the scene. The man later sought treatment for his gunshot wound, and the hospital staff called the local police. When the police arrived at the hospital, the man complained to them that the Deputy Marshal had unfairly shot him.

- A DEA Special Agent was involved in a shooting incident, but thought he had missed the suspect. A week later, local law enforcement officers arrested the suspect and found a bullet wound in the suspect's arm. The suspect attributed the wound to the earlier shooting incident.

The states have the primary authority and responsibility to investigate and prosecute assaults, homicides, or other felonies occurring in their jurisdictions and, in fact, investigated the vast majority of firearms discharges, including most of the 9,369 homicides committed with a firearm in 2002.³⁷ Allowing local authorities to carry out their duties may eliminate the need for an extensive federal investigation. Relying on local authorities to conduct criminal investigations also reduces the possibility that separate local and criminal investigations will lead to conflicting conclusions.

In contrast to the ATF, the DEA, and the USMS, the FBI always conducted a criminal investigation on any shooting incident involving its Special Agents. The FBI conducted criminal investigations on all 39 cases we reviewed. However, we found that state or local agencies also conducted an investigation in 12 of those 39 cases.³⁸

We asked the Deputy Assistant Director why the FBI conducted a federal criminal investigation in every case, even if it duplicated a local criminal investigation. He told us that for cases involving injury or death, the FBI's reporting agreement with the CRD requires that the FBI investigate any potential violation of civil rights.³⁹ He said that policy has been extended, by practice, to every shooting incident. He also told us that the FBI would not discourage any local investigation and would cooperate with state or local investigators if they conducted an investigation, but that they would not request an investigation by a local law enforcement agency because the FBI had the resources to conduct investigations in all cases.

³⁷ FBI, *Crime in the United States, Summary of Uniform Crime Reports*, 2002.

³⁸ Local law enforcement officers may be present at the scene of a shooting incident as part of the task force or ad hoc team assembled to conduct the operation or because they were the first responders to the scene. We found indications that local authorities were present in 29 of the 39 FBI cases we reviewed.

³⁹ Civil rights violations are federal offenses punishable under 18 U.S.C. § 242.

The DEA has a similar requirement in its reporting agreement with the CRD but takes a different approach to the criminal investigation of shooting incidents. The DEA meets its requirement by asking local law enforcement authorities to investigate the shooting and submitting the local criminal investigations to the CRD.

We discussed with CRD attorneys the fact that the DEA and the FBI have similar agreements with the CRD but have different approaches to conducting criminal investigations into shooting incidents. The CRD attorneys said that they used the local criminal investigations of the DEA shooting incidents to determine whether a civil rights violation had occurred. The CRD attorneys also said that local authorities questioned the objectivity of the FBI's criminal investigations of shooting incidents involving its Special Agents in at least one case. In that case, FBI headquarters admonished the FBI SAC for turning over the scene of an FBI shooting incident to local and state criminal investigators who insisted on conducting a criminal investigation of the incident.

The rights of the LEOs involved in shooting incidents. Both Resolution 13 and the components' policies direct that the investigation balance the importance of conducting an objective, thorough, and timely criminal investigation with protecting the rights of the LEOs for whom shooting incidents are traumatic events. LEOs may exercise their constitutional right to remain silent during the criminal investigation or can make voluntary statements, with the advice of an attorney if they choose. In 101 of the 124 shooting cases we reviewed, the LEOs who fired their weapons made voluntary statements, and in 30 of the 101 cases, an attorney representing the LEO was present during the statement to advise the LEO (Table 4).

Table 4: Voluntary Statements With Attorneys Present				
Component	Cases	Cases With Voluntary Statements	Attorney Present at Voluntary Statement	Percentage
ATF	23	21	6	29
DEA	40	40	11	28
FBI	39	25	5*	20
USMS	22	15	8	53
TOTAL	124	101	30	30

Source: OIG analysis of components' shooting cases.

* Three additional FBI Special Agents were represented by counsel, but their attorneys were not present when the voluntary statements were given.

Declinations of prosecution. After the criminal investigation is complete, each component requires investigators to obtain a declination of prosecution from state or federal prosecutors or otherwise ensure that there is no criminal action pending before completing the administrative investigation of a shooting incident. Because both state and federal declinations of prosecution are recorded in the case files, we were able to evaluate their use by the components. When they sought a declination, we noted that only the FBI followed the practice of obtaining declinations from both federal and state prosecutors (Table 5).

Table 5: Declinations of Prosecution Obtained by Components				
Component	Cases	Federal Declinations	State Declinations	Federal and State Declinations
ATF	23	1	18	0
DEA	40	9	21	4
FBI	39	23	22	21
USMS	22	2	3	0
TOTAL	124	35	64	25

Source: OIG analysis of components' shooting cases.

We also examined components' compliance with their individual policies regarding obtaining declinations of prosecution. The DEA and the FBI reported to us that they do not routinely obtain declinations of prosecution in cases that do not involve injury or death. However, we found that the DEA and the FBI did not obtain a declination of prosecution in one case involving death or injury each. The ATF and USMS are required by their policies to obtain a declination of prosecution in every case. Yet, the ATF did not obtain a declination of prosecution in 4 cases and the USMS did not obtain a declination of prosecution in 17 cases (Table 6).

Table 6: Cases in Which No Declination of Prosecution Was Obtained				
Component	Cases	No Declination	Death or Injury	No Death or Injury
ATF	23	4	0	4
DEA	40	14	1	13
FBI	39	15	1	14
USMS	22	17	5	12

TOTAL	124	50	7	43
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Source: OIG analysis of components' shooting cases.

The ATF investigators acknowledged that they had not obtained the required declinations in four cases due to an administrative oversight; these four ATF cases involved shooting incidents in which the suspect was neither injured nor killed. The DEA investigators said that a declination of prosecution was not obtained in one case because it involved a minor wound to a suspect who eluded arrest. The FBI could not explain why one of its cases was not reported to the CRD for the required declination of prosecution. The USMS told us that its policy of obtaining declinations of prosecution in every case "needed to be more actively enforced."

Compelled statements in the administrative investigation. As noted above, during criminal investigations, LEOs have a constitutional right under the Fifth Amendment to remain silent. But once the criminal investigation is complete, the government can compel LEOs to provide statements for the administrative investigation and can discipline them if they refuse to comply. If a government agency compels an employee to provide a statement, it may use information in that statement to take administrative action against the employee, but it may not use the information against the individual in a criminal prosecution.⁴⁰ In the 124 cases we reviewed, the components compelled 30 administrative statements (Table 7).

Table 7: Statements by LEOs Involved in Shooting Incidents					
Component	Cases	Voluntary Statement	Compelled Statement	Both Voluntary and Compelled Statements	No Statement
ATF	23	21	2	0	0
DEA	40	40	0	0	0
FBI	39	25	14	1	1*
USMS	22	15	14	7	0
TOTAL	124	101	30	8	1

Source: OIG analysis of components' shooting cases.

* One FBI Special Agent retired before the administrative investigation was completed.

⁴⁰ However, an employee who makes a false statement in the compelled interview *may* be criminally prosecuted for the false statement.

We discussed the practice of compelling statements with investigators from each of the components. The ATF and DEA shooting incident investigators we interviewed said that it is their components' policy not to compel statements unless they are needed to complete the administrative investigation. The ATF shooting investigator said this was the ATF's reason for compelling statements in two ATF cases. The FBI Deputy Assistant Director we interviewed confirmed that it is FBI practice to compel an administrative statement in all administrative cases unless the LEO has already made a voluntary statement in the criminal one. The FBI Deputy Assistant Director also stated that the administrative warnings and criminal immunity associated with compelled administrative statements were necessary to protect the rights of the LEOs. The Deputy Marshal now responsible for investigating shooting incidents told us that, in the past, the USMS's practice was to compel an administrative statement in every case, but that the USMS discontinued the practice. Currently, USMS policy authorizes compelled administrative statements only when necessary to complete the administrative investigation.

Our review of the case files also found that the components followed substantially different practices for compelling administrative statements in similar situations. In four FBI shooting cases, investigators compelled administrative statements (without declinations of prosecution) from the Special Agents involved in shooting incidents for use in the criminal cases against the suspects involved in the shooting incidents. In similar DEA shooting incidents, the DEA did not compel the Special Agents involved to provide administrative statements to support the prosecution of the suspects. Instead, the DEA consulted with the Assistant United States Attorney, and the DEA Special Agents testified before the federal grand jury considering the charges against the suspects.

In the DEA and FBI cases, the suspects were charged under 18 U.S.C. § 115 with assaulting the Special Agents. Although the assaults may be related to shooting incidents, both the FBI and the DEA policies require that the charges of assaulting the LEOs must be investigated separately, not as a part of the shooting incident administrative investigation. The four FBI case files included no explanation for the shooting incident investigators' decision not to conduct a separate criminal investigation and to rely instead on compelled administrative statements.

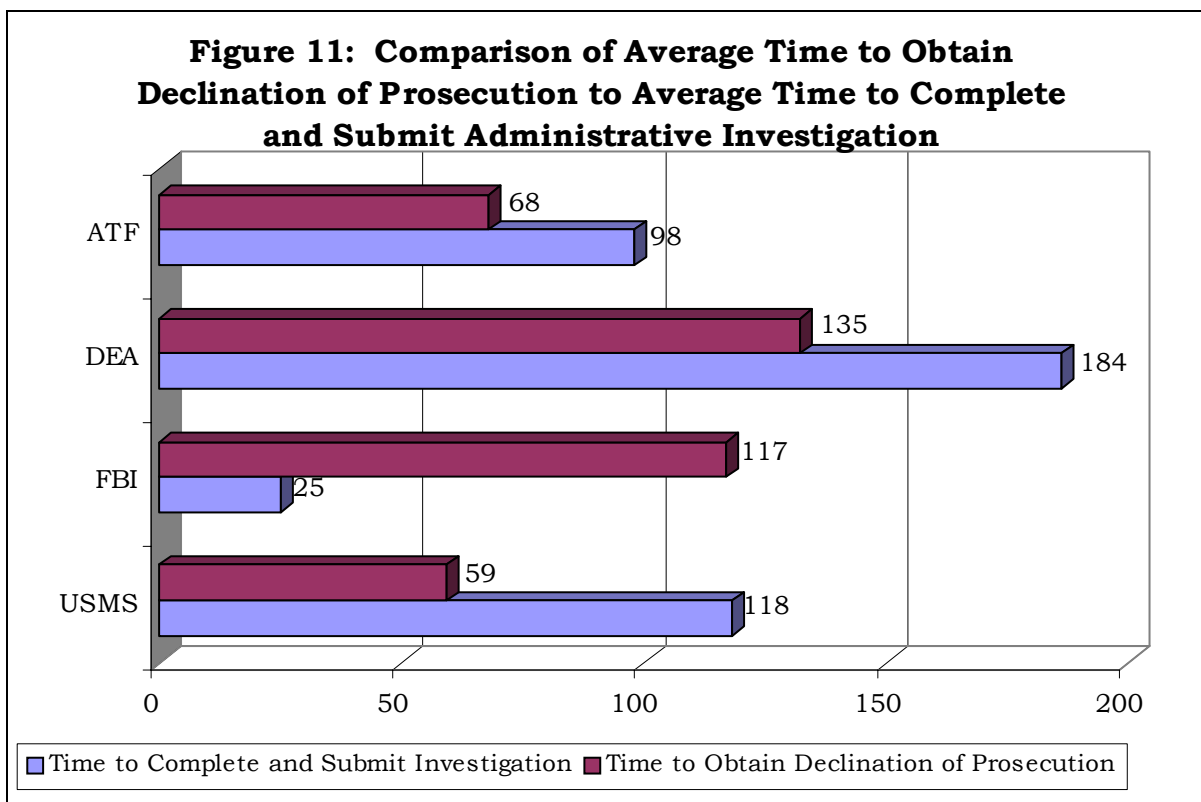
Timeliness of shooting incident investigations. All of the components have established timeliness standards for their shooting incident investigations. We found that all components began their administrative investigations while the criminal investigations were in progress, and all components required that the criminal investigations be completed before the administrative investigations were closed. The FBI requires that an

administrative investigation be completed within two weeks of the incident, and the ATF, the DEA, and the USMS require completion within 30 days. All of the components allow for extensions of the time required to complete the administrative investigation.

During our review, we found that the components documented the “completion” of administrative investigations differently. The ATF, the DEA, and the USMS Inspections Divisions prepared formal memoranda to document the completion of the administrative investigation and to forward the case to the Review Board. We used the dates of those memoranda as the dates that the investigations were completed. The FBI completed a Form FD-263, Report of Administrative Investigation, but did not submit the administrative investigation to the FBI Review Board at that time. We found no documentation in the FBI’s files as to when the administrative investigations were actually submitted to the FBI Review Board. The case files we reviewed did not contain sufficient documentation for us to determine when, or for what reasons, extensions were granted.

We determined that the completion dates recorded on the FBI’s Reports of Administrative Investigation could not have been the actual dates that the FBI completed the administrative investigations. On the date these forms were completed, most criminal investigations had not been completed and the CRD declinations of prosecution had not been obtained, both of which are required before an administrative investigation can be closed. We examined the time taken by the FBI to obtain declinations of prosecution from the CRD and found that it took the FBI an average of 117 days to obtain the declinations required to close the criminal investigations. Therefore, the completion dates recorded on the FBI’s Reports of Administrative Investigation appeared to represent only the completion of the on-site investigations.

We compared the time required by all the components to obtain declinations of prosecution to the time required to complete an administrative investigation (Figure 11).



Source: OIG analysis of components' shooting incident data.

Note: The chart shows the time required by the ATF, the DEA, and the USMS to obtain either a local or federal declination of prosecution and the time required by the FBI to obtain a declination of prosecution from the CRD.

As Figure 11 shows, the ATF, the DEA, and the USMS took longer to close their investigations than they took to obtain declinations of prosecution, which was the expected result. However, the FBI records indicated that the FBI completed a Form FD-263, Report of Administrative Investigation, in far less time than it took to obtain declinations of prosecution. Specifically, it took the FBI an average of 117 days to obtain the declination of prosecution required to close a criminal investigation, but only 25 days, on average, to record the administrative investigation as complete. Because our review of the FBI's case files found no other documentation that recorded the completion of the overall investigation, we used the FBI's average time to obtain declinations of prosecution as the average time in which FBI administrative investigations were completed and ready for Review Board consideration.

Overall, we found that all of the components exceeded their established time frames for completing administrative investigations. We recognize that the amount of time taken to complete any particular investigation may have been reasonable based on the complexity of the incident, pending criminal charges, or other factors outside the control of

the components. However, the files we reviewed generally did not contain sufficient documentation to enable us to conduct a detailed analysis of these factors. Moreover, for the FBI's cases, the files did not contain sufficient documentation to enable us to accurately determine when the administrative investigations were actually completed and ready for review.

The Components' Review Boards

Resolution 13 requires the Review Boards to "determine the reasonableness of the application of deadly force in accordance with the Department's Deadly Force Policy and the law" based on the shooting investigation and to provide senior management with analyses, observations, and recommendations concerning operational training and discipline. Resolution 13 also requires that Review Boards be independent and objective, and their decisions and recommendations free of the control or direction of component management.

Although each of the components had established a Review Board to consider shooting incident investigations, we found significant differences among the Boards, including the composition of the Boards, the length of time the Boards took to complete the review process, the decisions made and the process used to reach them, the extent to which decisions were documented, and whether and how the Boards referred cases for discipline.

The composition of Review Boards. Resolution 13 requires that "the investigation and review process must be overseen to ensure that ... potential conflicts of interest are avoided, including even the appearance of conflict of interest or impropriety." The composition of the components' Review Boards varied significantly, including differences in the number of Board members, the grade level and position of the members, and whether members from outside the component were included.⁴¹ Specifically:

- The seven-person ATF Review Board included five senior ATF managers and two senior managers from other law enforcement components of the Department.⁴²
- The DEA Review Board consisted of three of the highest-ranking officials in the agency – the Chief Inspector, Inspections Division (the Chairperson); the Chief of Operations (Vice-Chairperson); and the SAC of the Office of Training.

⁴¹ Resolution 13 does not require outside membership on the Review Board.

⁴² The ATF began including outside representatives while it was part of the Department of the Treasury and continued this practice after transferring to the Department.

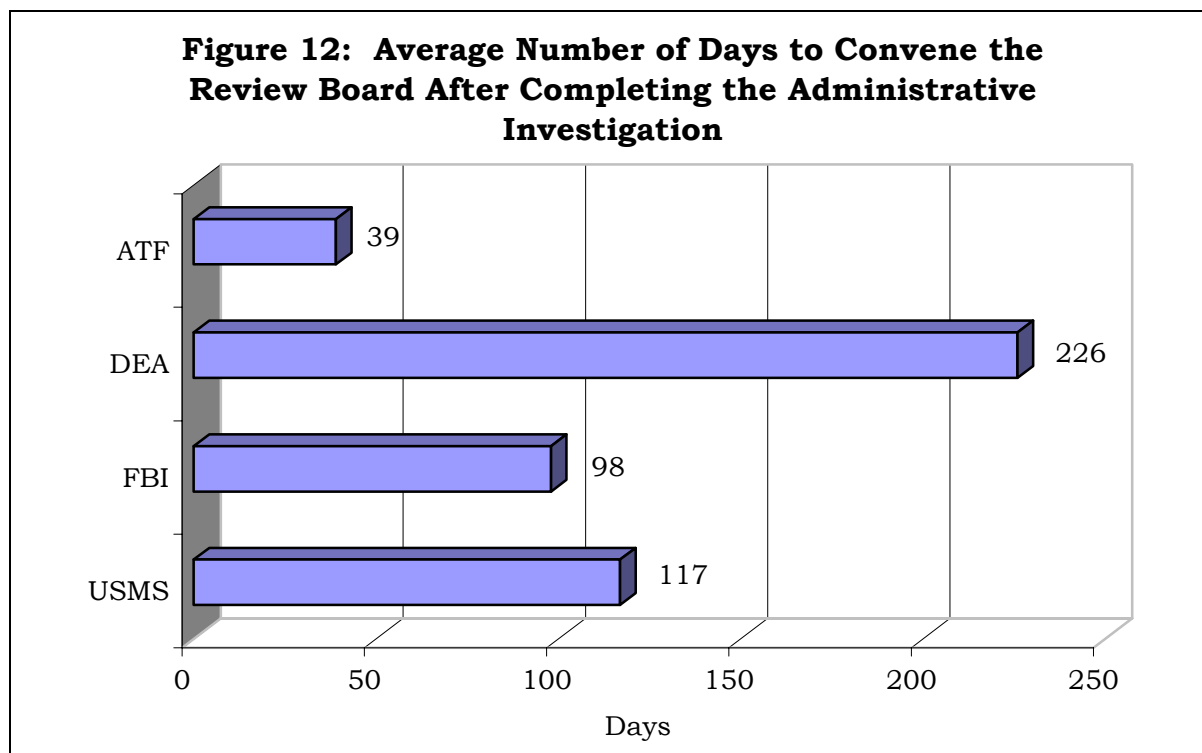
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- The composition of the FBI's Review Board varied. During the period of our review it included 14 members representing various divisions and positions within the FBI (e.g., Criminal Investigative Division, National Security Division, Training Division) as well as one Department attorney from the CRD.
 - The USMS Review Board had seven members, each an LEO with at least four years of law enforcement experience. Five of the members were senior management staff, one was a USMS Instructor from FLETC, and one was a nonsupervisory Deputy Marshal. The USMS Board also included an advisory representative from the USMS Office of the General Counsel. The USMS placed restrictions on members that other components did not, including:
 - Prohibiting membership to anyone disciplined for an incident involving the use of a weapon or under investigation for a disciplinary matter; and
 - Prohibiting any Review Board member who investigated a shooting incident from participating in the final decision.

In examining the composition of the components' Review Boards, we were told by Board members that including outside members could improve the independence and objectivity of Review Boards. Two former ATF Review Board members, one from the Department of the Treasury and one from the Department of Justice, believed that including representatives from peer organizations helped ensure the independence and objectivity of the Boards in which they participated.

We also concluded that the composition of the DEA's Review Board might not be consistent with the Resolution 13 requirement for an independent review. The DEA's Review Board is composed of three of the highest-ranking individuals in the agency's management structure. Their only supervisors are the DEA Administrator and Deputy Administrator. Because the members of the Review Board are at the highest levels of DEA management, their decisions are not only subject to the control or direction of component management, but may, in fact, be the decisions of the component's management. Although the DEA Administrator and Deputy Administrator can provide some independent oversight, limiting Review Board membership only to individuals who bear significant responsibility for the operations being reviewed can create an inherent conflict with the need for the Board to independently examine and potentially criticize those operations. In response to our observation, DEA Review Board members

asserted that the more extensive training and experience of their Review Board outweighed any theoretical reduction in the Review Board's independence.

Timeliness of reviews by Review Boards. Resolution 13 states that prompt reporting, investigation, and review of shooting incidents are important, although it does not establish time standards for Review Boards' consideration of cases. To evaluate the timeliness of reviews, we examined the average time it took for each component's Board to meet after the completion of the investigation. The average time for Boards to meet to consider completed investigations ranged from 39 days at the ATF to 226 days at the DEA (Figure 12).



Source: OIG analysis of components' shooting incident data.

In examining the reasons for the differences in the time that the components' Review Boards took to convene after investigations were completed, we found that the ATF required its Review Board to meet within a specified time (60 days after the completion of a shooting incident investigation). The other components did not require their Boards to meet within a specified time. During our review, the USMS Board decided to begin meeting on a quarterly basis beginning on March 1, 2004.⁴³ DEA Inspections Division staff told us that the lengthy delays in convening the

⁴³ Prior to our review, the USMS Review Board met only when the Chairperson believed there were a sufficient number of cases to review.

DEA Review Board were due to difficulties in coordinating the full schedules of its three high-ranking members.

Lengthy review delays had two negative effects. First, recommendations to senior management regarding operational, training, and safety issues were delayed, which hindered management's ability to make prompt corrections. Second, lengthy delays increased the time that employees remained under investigation. For example, the USMS Chief Inspector told us that the delays had a negative effect on the careers of Deputy Marshals involved in shooting incidents, even those ultimately cleared of any misconduct, because their promotions and transfers were delayed until the reviews were complete.

During our examination of Review Board actions, we also found one DEA incident that was never considered by the DEA Review Board. During a multijurisdictional operation, two LEOs (a DEA Special Agent and a local detective) fatally shot two suspects because, according to the LEOs, they believed that the suspects were accelerating toward them in a car. However, evidence from the scene conflicted with the LEOs' account. The car was in reverse, had backed up against another vehicle, and could not have been accelerating toward the LEOs. The DEA OPR and the CRD investigated this case extensively, and the DEA Administrator directed a special review of the tactics used in this and similar cases. The DEA OPR investigation cleared the DEA Special Agent of misconduct, but the case was never forwarded to the DEA Review Board for consideration as a shooting incident.

Components' Review Boards apply the standard for the reasonable use of deadly force differently. Resolution 13 requires components' Review Boards to determine whether the application of deadly force was reasonable.⁴⁴ Of the 121 shooting incidents that were considered by Review Boards, 14 were determined to be unreasonable uses of force (Table 8).⁴⁵

⁴⁴ The Review Boards applied the standard for reasonableness in the use of deadly force established in the Department's Resolution 14, approved by the Attorney General on October 17, 1995, which states that an LEO "may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." The Department issued a revised deadly force policy on July 1, 2004, but did not change the standard for the use of deadly force.

⁴⁵ Resolution 13 is specific in requiring Review Boards to decide whether a use of force was reasonable, but none of the Review Boards used that terminology. The ATF, the DEA, and the FBI Review Boards used "justified" and "not justified" to describe their determinations. The USMS Review Board used "authorized" and "not authorized." For consistency, we use the terms "reasonable" and "unreasonable" to describe Review Board determinations.

Of those 14 determinations, 11 were made in cases in which the discharge was unintentional. In only three cases, all relating to USMS Deputy Marshals, did a Review Board find that an intentional discharge was unreasonable.

Table 8: Review Board Decisions			
Component	Unreasonable	Reasonable	Total
ATF	0	23	23
DEA	7	30	37
FBI	4	35	39
USMS	3	19	22
TOTAL	14	107	121

Source: OIG analysis of components' shooting incidents.

We found that when considering whether the actions of LEOs were reasonable, the ATF, the DEA, and the FBI Review Boards focused on the moment the LEOs decided to discharge their firearms. In contrast, the USMS Review Board took into account the total circumstances preceding the incident. These different approaches can lead to different conclusions about similar sets of facts. For example, the ATF, the DEA, and the FBI approach would find “reasonable” the actions of an LEO who failed to properly identify a suspect and consequently shot an innocent civilian if, at the moment the LEO fired, he or she believed that the civilian was the suspect and was acting in a way that the LEO believed was threatening. The USMS’s approach could find the same actions to be “unreasonable” because the LEO had not taken steps to properly identify the individual. Although no incidents are exactly alike, several incidents we reviewed demonstrated that the components were applying the standard for the use of deadly force differently. In each incident, although we found no evidence that the findings we reviewed were inconsistent with the review procedure established by each component, the Review Boards reached different conclusions on the reasonableness of LEOs’ actions. For example:

Incidents Involving Fleeing Suspects

A Deputy Marshal shot and wounded a civilian mistakenly identified as a suspect. The civilian was in a vehicle that matched the description provided by an informant and arrived at the location and time that the informant had arranged. The Deputy Marshal and local police on the scene believed that the person was the suspect. The Deputy Marshal stated that, as the vehicle door opened, he saw the individual reach across the steering wheel with a gun, and he fired because he perceived an imminent threat to his safety. The Deputy Marshal did not properly identify the individual in the vehicle and rushed the vehicle rather than wait for assistance. The USMS Review Board determined that the Deputy Marshal did not have a reasonable belief that the individual posed an imminent danger of death or serious physical injury.

A FBI Special Agent shot and wounded a civilian mistakenly identified as a suspect. The civilian was in a vehicle that matched the description provided by an informant and arrived at the location and time that the informant had arranged. The Special Agent believed that the person was the suspect, and other Special Agents at the scene were communicating over the radio that they shared a similar belief. The Special Agent stated that, upon approaching the vehicle, he believed that he saw the individual reaching into his waistband for a weapon, and he fired his weapon because he perceived an imminent threat to his safety. Although the administrative investigation stated that no exigency was identified justifying the rush to physically extract the occupants, the FBI Review Board determined that the Special Agent's use of deadly force was reasonable.

Incidents of Mistaken Identity

Documentation of findings and recommendations. Resolution 13 requires Review Boards to provide component management with their "analyses, observations, and recommendations concerning operational, training, and other relevant issues." All of the Review Boards prepared memoranda for senior management summarizing their findings on each case. In almost all of the cases that we reviewed, the memoranda prepared by the FBI and the USMS Review Boards were thorough and provided useful

A Deputy Marshal fired into a fleeing fugitive's car as the fugitive drove away from the Deputy Marshal after a failed arrest attempt. The Review Board found that the Deputy Marshal's use of deadly force was unreasonable, and the Deputy Marshal was suspended for five days.

A DEA Special Agent fired into a pickup truck driving away from him after shots were fired in the general direction of DEA Special Agents during a surveillance operation. The Review Board found that the use of deadly force was reasonable, and no discipline was imposed.

recommendations. For instance:

- FBI Board memoranda for some cases noted that Special Agents did not wear body armor, created dangerous one-on-one arrest scenarios, had not attended deadly force instruction training sessions, had not qualified with Bureau-issued weapons, placed a loaded firearm near a handcuffed prisoner, did not display clear law enforcement identifiers, or did not use shields.
- In November 2002, the USMS Board observed that personnel frequently attempted to arrest fugitives while the fugitives were in their vehicles. Attempts to block the vehicles were often unsuccessful and could lead to the discharge of firearms. The Review Board recommended that the USMS conduct research to identify devices that could be used to immobilize vehicles, preventing the fugitive from fleeing and possibly preventing serious injury to law enforcement personnel and others.

In contrast, the ATF Review Board's memoranda provided a written summary of the shooting incident and Review Board discussion, but almost no analysis of the incident and few training recommendations for senior management. Two of the 13 ATF Review Board memoranda included recommendations for training improvements.⁴⁶

The DEA Review Board memoranda contained standard language describing their findings that the facts and circumstances were accurately and completely reported in the investigation, that the employee was acting within the scope of employment and authority, that the action taken by the employee was in compliance with component policies and procedures, that there was no evidence of employee misconduct or malfeasance, that the use of force was justified, and that the use of force did or did not violate the law. The DEA required Board members to complete and sign a two-page worksheet indicating that their case review covered all the above factors. We found that 32 of 37 memoranda consisted *only* of the standard language contained in the worksheet and a brief summary of the incident.

Referral of cases for discipline. Resolution 13 requires Review Boards to make "appropriate, timely recommendations to senior management ...

⁴⁶ ATF Order 0 8200.3 in effect from April 22, 1996, until November 3, 2000, and superseding ATF Order 0 8200.3A, which took effect on November 3, 2000, and is still in effect requires that the Review Board's report include findings "relative to the following issues: use of force, compliance with [ATF] policies and directives, and determinations of wrongful or inappropriate actions of those involved in the shooting incident. The [Review Board] will also make recommendations relative to needed changes to policy, directives, equipment, training, supervision, and safety issues identified in the [report]."

including, if necessary, referral to appropriate entities for disciplinary review.” The ATF Review Board did not refer any of the cases that we reviewed for discipline because it did not find any shooting cases unreasonable. The DEA Board referred eight cases, the FBI Board referred four cases, and the USMS referred three cases (Table 9).

Table 9: Review Board Discipline Referrals	
Component	Reason for Review Board Referral
ATF	<ul style="list-style-type: none"> • No referrals.
DEA	<ul style="list-style-type: none"> • Firing into a vehicle containing a passenger and in the proximity of law enforcement. • Change in statement regarding the shooting • Use of an unauthorized weapon. • Five unintentional discharges during enforcement operations.
FBI	<ul style="list-style-type: none"> • Four unintentional discharges during enforcement operations.
USMS	<ul style="list-style-type: none"> • Firing at a vehicle’s tires. • Shooting the wrong suspect. No reasonable belief of imminent danger. • Firing at a vehicle that was driving away. No reasonable belief of imminent danger.
Total Referrals:	15

Source: OIG analysis of components’ shooting incidents.

The referral for discipline was not always clearly stated in the memorandum of the Review Board’s finding. For example, a Deputy Marshal fired one round at a suspect’s car to disable it and, when this failed, fired again at the driver. The Review Board found that the round intended to disable the vehicle was unauthorized, but that the rounds fired at the driver were authorized. The Chairman of the Board summarized these findings in a memorandum to the Deputy Director dated June 18, 2003. In a letter dated August 12, 2003, the Chairman of the Board informed the Deputy Marshal that the Review Board recommended that he “review the USMS shooting policy ... and undergo 16 hours of remedial [firearms] training.” It was unclear from the files we reviewed whether the

case was referred for discipline, and the Deputy Marshal's personnel record did not contain any disciplinary action.

When a case is referred for discipline, the components follow their disciplinary adjudication processes. For the 15 cases in which the Review Boards made a referral for discipline, the components took the following actions:

- **DEA.** The DEA imposed no discipline in any of the eight referred cases. The DEA cleared three of the Special Agents and issued Letters of Caution to the other five Special Agents.⁴⁷
- **FBI.** The FBI followed the Board's recommendation and suspended two Special Agents for three days without pay, but increased the suspensions it imposed on the two other Special Agents from the recommended three days to five days.⁴⁸
- **USMS.** The USMS imposed discipline in two of the three cases. In the first, a Deputy Marshal was demoted and suspended without pay for 30 days. The individual resigned before the penalty was imposed. The second Deputy Marshal was suspended for five days without pay. The USMS was the only component to impose discipline on an employee for using deadly force against an innocent person or under other unreasonable circumstances.

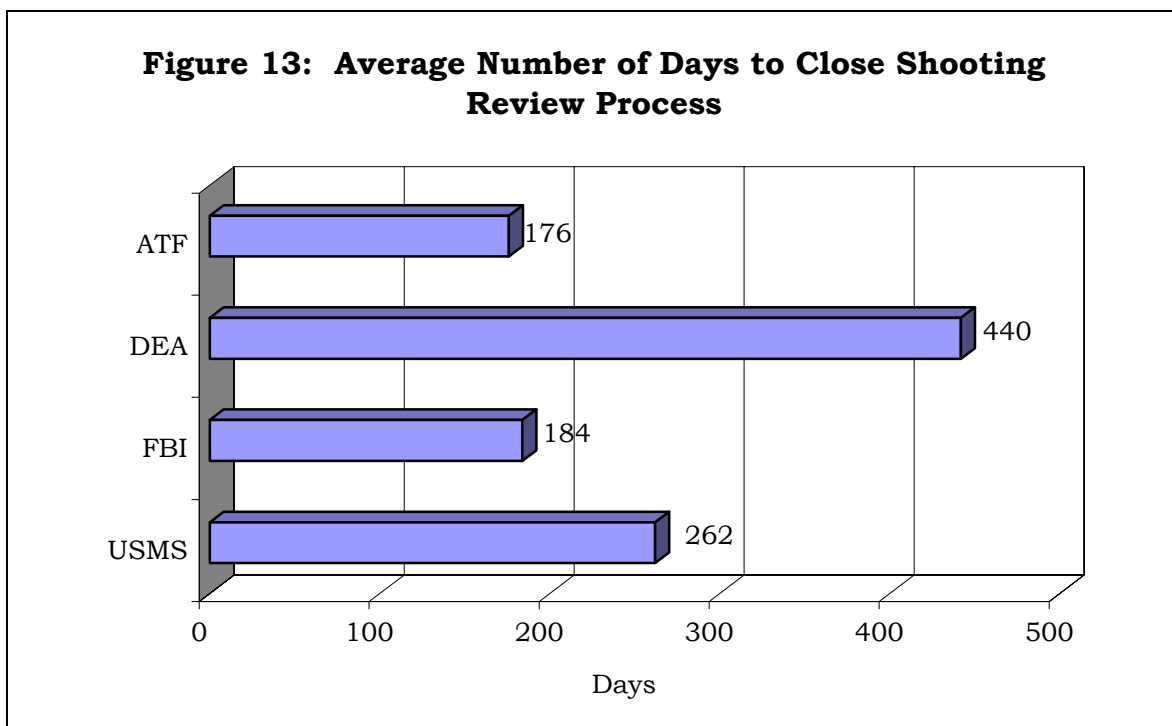
We also found that the process by which cases were referred for discipline affected the actual discipline imposed by the components. For example, because of its policy of recommending a minimum 3-day suspension for all unintentional discharges, the FBI Review Board recommended a 3-day suspension (increased to a 5-day suspension by the deciding official) for a Special Agent who unintentionally discharged one round into a dying suspect. The other components' Review Boards are not required to recommend a minimum disciplinary action. Consequently, in a similar case in which a DEA Special Agent unintentionally discharged her firearm into a suspect and another DEA Special Agent, wounding both, the Review Board referred the shooting incident to the Board of Professional

⁴⁷ A Letter of Caution is not a formal disciplinary action and does not become part of the employee's personnel record.

⁴⁸ The FBI Review Board recommendations were based on guidance outlined in an August 27, 1997, memorandum to all SACs, "Accidental Discharges of Weapons," in which the Director stated that accidental discharges of a firearm as a result of disregarding established safety procedures would result in a minimum penalty of a 3-calendar-day suspension, absent definitive mitigation. The FBI Review Board recommended 3-day suspensions for unintentional discharges, regardless of whether the discharge occurred at the range, in the office, or during enforcement operations.

Conduct without a specific recommendation and the Special Agent received a Letter of Caution.

Overall timeliness. Under Resolution 13, Review Boards are supposed to provide a check and balance on the reporting and investigative process and ensure that the process is completed expeditiously. We reviewed the files on 100 incidents to determine how long the shooting review process took. We used the date of the shooting incident as the start date and the date that a signed letter was sent to the subject LEO with the Review Board's decision as the date the review was closed. We found that the ATF and the FBI took the least amount of time on average to complete their reviews, while the DEA took the longest (Figure 13).



Source: OIG analysis of components' shooting incidents.

Conclusion. We concluded that the components' differences in implementation of the Review Board process could lead to inconsistent determinations and different disciplinary actions for similar shooting incidents. That outcome undermines Resolution 13's objective of "appropriate, consistent operational guidelines for the criminal investigative agencies of the Department." Although the weaknesses we identified need to be corrected to ensure the effectiveness of the Review Board process, each component's system had strengths that the other Review Boards could consider as benchmarks for improvement and that the Department could use to improve the shooting review process overall.

The most significant strength we noted was the inclusion of LEOs from other components as members of the Review Boards. Including representatives from peer organizations broadens the knowledge and experience applied to any shooting incident review and can help to ensure the independence and objectivity of the Review Boards.

The most significant weakness we noted was the components' failure to uniformly apply the standard for determining the reasonableness of the use of deadly force. The ATF, the DEA, and the FBI looked at the "reasonableness" of the LEO's belief that the suspect posed an imminent threat at the moment deadly force was used. The USMS Review Board considered the reasonableness of the Deputy Marshal's actions as a whole, including the actions that created the necessity for deadly force. A main purpose for reviewing shooting incidents is to ensure that LEOs use deadly force only when necessary to protect themselves and the public. Based on Resolution 13, we believe that Review Boards should uniformly apply the Departmentwide standard to determine the reasonableness of the use of deadly force.

We also concluded that uniform requirements are needed to ensure that Review Boards meet regularly to consider shooting incident investigations promptly, that they fully document their decisions, and that they provide the expected recommendations for improving training and operational procedures.

Sharing of Lessons Learned

Resolution 13 requires that "operational, safety, training or other relevant issues disclosed during the investigative or review process should be promptly communicated to component employees, and must be incorporated in policy manuals and training curriculae, as appropriate." Resolution 13 also requires that components conduct meaningful shooting data and trend analyses.

During site visits and interviews, we asked senior component officials how they communicate operational, safety, and training issues to LEOs. We found that the ATF prepared semiannual summaries of its shooting incidents that it made available to all employees on the ATF intranet. The DEA prepared annual summaries of its shooting incidents that were available to employees on the DEA intranet. We found that the FBI had not prepared summaries of its shooting incidents but began to prepare them during the course of our review, an effort that was ongoing when we completed our fieldwork. The USMS did not prepare any shooting incident summaries before we began our review. In March 2004, the USMS Review

Board suggested to the Director that the USMS prepare shooting incident summaries, stating:

We further suggest, in the same spirit of making information available to the Service that at the end of each Board session, a summary of all cases could be created, removing any specific individual names or districts. These could then be emailed or otherwise sent to all USMS operational personnel advising them of the facts and findings of each of the cases by the Training Academy representative. This summary could be used for educational, training and compliance purposes.

The USMS liaison told us that the USMS is implementing the Review Board's recommendation.

Incorporation of shooting incidents in training curricula. Although all of the components' training directors and supervisory firearms instructors we interviewed said that their headquarters would notify them of any safety issues disclosed during the investigative or review process and that they would promptly incorporate safety issues in policy manuals and training curricula, we found that only the DEA sent shooting incident files from its Review Board directly to its training academy for operational and training analysis. After completing the analysis, the DEA incorporated its findings directly into the training curriculum for new Special Agents. In contrast:

- The ATF training staff at FLETC did not receive the shooting incident files for review and, during our interview, was unaware that shooting incident summaries were available on the ATF's intranet;
- The FBI training academy only retained preliminary reports of shooting incidents; and
- The USMS supervisory firearms instructor at FLETC, who was a member of the Review Board, was prohibited from discussing shooting incident reviews with anyone not a member of the Review Board.

Consequently, the ATF, the FBI, and the USMS did not incorporate lessons learned from shooting incidents in their training curricula. According to one USMS trainer, the lack of a mechanism to incorporate lessons learned from shooting incidents into the training provided at the Academy meant that Deputy Marshals must rely on "word of mouth" for lessons learned from shooting incidents and that important details may be

lost or inaccurately conveyed. Resolution 13 requires components to use statistical techniques to describe, summarize, and compare shooting incident data and to identify patterns and changes that have occurred over time in order to minimize risks to LEOs and public safety. However, the Resolution does not specifically require components to share information with one another, and we found no evidence that the components shared shooting incident data among themselves.

We believe that components could benefit from a review of other components' shooting incidents. Only a small number of shooting incidents occurred in each component yearly. During the period we reviewed, the annual number of shooting cases involving the use of deadly force never exceeded 16 in any component. However, across the Department, the number of shooting incidents was higher. Aggregating the data on all the Department's shooting incidents would provide enough data to allow the components to use statistical techniques to describe, summarize, and compare shooting incident data and to identify long-term patterns and changes that have occurred over time.

Sharing information among components could enable them to identify significant trends earlier. For instance, we compiled the shooting incident data reported for all components over the last four years and found that more than half involved vehicles (Table 10).

Table 10: Shooting Cases Involving Vehicles			
Component	Total Cases	Involved Suspect in Vehicle	Percentage
ATF	23	9	39%
DEA	40	25	63%
FBI	39	20	51%
USMS	22	15	68%
TOTAL	124	69	56%

Source: OIG analysis of components' shooting incidents.

Because they did not share data with each other, the components learned each lesson independently. For example, in November 2002 the USMS Review Board observed that Deputy Marshals were frequently involved in shooting incidents while trying to arrest fugitives in stopped vehicles and recommended that the USMS research "devices that could be used to immobilize vehicles." During the same time, the DEA identified

vehicles as a principal factor in shooting incidents and conducted research on vehicle containment. Had the components shared lessons learned, the DEA could have informed the USMS that its research on vehicle containment concluded “that tire spike strips and an intentional puncture of the subject vehicle’s tire(s) for the purpose of preventing a subject from fleeing proved ineffective and unreliable.”⁴⁹ The DEA could also have shared the “active vehicle containment technique” that the DEA developed in response to shooting incidents to make it more difficult for suspects to use their vehicles as weapons against LEOs. We found there was no Departmentwide system to disseminate information on shooting incidents. Sharing information on shooting incidents among the components as soon as they are reported would allow the components to improve their operational planning and tactics immediately and avoid mistakes made by other components. All the individual LEOs we interviewed told us that knowing about shooting incidents involving other LEOs could improve the planning of enforcement operations.

CONCLUSIONS

We noted several areas in the components’ shooting review processes that differed significantly. We believe that the results of our review should be examined carefully by the components to identify areas that could be improved and to ensure that shooting incidents are reported promptly, investigated thoroughly, and reviewed by an objective and independent Review Board.

All of the components require a written report within one day so that senior management can make investigative decisions, but, on average, only the ATF and the FBI consistently met the requirement. Further, the FBI and the DEA are required to report shooting incidents involving injury and death to the CRD, and all the components are required to report shooting incidents to the OIG, but neither the CRD nor the OIG were informed of all reportable incidents.

Three of the components – the ATF, the DEA, and the USMS – rely on local law enforcement to conduct the criminal investigations of shooting incidents, but the FBI conducts all its own criminal investigations. Investigators assigned by the components’ headquarters conducted the administrative investigation of every ATF and USMS shooting incident, but the DEA and the FBI delegated the administrative investigation of some shooting incidents to the field office to which the LEO involved was assigned.

⁴⁹ DEA Deputy Administrator Memorandum, “Vehicle Containment and Vehicle-Involved Arrest Procedures,” dated August 22, 2002.

While each of the components' Review Boards prepares a memorandum for every shooting incident reviewed, we found that only those prepared by the FBI and USMS Review Boards consistently included analysis and recommendations specific to the incident being reviewed. We also found that each component has different Review Board membership requirements, ranging from only senior-level managers to outside law enforcement to nonsupervisory personnel. Outside representation on Review Boards can improve objectivity and independence, and reduce inconsistencies among the components. The ATF approach of including experienced LEOs from peer law enforcement agencies appeared to enhance the independence and objectivity of its Review Board.

The most important difference in the components' review of shooting incidents was the lack of uniform application of the standard for determining the reasonableness of the use of deadly force. The ATF, the DEA, and the FBI Review Boards looked at the reasonableness of the LEO's belief that the suspect posed an imminent threat at the moment deadly force was used. The USMS Review Board considered the reasonableness of a Deputy Marshal's actions as a whole, including the actions that created the necessity for deadly force. As a result, Review Boards made different decisions regarding the reasonableness of the use of deadly force for similar shooting incidents. We believe that Review Boards should apply a uniform Departmentwide standard for determining the reasonableness of the use of deadly force.

Overall, we found that the components varied substantially in the time they took to complete the administrative investigation of shooting incidents. The ATF averaged 176 days; the DEA, 440; the FBI, 184; and the USMS, 262. Much of this difference appeared to be due to the time it took for each component's Review Board to meet after the completion of the investigations. The average times ranged from 39 days at the ATF to 226 days at the DEA. Only the ATF required its Review Board to meet within a specified time period (60 days after the completion of a shooting incident investigation). The other components did not require their Boards to meet within a specified time.

Although the areas we identified need to be corrected to ensure the effectiveness of the shooting review process, each component's system had strengths that the other components and the Department could use as benchmarks to improve the shooting review process. Moreover, better sharing and analysis of information on shooting incidents could identify improvements to operational procedures and training.

RECOMMENDATIONS

To better ensure timely, thorough, and objective reporting, investigation, and review of shooting incidents, we recommend that the Department:

1. Establish a working group to consider uniform Department standards for the components' shooting incident reviews. The standards should include requirements regarding:

- A. Content and timeliness of preliminary shooting incident reports and investigations.
- B. Delegation of investigative responsibility, involvement of local authorities in criminal investigations of shooting incidents, and requirements for declination of prosecution.
- C. Composition of the Review Boards, application of the standard for determining the reasonableness of deadly force, and documentation of Review Board decisions.
- D. Aggregation within the Department of shooting incident data and lessons learned, including the preparation and distribution of shooting incident summaries.

With regard to specific component practices, we recommend that the components take the following actions to correct the specific weaknesses identified in this report.

2. ATF Recommendations – We recommend that the ATF:

- A. Establish a formal reporting relationship with the CRD.
- B. Improve the documentation of Review Board findings and recommendations.

3. DEA Recommendations – We recommend that the DEA:

- E. Improve the consistency and timeliness of shooting incident reports.
- F. Ensure compliance with its CRD reporting agreements.
- G. Consider changing the composition of its Review Board and

including outside members on its Review Board.

H. Improve documentation of Review Board findings and recommendations.

E. Improve the timeliness of review of shooting incidents.

4. FBI Recommendations – We recommend that the FBI:

A. Ensure compliance with its CRD reporting agreements.

B. Establish specific criteria for when to delegate shooting incident investigations to field offices.

C. Consider requesting local criminal investigation of shooting incidents and avoid duplication of local criminal investigations.

5. USMS Recommendations – We recommend that the USMS:

A. Streamline its shooting incident reporting system to improve consistency and timeliness in reporting shooting incidents.

B. Establish a formal reporting relationship with the CRD.

C. Consider including outside members on its Review Board.

APPENDIX I: RESOLUTION 13

U. S. Department of Justice
Office of Investigative Agency Policies
Washington. D.C. 20530

September 20, 1995

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: LOUIS J. FREEH
DIRECTOR, INVESTIGATIVE AGENCY POLICIES

SUBJECT: Resolutions 12 and 13

PURPOSE: To obtain approval for implementation of
Resolutions 12 and 13, which are attached

TIMETABLE: Immediate

DISCUSSION: Resolution 12 addresses Department of
Justice critical incident response. Resolution 13 creates
policy regarding Department of Justice shooting incident
reviews. These Resolutions represent consensus recommendations
of the Executive Advisory Board of the Office of Investigative
Agency policies. No party to these Resolutions has advised
that it wishes to appeal either of them.

RECOMMENDATION: Approval.

APPROVE

September 21, 1995

Concurring component:

OLC

DISAPPROVE

OTHER

RESOLUTION 13

Pursuant to the Attorney General's Order Number 1814-93, dated November 18, 1993, and in my capacity as Director of Investigative Agency Policies, I hereby issue the following resolution concerning the conduct of post-shooting incident reviews.

Background

The Attorney General requested that the Office of Investigative Agency Policies ("OIAP") consider the means by which Department of Justice ("DOJ") investigative agencies conduct post-shooting incident reviews. I referred this matter to the Firearms and Ammunition Working Group ("FAWG").⁵⁰ Resolution is the product of the FAWG's efforts and has been approved by the OIAP Executive Advisory Board ("EAB").

Discussion

According to the terms of the Order creating the OIAP, I have been authorized, "in the areas of overlapping jurisdiction of the criminal investigative agencies," to:

(1) Take all steps necessary to improve coordination among the criminal investigative agencies of the Department [of Justice], both within the United States and abroad; (2) Assure, to the extent appropriate, consistent operational guidelines for the criminal investigative agencies of the Department [of Justice]; (9) Provide advice to the Attorney General and the Deputy Attorney General on all investigative policies, procedures and activities that warrant uniform treatment or coordination among the criminal investigative agencies of the Department; [and] ... (11) Perform such other functions as may be necessary for the effective policy-level coordination of criminal investigations by the criminal investigative

⁵⁰ The FAWG was created on September 14, 1994, pursuant to OIAP Resolution 8.

agencies of the Department [of Justice], particularly with respect to drug trafficking, fugitive apprehension, violence, and related areas, and for the elimination of waste and duplication in these functions...

Order Number 1814-93, Section (b).

Attached to this Resolution as Exhibit A is the proposed policy and accompanying commentary concerning the conduct of post-shooting incident reviews. I believe that this policy and commentary set forth appropriate general guidance to the agencies. Furthermore, that general guidance is balanced with appropriate deference to the specific needs of the agencies.

This Resolution does not create or confer any right or benefit on any person, public or private. Nothing in it, its attachments, or associated documents is intended to restrict authority as provided by law, statute, or regulation.

Conclusion

As I noted above, this Resolution has been approved by the EAB. Further, I have been advised that no OIAP member agency will appeal this Resolution.

Dated: September 20, 1995
Washington, D.C.

LOUIS J. FREEH
Director of Investigative
Agency Policies

Policy Statement on Reporting and Review of Shooting Incidents

1. **Reporting Requirement.** Every shooting incident by a Department of Justice ("DOJ") employee must be reported, documented, and investigated. An exception to this requirement would be weapons harmlessly discharged in a training or recreational environment. Questions regarding the need to report the discharge of a weapon should be resolved by contacting a designated component Headquarters Senior Manager for guidance.

2. **Shooting Inquiry.** The circumstances surrounding the shooting incident will dictate the nature of the report(s) submitted and the level of investigation and review to which the incident is subjected. In all cases, component Senior Management must take prompt and appropriate measures to ensure, to the greatest extent possible, that DOJ shooting inquiries are thorough and objective.

3. **Investigative Discretion.** The decision whether a shooting inquiry will be conducted by investigators assigned to the field office where the incident occurred or by investigators assigned to a component Headquarters Office of Inspection or other Headquarters element, will be made by designated--component Headquarters Senior Management following consultation with field office Senior Management.

4. **Shooting Investigation Team.** ("SIT"). The SIT, regardless of origin, will be comprised of sufficient, qualified personnel to ensure that a logical, thorough, objective, and factual inquiry is conducted and documented. The results of this inquiry should be memorialized in a comprehensive report appropriate for the type of shooting being investigated.

5. **Shooting Incident Review.** All shooting incident documentation, including investigative reports, will be reviewed by an independent review committee designated by each component. The purpose of this committee is:

- a. to act as an objective administrative "check and balance" for the reporting and investigative process;
- b. to determine the reasonableness of the application of deadly force, in accord with the DOJ Deadly Force Policy and the law; and,
- c. to provide component Senior Management with appropriate analyses observations and recommendations concerning operational, training, and other relevant issues, including the need for referral for further administrative or disciplinary review, if deemed necessary.

6. **Policy Guidelines.** At a minimum, component shooting incident policies shall include, but not be limited to, the following:

- a. a clear definition of what constitutes a reportable shooting incident;
- b. instructions regarding the content of the initial report that a shooting incident has occurred;
- c. instructions regarding to whom, by what means (telephone, teletype, written communication, etc.), and within what time parameters shooting incidents are initially reported;
- d. instructions regarding the content and format of all documents, including investigative or administrative reports, relating to the shooting incident inquiry;
- e. instructions regarding deadlines for submitting the results of shooting incident inquiries;
- f. instructions regarding the composition of Shooting Investigation Teams and Shooting Incident Review Committees.
- g. instructions regarding the timely reporting of planning, judgment, oversight, training, safety, or other relevant "lessons learned" that were disclosed during the shooting incident inquiry and which may compromise operations or the safety of component personnel;
- h. instructions regarding measures to be taken, particularly during the investigation of operationally or otherwise sensitive shooting incidents, to ensure that DOJ shooting incident inquiries are thorough, factual, and objective;
- i. instructions encouraging the recognition and accommodation, as appropriate under the circumstances, of multiple interests and jurisdictions following a shooting incident; and,
- j. instructions regarding the need to complete the shooting incident review process expeditiously, to include documenting circumstances which may delay reporting, e. g. waiting results of laboratory analyses.

7. **Lessons Learned.** Operational, safety, training or other relevant issues disclosed during the investigative or review process should be promptly communicated to component

employees, and must be incorporated in policy manuals and training curriculae, as appropriate.

8. Rights of Third Parties. Nothing in this policy and the attached commentary is intended to create or does create an enforceable legal right or private right of action.

**Commentary Regarding the Shooting Incident Reporting
and Review Process
I. Introduction**

The Department of Justice ("DOJ") hereby establishes a uniform policy with respect to the reporting and review of shooting incidents. The policy and this commentary provide practical guidance for DOJ law enforcement component officials tasked with reporting, documenting, investigating, and reviewing reports detailing the discharge of firearms during the conduct of official business. The policy is intended to ensure that (1) shooting incidents are investigated and reviewed commensurate with the type of incident involved, and (2) documented in a manner which is thorough, factual, and objective.

This policy is the product of discussions among DOJ's law enforcement components and the advice of their respective offices of legal counsel. As a matter of principle, this document does not attempt to dictate how individual components implement the policy nor encroach upon the prerogatives of their Senior Management, but rather establishes guidelines for the reporting, investigation, documentation, and review of shooting incidents.

II. DEFINITIONS

For the purposes of this policy, a "shooting incident" means:

(1) The intentional or unintentional discharge of a firearm by a DOJ law enforcement employee, on or off duty, under circumstances which warrant official notice or review. Weapons harmlessly discharged in connection with training or recreation are not included in this definition and, except as noted below, need not be reported.

(2) The discharge of a firearm by anyone during the course of DOJ-related official business. If a shooting incident occurs during a DOJ joint or task force investigation and DOJ personnel are either not present or not directly involved, component Senior Management may exercise discretion regarding the levels of investigation and review to which such shooting incidents are subjected, and may defer subsequent investigations to local authorities.

(3) The discharge of a firearm in defense against vicious animals.

(4) The discharge of a firearm resulting in self-inflicted injuries or injuries to another person.

(5) The discharge of a firearm by a DOJ employee resulting in an investigation by any law enforcement agency.

Reporting Requirement - the necessity for promptly advising a designated component Headquarters Senior Manager that a shooting incident has occurred.

Shooting inquiry - the investigative process which must follow any shooting incident, except as noted in Paragraph (1) in the statement of policy.

Shooting incident review - the post investigation administrative process conducted by an independent review committee designated by each component.

III. INITIAL REPORTING

The initial report is intended to promptly (1) document the shooting incident and (2) involve a designated Senior Manager in appropriate oversight of the decisional and investigative process. The initial report must contain sufficient information to allow Senior Managers to make informed judgments regarding the necessity, type, and complexity of subsequent inquiries.

Field office and Headquarters Senior Management will

ensure that initial relevant details regarding the incident are documented and will establish by whom and to what extent the incident will be investigated.

IV. Shooting Incident Inquiries Generally

Shooting incident inquiries should be conducted with due regard for the physical, mental, and emotional well-being of involved employees, their families, co-workers, and other persons, including victims and witnesses. The purpose of the investigative, reporting, and review process is to provide Senior Management with a factual basis for evaluating operational activities; assessing the reasonableness of the conduct; and, determining the effectiveness of training, planning, judgment, and other factors, which may compromise operations or the safety of employees.

The circumstances surrounding the shooting incident will dictate the complexity of the investigation conducted, the nature of the report(s) submitted, and the level of review to which the incident is subjected. These decisions will be made by a designated component Headquarters Senior Manager following consultation with field office Senior Management. It's essential that sufficient oversight of this critical process be exercised to ensure that: (a) a thorough, factual, and objective investigation is conducted; (b) the results of the inquiry are memorialized in a comprehensive report appropriate for the type of incident being investigated; and (c) that potential conflicts of interest are avoided, including even the appearance of conflict of interest or impropriety.

Inquiries should be conducted to achieve, at a minimum, the following objectives:

- (1) A thorough, factual, and objective investigation;
- (2) Levels of investigative complexity and review appropriate for the type of incident involved;
- (3) A thoroughly documented report which is appropriate for the type of incident involved and includes all relevant information necessary for accurate and objective analysis;
- (4) Objective Senior Management oversight of the investigative and review process;

(5) Prompt reporting of identified planning, judgment, oversight, training or other relevant issues which may compromise operations or the safety of persons involved;

(6) Appropriate, timely recommendations to Senior Management regarding operational, training, safety, or other issues including, if necessary, referral to appropriate entities for further administrative or disciplinary review;

(7) Prompt follow-up on findings and recommendations including appropriate policy or manual changes; and,

(8) The ability to conduct meaningful shooting data and trend analyses.

The shooting incident review is intended to act as a "check and balance" for the investigative process and to provide appropriate objective analyses, observations, and recommendations to the component's Senior Management.

V. Compliance with Policy Guidelines

Within ninety (90) days, DOJ law enforcement components shall modify existing shooting incident review policies as necessary to accord with this general policy.

APPENDIX II: SAMPLE SHOOTING INCIDENT RESPONSE CARD

SUPERVISORY PERSONNEL:

- 1) RESPOND TO THE SCENE IMMEDIATELY.
- 2) DETERMINE THE FACTS, THEN PROVIDE SUCH INFORMATION TO THE INVESTIGATING AGENCY.
(Fax a USM-133 to Office of Internal Affairs within 24 hrs.)
- 3) TAKE CUSTODY OF ANY USMS FIREARMS THAT WERE DISCHARGED DURING THE INCIDENT.
(Another USMS Firearm will be issued, barring substantial cause not to re-issue a firearm. Contact OGC to approve the release of any firearm to any investigating agency.)
- 4) ADVISE ANY INVESTIGATING AGENCY THAT:
 - a) The ASRT has been notified and will contact them;
 - b) Any DUSM who discharged a firearm will not make an immediate statement and will be taken from the scene;
 - c) Any DUSM who discharged a firearm may provide a statement within a reasonable time; and
 - d) Ask that they not release names of involved USMS personnel to the media. (USMS HQ/DOJ decides whether to release names.)
- 5) REMOVE ANY DUSM WHO DISCHARGED A WEAPON FROM THE SCENE. THE DUSM WILL BE:
 - a) Examined/Treated by a physician (as needed);
 - b) Accompanied by an uninvolved DUSM (if possible); and
 - c) Advised not to return to duty until directed to do so by USMS Management.
- 6) IF REQUESTED, USMS WITNESSES (NON-SHOOTERS) MAY ANSWER QUESTIONS AT THE SCENE. INSTRUCT ALL DUSMs NOT TO DISCUSS THE INCIDENT UNTIL THEIR STATEMENTS ARE TAKEN.
- 7) THE SENIOR NON-SHOOTER DUSM ON THE SCENE SHOULD PERFORM THESE ON-SCENE FUNCTIONS UNTIL RELIEVED BY A USMS SUPERVISOR.

REVIEW CURRENT POLICY FOR DETAILED INFORMATION.

**USMS COMMUNICATIONS CENTER:
(800) 336-0102 OR (202) 307-9100**

APPENDIX III: ODAG RESPONSE



U. S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

September 10, 2004

MEMORANDUM

TO: Paul A. Price
Assistant Inspector General for Evaluations
and Inspections
Office of the Inspector General

FROM: Chuck Rosenberg *CR 9/13/04*
Chief of Staff

SUBJECT: Comments on the Draft Review of Shooting Incidents in the
Department of Justice. Assignment No. A-2004-004

This office has reviewed the Draft Report entitled *Review of Shooting Incidents in the Department of Justice*, Assignment No. A-2004-004. We appreciate the opportunity to provide the comments of the Department of Justice (hereafter, the "Department") on the recommendations contained in the Report.

The Department concurs with your recommendation that it establish a working group to consider uniform Department standards for the components' shooting incident reviews. Significantly, your Report does not conclude that shooting incident reviews are lacking or that any particular method of conducting such reviews is clearly superior to another. Rather, you suggest that the component's individual processes may be improved by incorporating strengths and "lessons learned" from the other components. We will carefully review the various areas you have identified and consider whether the Department and the agencies would benefit from the adoption of uniform standards in any or all of those areas. To this end, representatives from each of the components already have met to discuss the various Report recommendations, and the Department will ensure that these discussions continue until a reasonable determination can be made with regard to each of the issues you discuss in the Report.

The Department also concurs with the recommendations you have made for each of the four individual components. The Department incorporates and reiterates the comments submitted by each of the components, and notes that the components already have taken steps to address the areas you characterized as weaknesses in their individual review processes. The Department believes that the corrective actions to be taken by the components will satisfactorily resolve each of the recommendations.

-2-

We certainly agree with your observation that the use of deadly force is one of the most serious actions an individual law enforcement officer can take in carrying out the mission of the Department. Further, we believe it is critical that the Department's components thoroughly and objectively investigate shooting incidents and share information regarding the results of those investigations, not simply so that they comply with specific reporting requirements and internal policies that have been adopted, but more importantly so that we can be confident that our procedures and training adequately protect the safety of our officers and the public.

If you have any questions concerning these comments or the attached information, please feel free to call me directly at (202) 514-4995.

cc: Chad Boudreaux
Uttam Dhillon
Catherine M. O'Neil
Robert Trono

APPENDIX IV: OIG ANALYSIS OF THE ODAG RESPONSE

On August 11, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Office of the Deputy Attorney General (ODAG) with a request for written comments. The ODAG responded to the OIG in a memorandum dated September 10, 2004. The ODAG concurred with the OIG's recommendation to establish a working group to consider whether the Department and the components would benefit from the adoption of uniform standards for the investigation and review of shooting incidents. The Department also concurred with the OIG recommendations for actions by the components and with the actions taken and planned by the components to implement the OIG's recommendations. Our analysis of the ODAG's response follows.

RECOMMENDATIONS

Recommendation 1: Establish a working group to consider uniform Department standards for the components' shooting incident reviews, including:

- A. Content and timeliness of preliminary shooting incident reports and investigations.
- B. Delegation of investigative responsibility, involvement of local authorities in criminal investigations of shooting incidents, and requirements for declination of prosecution.
- C. Composition of the Review Boards, application of the standard for determining the reasonableness of deadly force, and documentation of Review Board decisions.
- D. Aggregation within the Department of shooting incident data and lessons learned, including the preparation and distribution of shooting incident summaries.

Summary of ODAG Response. The Department concurred with this recommendation, established the working group, and plans to continue discussions until a reasonable determination can be made with regard to each of the issues presented in this report.

Status of Recommendation. Recommendation 1 is Resolved – Open. The actions planned by the Department are responsive to the recommendation. We will close this recommendation when the Department provides us a record of the decisions made by the working group.

APPENDIX V: ATF RESPONSE



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Office of the Director

SEP -7 2004 Washington, DC 20226

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MEMORANDUM TO: Assistant Inspector General for Evaluations and Inspections

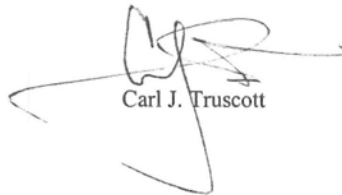
FROM: Director

SUBJECT: Response to the Office of the Inspector General's (OIG) Draft Report:
Review of Shooting Incidents in the Department of Justice,
Assignment Number A-2004-004

This memorandum serves to transmit the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) official response to the findings and recommendations contained in the above-cited draft report. The response is attached to this correspondence.

A law enforcement sensitivity review disclosed no information that should not be released to the general public pursuant to the Freedom of Information Act, the Trade Secret Act, or any other applicable law or policy.

Should you have any questions or need additional information regarding this response, please contact Ms. Carol Campbell, Audit Liaison, at 202-927-8276.



Carl J. Truscott

Attachment

**ATF Response to the
Office of the Inspector General's Draft Report:
Review of Shooting Incidents in the Department of Justice**

Findings: The report states that the "most significant weakness we noted was the components' failure to uniformly apply the standard for determining the reasonableness of the use of deadly force." It further states that: "The ATF, DEA, and FBI (Review Boards) looked at the 'reasonableness' of the LEO's (law enforcement officer's) belief that the suspect posed an imminent threat at the moment that deadly force was used. The USMS Review Board considered the reasonableness of the Deputy Marshal's actions as a whole, including the actions that created the necessity for deadly force." The report goes on to state: "A main purpose for reviewing shooting incidents is to ensure that LEOs use deadly force only when necessary to protect themselves and the public."

Response: With respect to ATF's Shooting Incident Review Board, the Board makes "findings relative to the following issues: use of force, compliance with Bureau policies and directives, and determinations of wrongful or inappropriate action." (ATF Order 8200.3A, paragraph 16b.) While it is true that ATF's Review Board initially looks at whether the agent had a reasonable belief that the suspect posed an imminent danger of death or serious physical injury to the agent or another person, ATF's Review Board also looks at the totality of the incident to determine whether there was any wrongful or inappropriate action on the part of their employee.

Recommendation for the Department of Justice: Establish a working group to consider uniform Department standards for the components' shooting incident reviews.

Response: ATF concurs with this recommendation. ATF's Shooting Review Coordinator, or his designee, will represent ATF at working group meetings to share data and lessons learned and to discuss whether uniform Department standards for the components' shooting incident reviews should be considered.

Recommendation for ATF: Establish a formal reporting relationship with the Civil Rights Division (CRD).

Response: ATF concurs with this recommendation. ATF's Shooting Review Coordinator has already entered into a dialogue with CRD attorneys regarding this matter. ATF will work with them to establish guidelines for determining which incidents should be reported and how they should be reported. The guidelines will also set forth requirements for the CRD response.

Recommendation for ATF: Improve the documentation of Review Board findings and recommendations.

Response: ATF concurs with this recommendation. ATF has always documented the discussions, findings, and any appropriate related recommendations of its Shooting Incident Review Board in the form of a memorandum to senior management officials. Actions have already been taken to revise that memorandum to include greater detail in the areas of findings and recommendations. In addition, the actions taken or planned as the result of a recommendation from the Board will now be tracked separately.

APPENDIX VI: OIG ANALYSIS OF THE ATF RESPONSE

On August 9, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) with a request for written comments. The ATF responded to the OIG in a memorandum dated September 7, 2004. The ATF concurred with all of the recommendations and agreed to participate in the working group, establish a formal reporting relationship with the Civil Rights Division (CRD), and improve the documentation of Review Board findings and recommendations. Our analysis of the ATF's response follows.

RECOMMENDATIONS

Recommendation 1: Establish a working group to consider uniform Department standards for the components' shooting incident reviews.

Summary of ATF Response. The ATF concurred with this recommendation and agreed to participate in the working group.

Status of Recommendation: Recommendation 1 is Resolved – Open. The actions planned by the ATF are responsive to the recommendation. We will close this recommendation when Departmentwide action is complete.

Recommendation 2A: Establish a formal reporting relationship with the CRD.

Summary of ATF Response. The ATF concurred with this recommendation and reported that it is working with CRD attorneys to establish a formal reporting relationship.

Status of Recommendation. Recommendation 2A is Resolved – Open. The actions planned by the ATF are responsive to the recommendation. We will close this recommendation when the ATF provides a copy of the document formalizing the agreement.

Recommendation 2B: Improve the documentation of Review Board findings and recommendations.

Summary of ATF Response. The ATF concurred with this recommendation and plans to revise the memorandum reports of the Review Board to include greater detail on findings and recommendations. The ATF also plans to track each Review Board recommendation individually for corrective action.

Status of Recommendation. Recommendation 2B is Resolved – Open. The actions planned by the ATF are responsive to the recommendation. We will close this recommendation when the ATF provides copies of the memoranda documenting the decisions made in the cases considered at the next meeting of the ATF Review Board.

COMMENTS ON THE FINDINGS OF THE REVIEW

The ATF provided additional information on one of the findings made in the review.

Summary of ATF Response. The ATF stated that its Shooting Incident Review Board initially considers whether the Special Agent had a reasonable belief that the suspect posed an imminent danger of death or serious physical injury, but also considers the totality of the incident to determine if any of the Special Agent's actions were inappropriate.

OIG Analysis. The ATF did not find the use of deadly force to be unreasonable or impose any discipline for inappropriate actions by ATF Special Agents in any case we reviewed. Accordingly, our review could not fully evaluate the ATF's application of the standard for determining the reasonableness of the use of deadly force.

APPENDIX VII: DEA RESPONSE



U. S. Department of Justice
Drug Enforcement Administration

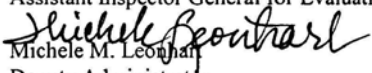
www.dea.gov

Washington, D.C. 20537

SEP 1 2004

MEMORANDUM FOR THE OFFICE OF THE INSPECTOR GENERAL

TO: Paul A. Price
Assistant Inspector General for Evaluation and Inspections

FROM: 
Michele M. Leonhart
Deputy Administrator

SUBJECT: Draft Audit Report: *Review of Shooting Incidents in the Department of Justice*,
A-2004-004

The Drug Enforcement Administration (DEA) has reviewed the Department of Justice, Office of the Inspector General's (OIG) draft audit report entitled *Review of Shooting Incidents in the Department of Justice*. DEA provides the following comments as requested in your memorandum dated August 9, 2004.

DEA concurs with the recommendations resulting from this audit and will take steps to implement the recommendations or where appropriate, explore alternatives to strengthen DEA's shooting review program. As a federal law enforcement agency, DEA is periodically involved in shooting incidents. Although shooting incidents are an unfortunate but inevitable facet of federal drug law enforcement, DEA is committed to gathering and revealing all facts leading up to and associated with the discharge of a weapon by DEA employees and in assisting the state, local, and/or federal agencies having jurisdiction at the shooting location.

DEA regularly evaluates its programs, to include its shooting review process, and responds internally to correct noted deficiencies. OIG's review focused on the time period of fiscal years 2000 through 2003. During this time period, several improvements were made to DEA's shooting incident reporting process to streamline both the internal and external reporting procedures. These actions have had a positive impact and have strengthened DEA's overall shooting review process. The revisions are summarized below to supplement OIG's reported findings.

DEA recognizes that shooting incidents are serious and stressful events. A sound reporting system has been instituted to ensure that complete and factual information is reported incrementally by the field to senior managers at DEA Headquarters to capture the events of the evolving situation at the scene. The reporting process begins with a required, immediate telephonic notification to

DEA Headquarters. For incidents declared critical shooting incidents by the Chief of Operations, developments at the shooting scene are transmitted via facsimile within six hours of the event to DEA Headquarters. All shooting incidents require a written summary of events within a 24-hour time period to DEA Headquarters, with regular follow-up reporting to DEA offices investigating the shooting incident as deemed necessary. The incremental reports allow DEA to effectively manage shooting incidents through ongoing communication.

A key step in the investigation of all shooting incidents involving injury or death of a human being is the notification of the event to the Department of Justice, Civil Rights Division (CRD). DEA's Office of Professional Responsibility (OPR) is the responsible office for notifications to CRD. OPR is informed of shooting incidents involving injury or death immediately following telephonic notification to DEA Headquarters. This action ensures consistent and timely reporting to CRD as well as OIG since OPR is also the point-of-contact for the OIG's Investigations Division. OIG found three incidents involving injury or death that CRD was not notified by OPR during the time period September 2000 through April 2002; however, no instances of non-compliance have been noted since 2002, indicating the improved procedures are effective.

Investigations of DEA shooting incidents are normally the responsibility of state and local investigative agencies in whose jurisdiction the shooting incident occurs. These agencies manage the crime scene, conduct the follow-up investigation, and are the primary source for much of the information that must be reported to DEA Headquarters. DEA's Office of Inspections is responsible for coordinating with state and local authorities and the ensuing shooting review process. OIG found DEA averaged 440 days to complete the shooting review process. DEA attributes the extended time to complete the shooting incident review process to its internal procedures and the assignment of the function as a collateral duty, as opposed to the length of time required to conduct a thorough investigation of the incident. Nonetheless, DEA acknowledges the length of time can be reduced.

Notwithstanding the time required to conduct a thorough shooting investigation and review, DEA employees involved in shooting incidents are eligible for promotion, reassignment, awards, etc. In 2002, DEA instituted a pragmatic method of reviewing personnel actions for subjects of active internal investigations. Personnel actions for subjects of active internal investigations are considered on a case-by-case basis by the Deputy Chief Inspector and/or the Chairman of the Board of Professional Conduct and/or the Deciding Official to make a determination as to the likely outcome of the particular case. If the investigation has progressed sufficiently to allow these officials to determine the likely outcome of the particular case, a decision can be made to approve the personnel action. Approximately, 50-70 percent of all cases end with no discipline assessed. Decisions regarding actions before the Career Board are reserved for the Deputy Administrator.

DEA's shooting investigation process is intentionally compartmentalized to ensure the results are unbiased and the outcome is deemed fair by the public, the agency, and the affected employee(s). Established policy and procedure further ensure standardization as well as proper, timely coordination with concerned departmental offices. Improvements to this process and policy will bolster the public's confidence in DEA and federal law enforcement, collectively.

Paul A. Price, Assistant Inspector General for Evaluation and Inspections

Page 3

DEA has completed a sensitivity review of the draft audit report. This information will be provided under separate cover.

Documentation detailing DEA's efforts to implement the attached action plan will be provided to OIG until all corrective actions are employed. If you have any questions regarding this information, please contact Audit Liaison Sheldon Shoemaker at (202) 307-4205.

Attachment

ACTION PLAN

Review of Shooting Incidents in the Department of Justice

Recommendations	Action Planned	Projected Completion Date
3.A Improve the consistency and timeliness in reporting shooting incidents.	The Drug Enforcement Administration's (DEA) shooting reporting requirements are set forth in Chapter 6114 of the <i>Agents Manual</i> . Incremental reporting requirements begin with immediate telephonic notification to DEA Headquarters' Command Center, and at a minimum, a written summary report is required within 24 hours of the incident. DEA will issue a teletype to its field offices reaffirming the existing policy requirements to consistently and timely report shooting incidents.	October 1, 2004
3.B Ensure compliance with its CRD reporting agreements.	The Office of Professional Responsibility (OPR) will continue to serve as the responsible office for coordination with the Department of Justice's Civil Rights Division (CRD) as outlined in the September 12, 2000 agreement between DEA and CRD. To further ensure compliance, DEA Headquarters' Command Center will modify its notification protocols to include the Office of Professional Responsibility on all shooting incidents, as opposed to only those involving injury or death.	October 1, 2004
3.C. Consider changing the composition of the Review Board, and including outside members on its Review Board.	DEA Executive staff will consider modifying make up of the Shooting and Assault Incident Review Committee (SAIRC).	June 30, 2005
3.D Improve documentation of Review Board findings and recommendations.	In addition to SAIRC findings, the Office of Inspections (IN) will immediately begin to include recommendations, lessons learned, and other observations in SAIRC memo to Special Agents in Charge when deemed necessary by the SAIRC.	September 2, 2004
3.E Improve the timeliness of reviews of shooting incidents.	IN will begin scheduling SAIRC meetings every 90 days to improve the timeliness of shooting incident reviews. The next SAIRC meeting is scheduled for September 2, 2004.	September 2, 2004

APPENDIX VIII: OIG ANALYSIS OF THE DEA RESPONSE

On August 9, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Drug Enforcement Administration (DEA) with a request for written comments. The DEA responded to the OIG in a memorandum dated September 1, 2004. The DEA concurred with all of the recommendations made in the report. Our analysis of the DEA's response follows.

RECOMMENDATIONS

Recommendation 3A: Improve the consistency and timeliness of shooting incident reports.

Summary of DEA Response. The DEA concurred with the recommendation and plans to issue a teletype by October 1, 2004, to its field offices reaffirming the existing policy requirements to consistently report shooting incidents on a timely basis. The DEA has instituted an incremental reporting system consisting first of an immediate telephone notification to DEA Headquarters. For shooting incidents declared critical incidents by the Chief of Operations, developments at the shooting scene are transmitted via facsimile within six hours of the incident to DEA Headquarters. All shooting incidents require a written summary of events within a 24-hour period to DEA Headquarters, with regular follow-up reporting to DEA offices investigating the shooting incidents as deemed necessary. The incremental reports allow the DEA to manage shooting incidents through ongoing communication.

Status of Recommendation. Recommendation 3A is Resolved – Open. The actions planned by the DEA are responsive to the recommendation. We will close this recommendation when the DEA provides a copy of the teletype and documentation of its incremental reporting system.

Recommendation 3B: Ensure compliance with its Civil Rights Division (CRD) reporting agreements.

Summary of DEA Response. The DEA concurred with this recommendation and indicated that it plans to improve internal procedures to ensure that all incidents resulting in injury or death are reported to the CRD. The Office of Professional Responsibility (OPR) will continue to serve as the responsible office for coordination with the CRD as outlined in the September 12, 2000, agreement. To further ensure compliance, DEA Headquarters Command Center will modify its notification protocols to

include the OPR on all shooting incidents, and not only those involving injury or death.

Status of Recommendation. Recommendation 3B is Resolved – Open. The actions planned by the DEA are responsive to the recommendation. We will close this recommendation when the DEA provides a copy of its modified notification protocols.

Recommendation 3C: Consider changing the composition of its Review Board and including outside members on its Review Board.

Summary of DEA Response. The DEA concurred with this recommendation, and DEA executive staff will consider modifying the composition of the Shooting and Assault Incident Review Committee (Review Board).

Status of Recommendation. Recommendation 3C is Resolved – Open. The action planned by the DEA is responsive to the recommendation. We will close this recommendation when the DEA informs us of the results of its reconsideration of the Review Board’s membership.

Recommendation 3D: Improve documentation of Review Board findings and recommendations.

Summary of DEA Response. The DEA concurred with this recommendation and plans for the Office of Inspections to immediately include appropriate recommendations, lessons learned, and other observations in Review Board memoranda to Special Agents in Charge.

Status of Recommendation. Recommendation 3D is Resolved – Open. The action planned by the DEA is responsive to the recommendation. We will close this recommendation when the DEA provides memoranda documenting the decisions made in the cases considered at the next meeting of the Review Board.

Recommendation 3E: Improve the timeliness of reviews of shooting incidents.

Summary of DEA Response. The DEA concurred with this recommendation, and the Office of Inspections plans to schedule Review Board meetings every 90 days. The DEA attributed the lengthy review times to the fact that the DEA does not have personnel dedicated solely to investigating shooting incidents. Nonetheless, the DEA acknowledged that it can reduce the length of time taken to complete reviews.

Status of Recommendation. Recommendation 3E is Resolved – Open. The action planned by the DEA is responsive to the recommendation. We will close this recommendation when the DEA submits a schedule and record of the Review Board meetings held from September 2004 through September 2005.

APPENDIX IX: FBI RESPONSE



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

September 27, 2004

MEMORANDUM TO: Paul A. Price
Assistant Inspector General
Office of the Inspector General
Evaluation and Inspections Division
Department of Justice

FROM: Charles M. Steele *CMS*
Chief of Staff

SUBJECT: COMMENTS ON DRAFT REPORT: REVIEW OF SHOOTING
INCIDENTS IN THE DEPARTMENT OF JUSTICE;
ASSIGNMENT NUMBER A-2004-004

The Federal Bureau of Investigation (FBI) has reviewed the Office of Inspector General's (OIG) draft Review of Shooting Incidents in the Department of Justice, Assignment Number A-2004-004. We appreciate the opportunity to provide comments on the draft report.

Recommendation 1: That the Department establish a working group to consider uniform Department standards for the components' shooting incident reviews. The standards should include requirements regarding:

- A. Content and timeliness of preliminary shooting incident reports and investigations.
- B. Delegation of investigative responsibility, involvement of local authorities in criminal investigations of shooting incidents, and requirements for declination of prosecution.
- C. Composition of the Review Boards, application of the standard for determining the reasonableness of deadly force, and documentation of Review Board decisions.

FBI/DOJ

D. Aggregation within the Department of shooting incident data and lessons learned, including the preparation and distribution of shooting incident summaries.

The FBI concurs with this recommendation, and looks forward to participating in the working group to be established by DOJ. In fact, the FBI, DEA, USMS and ATF have already initiated discussions regarding the issues and recommendations identified in the draft report, and agree that formation of the working group will facilitate these discussions and will serve inspection interests of each agency beyond those recommended in the draft report.

Recommendation 4A: That the FBI ensure compliance with its Civil Rights Division (CRD) reporting requirements.

The FBI concurs with this recommendation, and will continue its ongoing efforts to ensure compliance with CRD reporting requirements.

Historically the FBI has substantially complied with its CRD reporting requirements. The draft report reflects that fact, but identifies one instance in which there is no documentation indicating that the required notification was made. That incident, which occurred in July 2003, did not result in serious bodily injury or death; that may be the reason for the lack of formal, documented notification. However, a CRD official was part of the FBI's Shooting Incident Review Group (SIRG) in that case, so CRD was aware of the incident. In any event, the FBI will continue to seek to ensure full compliance with its CRD reporting requirements.

Recommendation 4B: That the FBI establish specific criteria for when to delegate shooting incident investigations to the field.

The FBI concurs with this recommendation, and will establish specific criteria, by December 31, 2004, for when to delegate shooting incident investigations to the field.

We would like to note that delegating a shooting incident investigation to the field will not necessarily compromise the independence and legitimacy of the investigation. Every FBI shooting investigation is evaluated independently and objectively by the Inspection Division. Further, appropriate and independent resources are utilized to conduct the investigations, which are ultimately evaluated by CRD and an independent Shooting Incident Review Board at FBIHQ.

In any event, the FBI acknowledges the importance of having clear guidelines in place to which all employees can refer. Therefore, the FBI will establish specific criteria regarding the delegation of shooting incident investigations.

Recommendation 4C: That the FBI consider requesting local criminal investigation of shooting incidents and avoid duplication of local criminal investigations.

The FBI concurs with this recommendation, and will consider, by December 31, 2004, the merits and demerits of requesting local criminal investigations of shooting incidents. We believe we have sound reasons for our current policy and practice of not requesting local criminal investigations (although we do not discourage local investigations, and we cooperate with state and local authorities when they conduct such investigations). However, we will consider this issue again in light of the findings and conclusions of the draft report.

General Comments:

1. "Cases of Mistaken Identity" and "Cases Involving Fleeing Suspects,"
pages 39-40:

The draft report uses two pairs of shooting incidents – one pair involving “cases of mistaken identity” and another involving “cases of fleeing suspects” – to illustrate and support its conclusion that DOJ components apply differently the standard for determining the reasonableness of particular uses of deadly force. The FBI believes the examples are not necessary to illustrate the conclusion, and more importantly, that they include such limited facts that they do not support the conclusion. It is inherently difficult to compare shooting incidents due to the unique circumstances of each incident, and the examples do not provide sufficient facts and analysis from which to draw sound conclusions. Moreover, even though OIG included the examples only to illustrate its point about perceived application of different standards, some (or many) readers will likely infer that OIG has drawn conclusions about the reasonableness of the shootings in one or more of the examples. The examples could therefore mislead readers about the appropriateness of the decisions of the components’ review groups.

Moreover, the FBI “mistaken identity” example mentions only the general fact that the SIRG determined that the Special Agent’s use of deadly force was reasonable. The SIRG in that case, however, included a representative of the OIG, who agreed with the SIRG’s decision. Readers should be informed of that fact, and also that the case was independently investigated by both the FBI and a local police department; that the results of both were utilized by a local prosecutor and a local grand jury; that the results of both investigations were presented to CRD; and that all concluded, prior to the evaluation of the FBI SIRG, that the use of deadly force was reasonable. In addition, the FBI “mistaken identity” case is currently the subject of pending civil litigation. Although the draft report does not expressly identify the matter, the example includes enough identifying facts that the plaintiff’s lawyer will certainly recognize it. Inclusion of the example in the report will likely complicate the litigation – for example, plaintiff’s counsel may seek to take discovery from OIG and OIG personnel, introduce the report into evidence, etc.

The “fleeing suspects” examples are also problematic. Even on the limited facts presented in the draft report, the circumstances of the two incidents are clearly and materially different. In the USMS example, deadly force was used against a felon fleeing from law enforcement in a vehicle after an unsuccessful arrest attempt. However, in the DEA example, deadly force was used against a felon fleeing from law enforcement after shots were fired in the general direction of DEA Special Agents. Without opining about the reasonableness of either shooting, the fact that shots were fired toward law enforcement personnel in one case is clearly a significant distinguishing factor in determining whether the use of deadly force was reasonable. The examples are not comparable, and therefore should not be compared, as they are in the draft.

For all these reasons, we request that the OIG delete the examples from its report.

2. Compelled Statements, page vii:

The draft report identified inconsistencies in the components’ practices of compelling administrative statements in shooting investigations. It noted what it believed to be four FBI shooting incidents in which investigators compelled administrative statements (without, declination of prosecutions) from Special Agents for use in criminal cases against the suspects involved in the shooting incidents.

The FBI incidents identified in the report are actually one incident in which four different Agents discharged their weapons. The Division where the shooting occurred formally requested authorization from FBI Headquarters, Office of the General Counsel and Inspection Division, to compel statements from the Agents involved in the shooting, citing benefits to both the Agents and the Bureau. Further, the United States Attorney’s Office had not filed charges against the subjects because of a lack of evidence concerning the shooting (i.e. the USAO needed the Agents’ statements in order to support charges against the subjects). The Agents involved, accompanied by a representative of the Division’s Chief Division Counsel, provided a brief statement immediately following the shooting in the interest of public safety. The Division requested authorization to compel statements on June 17, 2003, and authorization was received on June 18, 2003. Statements were provided by the Agents on July 24, 2003, 53 days following the shooting incident.

Finally, the subject was not struck by any discharged rounds, nor were there any injuries to innocent civilians, or significant damage to property.

3. Reporting to the OIG, pages iv-v:

The draft states that the FBI reported only seven of 17 “reportable” shooting incidents to the OIG prior to July 2004. This raises a possible inference that the FBI failed to comply with its reporting obligations; such an inference, however, would be inaccurate.

Prior to July 2004, the agreement between the FBI and the OIG was that only incidents involving serious misconduct would be reported to the OIG. However, in the ten unreported shooting incidents referenced in the draft report, the SIRGs and the Shooting Incident Review Teams did not find any serious misconduct. Therefore, the FBI was not required to report any of those incidents to the OIG, and the FBI was in compliance with its OIG reporting requirements.

Since the change in reporting requirements in July 2004, the FBI has notified the OIG of every shooting incident.

The FBI requests that the draft report be amended to include these facts.

4. Review of Shooting Incidents, page xi:

The draft report states that the FBI’s Review Board tries to meet on a quarterly basis, but is not required to do so. In fact, the FBI’s Shooting Incident Review Group is scheduled to meet monthly (if there are shooting incidents to review).

APPENDIX X: OIG ANALYSIS OF THE FBI RESPONSE

On August 9, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the Federal Bureau of Investigation (FBI) and requested written comments. The FBI responded to the OIG in a memorandum dated September 27, 2004. Our analysis of the FBI's response follows.

RECOMMENDATIONS

Recommendation 1: Establish a working group to consider uniform Department standards for the components' shooting incident reviews.

Summary of FBI Response. The FBI concurred with this recommendation and agreed to participate in the working group.

Status of Recommendation: Recommendation 1 is Resolved – Open. The actions planned by the FBI are responsive to the recommendation. We will close this recommendation when Departmentwide action is complete.

Recommendation 4A: Ensure compliance with its Civil Rights Division (CRD) reporting agreements.

Summary of FBI Response. The FBI concurred with the recommendation. The FBI also stated that it has substantially complied with CRD reporting requirements and noted that in a shooting incident described in the report a CRD official who served on the FBI Shooting Incident Review Group (SIRG) was aware of the incident.

OIG Analysis. The FBI's statement that a CRD attorney serves on the FBI SIRG is correct. However, in the shooting incidents we reviewed, the SIRG conducted its review an average of 184 days after the incident. Therefore, CRD participation in the SIRG review is not a substitute for investigative oversight based on the immediate report required by the FBI's agreement with the CRD.

Status of Recommendation. Recommendation 4A is Resolved – Open. The actions planned by the FBI are responsive to the recommendation. We will close this recommendation when the FBI provides us with documentation of timely reports to the CRD of all shooting incidents through December 31, 2004.

Recommendation 4B: Establish specific criteria for when to delegate shooting incident investigations to field offices.

Summary of FBI Response. The FBI concurred with this recommendation and stated that by December 31, 2004, it will establish specific guidelines on the delegation of investigations. The FBI also noted that delegating a shooting incident investigation to the field does not necessarily compromise the independence and legitimacy of the investigation.

Status of Recommendation. Recommendation 4B is Resolved – Open. The actions planned by the FBI are responsive to the recommendation. We will close this recommendation when the FBI provides us with documentation of its new guidelines.

Recommendation 4C: Consider requesting local criminal investigations of shooting incidents and avoid duplication of local criminal investigations.

Summary of FBI Response. The FBI concurred with this recommendation and by December 31, 2004, will consider the merits and demerits of requesting local criminal investigations of shooting incidents.

Status of Recommendation. Recommendation 4C is Resolved – Open. The actions planned by the FBI are responsive to the recommendation. We will close this recommendation when the FBI provides us a memorandum record of its decision regarding involving local authorities in the criminal investigation of FBI shooting incidents.

COMMENTS ON THE FINDINGS OF THE REVIEW

The FBI also provided comments regarding four of the findings in the draft report.

1. Cases of Mistaken Identity

Summary of FBI Comments. The FBI objected to our inclusion of case examples comparing Review Board findings in two shooting incidents. The FBI also stated that readers will likely infer from our comparison that the OIG has drawn conclusions about the reasonableness of the shootings in the different examples. The FBI also commented on perceived factual differences in our comparison of the Review Board findings in two incidents in which law enforcement officers fired at a suspect in a vehicle that was driving away. Finally, the FBI noted that one of the incidents we reviewed is the subject of pending civil litigation.

OIG Analysis. The FBI's statement that our comparison of Review Board decisions in similar cases inherently implies that one of the Review Boards must have erred, is incorrect. In our report, we discuss the facts documented in completed investigations and Review Board files. We concluded that the determinations made by the Review Boards were consistent with each component's policy and practice, and with Resolution 13. Nonetheless, our analysis showed that the Review Boards were considering the circumstances surrounding shooting incidents in different ways and applying the standards for the reasonable use of deadly force differently. We did not state, or imply, that we had reached any conclusion on the reasonableness of the conclusions of any of the Review Boards. Rather, we used these examples to support our recommendation that the Department consider establishing a uniform application of the standard for determining the reasonableness of the use of deadly force.

The FBI also commented on the alleged factual differences in the examples. While no two incidents are exactly alike, the incidents we described were similar enough to demonstrate how Review Boards apply different standards with regard to similar incidents.

Finally, with regard to the FBI's comment regarding pending civil litigation and the potential for the plaintiff to seek discovery from the OIG, we did not make any comments – explicitly or implicitly – in the report regarding the merits of any pending litigation. Moreover, the OIG regularly discusses cases in its reports even when there is ongoing litigation regarding those cases. By discussing those cases, we are not commenting on any of the issues involved in the litigation. We do not believe we should remove discussions of examples in OIG reports simply because they also relate to litigation.

2. Compelled Statements

Summary of FBI Comments. The FBI asserted that the OIG report cited four FBI shooting incidents, when in actuality four different FBI agents discharged their weapons in one incident. The FBI also stated that it properly compelled administrative statements from the four Special Agents and described the process used to compel the statements.

OIG Analysis. The FBI's comment that the compelled statements involved four Special Agents in a single shooting incident is not accurate. There were two separate shooting incidents involving the same four Special Agents that took place late one night and early the next morning at different locations. The FBI Review Board considered the incidents separately. More importantly, we included this example because it relates to the differences between the FBI's actions regarding compelling statements and the actions

of the DEA in similar cases we reviewed. Because of these and other inconsistencies, we recommended that the Department establish a working group to consider uniform Department standards for shooting incident reviews.

3. Reporting to the OIG

Summary of FBI Comments. The FBI asserted that it did not report ten shooting cases to the OIG and it was not required to do so under the existing agreement with the OIG because the FBI did not believe the shootings involved serious misconduct. The FBI stated that since July 2004, pursuant to a change in reporting requirements requiring all shootings to be reported to the OIG, the FBI has in fact notified the OIG of every shooting incident.

OIG Analysis. Although the FBI stated that it did not report ten shooting incidents because it did not believe the incidents involved serious misconduct, we found that the FBI conducted a criminal investigation in each case. The FBI has been required to report potential criminal wrongdoing or other serious misconduct to the OIG since July 11, 2001. Under this requirement, firearms discharges are reportable to the OIG except those in connection with training or off duty sports and hobbies. As such, the ten incidents should have been reported. The July 27, 2004, memorandum cited by the FBI reiterated the existing reporting requirement in order to eliminate any confusion over the requirement to report firearms discharges. The FBI's statement that it is now reporting all shooting incidents to the OIG is consistent with the requirement.

4. Review of Shooting Incidents

Summary of FBI Comments. The FBI asserted that its Review Board is scheduled to meet monthly if there are shooting incidents to review.

OIG Analysis. The information contained in the draft report was provided by FBI administrative personnel responsible for scheduling the Review Board meetings. Because we received conflicting statements from FBI employees regarding the scheduling of the meetings, we removed any reference to FBI scheduling of Review Board meetings from our report.

APPENDIX XI: USMS RESPONSE



U.S. Department of Justice


United States Marshals Service

Office of the Director

Washington, DC 20530-1000

September 7, 2004

MEMORANDUM TO: Paul A. Price
Assistant Inspector General for
Evaluation and Inspections

FROM: Benigno G. Reyna 
Director

SUBJECT: Review of Shooting Incidents in the Department of Justice
Assignment Number A-2004-004

Thank you for the opportunity to comment on the draft report for the Review of Shooting Incidents in the Department of Justice. The report and its recommendations are addressed in the Attachment.

Should you have any questions or concerns regarding this response, please contact Isabel Howell, Audit Liaison, at 202-307-9744.

Attachment

cc: Richard P. Theis
Acting Director
Audit Liaison Office

**USMS Response to Draft Audit Report on the
Review of Shooting Incidents in the Department of Justice**

General Comments

The following comments refer to the body of the report and do not address any specific recommendations:

Standard for Judging the Use of Deadly Force:

On p. ix the report says:

We also found that the components' Review Boards applied the standard for the reasonable use of deadly force differently. . . . The ATF, the DEA, and the FBI Review Boards focused on the moment the LEOs decided to discharge their firearms. In contrast, the USMS Review Board took into account the circumstances that led to the incident. These different approaches can lead to different conclusions about similar sets of facts. For example, the ATF, DEA and FBI approach would find reasonable the actions of an LEO who failed to properly identify a suspect and consequently shot an innocent civilian if, at the moment the LEO fired, he or she believed that the civilian was the suspect and was acting in a threatening manner. The USMS approach would find the same actions to be unreasonable because the LEO had not taken steps to properly identify the individual.

(See also p. 39)

The language from the report may imply that the USMS does not focus on the moment that the LEO discharged his or her weapon. The USMS does in fact consider what occurred at the moment that the LEO discharged his or her weapon. In its deliberations, the USMS Shooting Review Board considers the following: At the time the Deputy U.S. Marshal discharged his or her weapon, did the Deputy have a reasonable belief that the Deputy or another person was in imminent danger of death or serious physical injury from the person who was the subject of the deadly force? The answer to this question may depend on what the Deputy did before discharging his or her firearm, and the USMS does take that into account. However, the USMS judges the action based on the instant at which the firearm was discharged.

Incorporation of Shooting Incidents into Training Curricula:

pp. 45-46:

The application of a USMS policy which deals with discussing what goes on during meetings of the Shooting Review Board appears to need clarification. The report indicates that the DEA sent shooting review files to its training academy for operational and training analysis, but the USMS

did not incorporate lessons learned from shooting incidents into its training curriculum because it was inhibited by USMS policy. Because the USMS is cognizant of the significant training applications of each shooting, the USMS has a representative from its Training Academy as a member of its Shooting Review Board. This allows that person to return to the Academy and incorporate facts from shooting incidents into the USMS curriculum.

The report states, on p. 46, that the USMS supervisory firearms instructor at FLETC, who is a member of the USMS Shooting Review Board, "was prohibited from discussing shooting incident reviews with anyone not a member of the Review Board." The relevant policy states: "Board members will not disclose what is said at board meetings except as required by law or Department of Justice or USMS policy, or as directed by the Director or Deputy Director." The policy prohibits the disclosure of the Shooting Review Board's discussions; however, the Academy instructor is free to discuss the facts of the shooting incidents with other instructors at the Academy. This is so that lessons learned from these incidents are incorporated into the USMS training curriculum. However, to ensure clarity the USMS will specifically instruct the FLETC representative of his/her role in the training process.

Sharing Information:

p. xii, p. 47:

The report indicates that since DOJ components do not share lessons learned from their shooting incidents, they duplicate efforts. The report indicates that both the USMS and DEA noticed that vehicles were involved in many of their shootings, so they each decided to look into vehicle containment. The report states that if they had "shared information and lessons learned" the DEA could have shared with the USMS the active vehicle containment technique that it developed.

While the USMS agrees that sharing lessons learned is a good idea, the USMS did ask the FBI, DEA, and other law enforcement agencies for information they had developed on containing vehicles. As a result of the USMS request, DEA forwarded a training tape on vehicle containment to the USMS. However, because of the differences in the field investigations, the DEA technique may not always be appropriate for a USMS fugitive investigation.

Actions Taken in Response to the Audit:

The report indicates that some changes were made by the USMS after the audit began. Footnote 8 on p. 6 states, "The USMS created its Office of Inspection during our review." Please note that the USMS, which had an office of Internal Affairs before the audit, completed a reorganization which incorporated authorities of the Office of Internal Affairs into the Office of Inspection. Likewise, the USMS decision to prepare summaries of shooting cases for all operational personnel (p. 45) and the Shooting Review Board's decision to hold meetings every three months (fn. 11, p. xi) were changes in progress.

Responses to Recommendations 5.A. - 5.C

Recommendations specific to the USMS are addressed below:

Recommendation 5.A:

Streamline shooting incident reporting system to improve consistency and timeliness in reporting shooting incidents.

Response: (*Agree.*) Although USMS policy requires a written report within 24 hours, extenuating circumstances at the critical incident scene may not allow managers to send a written report until the next business day. However, Headquarters Communications Center records can verify that every shooting incident was reported via telephone within the appropriate time frame.

Further, decentralization is not a factor in the timeliness of the reporting of shooting incidents, because district offices are making immediate notifications of shooting incidents through the USMS Communications Center.

However, procedural changes have now been implemented that will improve the consistency and timeliness of the documentation of shooting incidents. Specifically, the Chief, USMS Communications Center, will forward copies of all Significant Incident Report Forms involving weapons discharges to the Office of Inspections. (See Attachment 1.) This form contains sufficient initial relevant detail regarding the incident to allow senior managers to make informed judgements regarding the necessity, type, and complexity of subsequent inquiries.

Additionally, the USMS shooting policy reviewed by the OIG Audit Team was being updated during the OIG review to reflect a recent reorganization of the Office of Inspection. These policy changes were initiated prior to the Shooting Review Audit. (See Attachment 2.)

Recommendation 5.B:

Establish a formal reporting relationship with the Civil Rights Division (CRD).

Response: (*Agree.*) Although USMS has relied on the DOJ/OIG Investigations Division (OIG) in the past to report incidents to the CRD, we acknowledge it is our responsibility and will establish a formal reporting relationship with the CRD.

As noted in the OIG report, USMS reports all incidents to the OIG. The OIG assumed responsibility for reporting incidents to the CRD to avoid duplication and retained responsibility for any criminal investigation of USMS employees. The OIG sends USMS written confirmation of its notification to CRD. (See Attachment 3.)

In order to assure full compliance with the Department's CRD authority to review and prosecute complaints of violations of federal civil rights statutes, USMS will assume the responsibility of

forwarding all reports of death or bodily injury directly to the CRD, regardless of any formal reporting relationship.

Recommendation 5.C:

Consider including outside members on USMS Shooting Review Board.

Response: (Agree.) USMS concurs that there is a need to ensure that DOJ Shooting Review Boards are independent and objective and that their decisions and recommendations are free of the control or direction of component management. For that reason, as noted in the OIG report, the USMS Shooting Review Board continues to include representatives from several levels of the organization, i.e., U.S. Marshals, Chief Deputy U.S. Marshals, Supervisors, Deputy U.S. Marshals, Training Academy personnel, Investigative Services Division personnel, and a representative from the Office of General Counsel, each of whom is able to assess the facts objectively.

USMS will consider including outside members on the Shooting Review Board in the future, although the current consensus is that the thorough, factual, and unbiased investigations conducted by local law enforcement agencies provide sufficient objectivity for accurate and objective analysis.

APPENDIX XII: OIG ANALYSIS OF THE USMS RESPONSE

On August 9, 2004, the Office of the Inspector General (OIG) sent copies of the draft report to the United States Marshals Service (USMS) with a request for written comments. The USMS responded to the OIG in a memorandum dated September 7, 2004, and concurred with all of the recommendations. Our analysis of the USMS's response follows.

RECOMMENDATIONS

Recommendation 5A: Streamline the shooting incident reporting system to improve the consistency and timeliness in reporting shooting incidents.

Summary of USMS Response. The USMS agreed with the recommendation and has implemented procedural changes to improve the consistency and timeliness of shooting incident reports. Specifically, the Chief, USMS Communications Center, will forward all Significant Incident Reports involving shooting incidents to the Office of Inspections. These reports will contain sufficient information to make decisions on the necessity, type, and complexity of subsequent investigations.

Status of Recommendation. Recommendation 5A is Resolved – Open. The actions planned by the USMS are responsive to the recommendation. We will close this recommendation when the USMS provides copies of the Significant Incident Report Forms on the next six USMS shooting incidents.

Recommendation 5B: Establish a formal reporting relationship with the Civil Rights Division (CRD).

Summary of USMS Response. The USMS agreed with the recommendation and acknowledged its responsibility and intent to establish a formal reporting relationship with the CRD. The USMS explained that in the past, the USMS relied on the OIG Investigations Division to report shooting incidents to the CRD and provided a case example as supporting evidence of this practice.

Status of Recommendation. Recommendation 5B is Resolved – Open. The actions planned by the USMS are responsive to the recommendation. We will close this recommendation when the USMS provides a copy of the document formalizing the agreement with the CRD.

Recommendation 5C: Consider including outside members on the USMS Shooting Review Board.

Summary of USMS Response. The USMS agreed with the recommendation and will consider including outside members on future Review Boards, but stated that the use of criminal investigations conducted by state and local law enforcement agencies provides sufficient objectivity for accurate and objective analysis.

Status of Recommendation. Recommendation 5C is Resolved – Open. The action planned by the USMS is responsive to the recommendation. We will close this recommendation when the USMS provides a copy of the document recording management’s decision regarding the inclusion of outside members on the Review Board.

COMMENTS ON THE FINDINGS OF THE REVIEW

The USMS provided additional information on four of the findings made in the report.

1. Application of the Standard for Use of Deadly Force

Summary of USMS Response. The USMS stated that its Review Board considers what occurred at the moment the Deputy Marshal discharged his or her weapon and the actions of the Deputy Marshal before discharging his or her firearm to determine if the use of deadly force was reasonable.

OIG Analysis. We did not state that the USMS Review Board did not consider the moment the Deputy Marshal discharged his or her weapon, but rather that the Review Board also considered the circumstances leading to the incident and the reasonableness of the Deputy Marshal’s use of deadly force in light of those circumstances. The USMS confirmed this by stating in its response:

In its deliberations, the USMS Shooting Review Board considers the following: At the time the Deputy U.S. Marshal discharged his or her weapon, did the Deputy have a reasonable belief that the Deputy or another person was in imminent danger of death or serious physical injury from the person who was the subject of the deadly force? The answer to this question may depend on what the Deputy did before discharging his or her firearm, and the USMS does take that into account.

2. Incorporation of Shooting Incidents Into Training

Summary of USMS Response. The USMS stated that it did not intend to prohibit the Training Academy's Review Board member from discussing the facts of shooting incidents with other instructors at the Academy. The USMS reported that its policy, which does prohibit Review Board members from disclosing Board deliberations, was not intended to prevent Training Academy instructors from utilizing the facts of shooting incidents in training.

OIG Analysis. Our review found that it was the understanding of the Training Academy Review Board member that he was prohibited from disclosing the facts of specific shooting incidents. We agree with the USMS that this interpretation of the USMS policy should be corrected and shooting incident examples should be utilized in training.

3. Sharing Information on Shooting Incidents

Summary of USMS Response. The USMS reported that it did ask the FBI, the DEA, and other law enforcement agencies for information on vehicle containment and that the DEA provided the USMS with a training video.

OIG Analysis. We acknowledge that the USMS gathered information related to vehicle containment from other components and found that the DEA technique for vehicle containment may not always be appropriate for a USMS fugitive investigation. However, the USMS has not provided any information on its efforts to develop vehicle containment techniques that are appropriate for USMS fugitive investigations and its efforts to train Deputy Marshals in those techniques. As we noted in the report, the purpose of aggregating data is to identify problems and long-term trends so that components can proactively test and implement new tactical techniques.

4. Actions Taken in Response to the Review

Summary of the USMS Response. The USMS stated that its decision to create an Office of Inspections, prepare summaries of shooting incidents for all operations personnel, and hold Review Board meetings every three months was not based on the OIG's review.

OIG Analysis. In our report, we noted that during our review the USMS created the Office of Inspections, began to prepare shooting summaries, and began holding quarterly Review Board meetings. We did not state that the USMS took the actions in response to our review. It is our standard practice to acknowledge ongoing efforts of components to improve operations related to our reviews.