



May 26, 2017

Mr. Dustin Brown
Acting Deputy Director
Office of Management and Budget

Ms. Linda Springer
Acting Executive Chair
Council of the Inspectors General on Integrity and Efficiency
Office of Management and Budget

Mr. Brown and Ms. Springer,

As Chair of the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), I am pleased to provide you this summary of the Committee's legislative priorities for the 115th Congress. We appreciate your feedback, and thank you in advance for your support of these efforts.

The CIGIE Legislation Committee (or Committee) is dedicated to providing helpful and timely information about congressional initiatives to the Inspector General (IG) community; soliciting the views and concerns of the community in response to congressional initiatives and requests; and presenting views and recommendations to congressional entities and the Office of Management and Budget on issues and initiatives of interest. While a number of our prior legislative priorities were addressed in the Inspector General Empowerment Act,¹ the Committee continues to advocate legislative proposals that enhance the work of IGs. Presented below is a list of legislative proposals that CIGIE considers a high priority to strengthen oversight of Federal programs or resolve challenges that IGs face under current law.

One matter of great interest to both CIGIE and Congress is strengthening whistleblower rights and protections. CIGIE supports repealing the sunset provision for the Establishment IG Whistleblower Ombudsman function enacted through the Whistleblower Protection Enhancement Act. CIGIE looks forward to engaging with Congress as it looks to repeal that sunset provision and further enhance the role of Offices of Inspector General (OIGs) in educating and protecting whistleblowers.

As Congress considers appropriate funding levels for agencies and their respective OIGs, the Committee will continue to encourage appropriately prioritizing risk-based oversight. Legislatively mandated reviews and congressional requests for information can and should be

¹ Pub. L. 114-317 (Dec, 16, 2016).

tailored to meet the oversight needs of Congress while allowing for the most efficient use of OIG resources. This is particularly important given the finite resources that each OIG possesses in relationship with the scope of the programs it oversees. We have enjoyed a constructive dialogue with congressional oversight committees about legislative mandates and hope to continue that dialogue as we have in past sessions of Congress.

Further, the CIGIE Legislation Committee looks forward to discussing providing CIGIE with a direct appropriation. Since its establishment following the Inspector General Reform Act of 2008, CIGIE has made significant strides in building the necessary infrastructure to carry out its multifaceted mission, including hiring staff to manage its operations, establishing a comprehensive training institute, adopting a charter, and implementing a 5-year strategic plan. However, the methods used to date to fund CIGIE have not assured it the transparent, stable stream of funding it needs to fully meet its statutory mission. Direct funding would enable CIGIE to hire the personnel necessary to undertake these important activities – activities that will benefit the OIG community by saving money, optimizing work, and supporting CIGIE’s new responsibilities for the Integrity Committee process pursuant to the IG Empowerment Act.

In addition to our support of enhanced whistleblower protections, risk-based oversight, and a direct appropriation for CIGIE, the IG community has a strong interest in several specific legislative proposals. The Committee would welcome the opportunity to provide technical assistance to advance related legislation in these areas:

- A. Protecting cybersecurity vulnerability information.
- B. Testimonial subpoena authority.
- C. Notification to Congress of decision to place an Inspector General on paid or unpaid, non-duty status.
- D. Reforming the Program Fraud Civil Remedies Act.
- E. Amendment to the Privacy Act to facilitate oversight.
- F. Technical Amendments to the Inspector General Reform Act of 2008.

Summaries of CIGIE’s legislative proposals are provided below, and additional relevant information is provided in the enclosure.

A. Protecting Cybersecurity Vulnerability Information

For years, OIGs across the Federal Government have raised serious concerns that information related to Federal agencies’ information security may be unprotected from disclosure under the Freedom of Information Act (FOIA). Although FOIA exemptions apply to classified information and documents compiled for law enforcement purposes, no single exemption covers the varied area of documents that analyze, audit, and discuss in detail the information security vulnerabilities of the Federal Government. Previously, a number of Federal agencies and OIGs used the "high 2" form of FOIA's Exemption 2 to protect this sensitive information, including audit work papers and agency records related to agency information security vulnerabilities. After the Supreme Court’s decision in Milner v. Department of the Navy, this exemption is no longer available. Protecting this information, whether found in records controlled by OIGs or agencies, will help prevent hackers and others from using these vulnerability reports as a roadmap to exploit gaps in Government information systems.

CIGIE is aware of the requirements under the FOIA to take reasonable steps necessary to segregate and release nonexempt information. Here, CIGIE is proposing a narrow protection covering

information that "could reasonably be expected to lead to or result in unauthorized access, use, disclosure, disruption, modification, or destruction of an agency's information system or the information that system controls, processes, stores, or transmits." This language emulates existing FISMA language found in 44 USC § 3552(b)(3), and CIGIE suggests that this intention be included in any legislative history that may be developed.

B. Testimonial Subpoena Authority

The amendment would authorize IGs to subpoena the attendance and testimony by certain witnesses as necessary in the performance of the functions of the IG Act. For example, in cases involving a Federal employee, that employee's resignation can substantially hamper an audit, investigation or other review into matters within the scope of that individual's former responsibilities. The new authority would be most effective in assisting IG work if it does not limit the allowable recipients of a subpoena. Requiring that the testimonial subpoena be necessary for performance of the functions assigned to IGs by the IG Act provides the same limitation found in the IGs' existing authority to subpoena documents. That authority, set forth in section 6(a)(4) of the IG Act, does not specify the recipients to whom IGs may issue subpoenas; rather, it only requires that a subpoena must be necessary in the performance of IG work. However, we agree that the authority should not include current Federal employees in an IG's subpoena purview. Current Federal employees should not be subpoenaed because they are otherwise obligated to provide testimony and cooperate with the Inspector General.

C. Notification to Congress of decision to place an Inspector General on paid or unpaid, non-duty status

Section 3(b) of the IG Act provides a specific process for removal of an IG from office or transfer to another position or location within an "establishment." Similarly, Section 8(G)(e) provides a comparable process for IGs within designated Federal entities. These processes require congressional notification not later than 30 days before any such removal. They provide an unparalleled safeguard to protect the independence of IGs to carry out any audit or investigation, or issue any subpoena during the course of any audit or investigation. However, this safeguard is defeated when an IG is placed on "administrative leave" or "suspended without pay" (i.e., a paid or unpaid, non-duty status) by the President in instances involving an IG of an establishment or an Agency Head in instances involving an IG of a designated Federal entity. CIGIE supports amending the IG Act to establish a congressional notification requirement for use of either paid or unpaid, non-duty personnel actions involving an IG.

D. Reforming the Program Fraud Civil Remedies Act

The Program Fraud Civil Remedies Act (PFCRA) (31 U.S.C. §§ 3801-3812) is often referred to as the "mini False Claims Act" because it provides administrative civil remedies for false claims of \$150,000 or less and for false statements in cases DOJ does not accept for prosecution. Although many of the terms in, and underlying concepts of, the False Claims Act (31 U.S.C. §§ 3729-3733) and the PFCRA are similar, PFCRA cases are adjudicated before Administrative Law Judges (ALJs), unlike False Claims Act cases, which are litigated in Federal court. The False Claims Act allows the Government to recover three times the amount of the false claim, whereas only double damages are available under the PFCRA. Both statutes also allow for recovery of civil money penalties for false claims. However, the False Claims Act allows penalties of \$11,000 per false claim, whereas the PFCRA permits a \$5,000 recovery for each false claim. However, unlike the False Claims Act, the PFCRA authorizes civil money penalties for false statements even if there has been no claim for payment of money.

Use of ALJs can make the PFCRA a potentially faster and lower-cost alternative to recover damages in smaller dollar fraud cases. However, the statute remains a relatively underused tool as noted in a 2012 report from the Government Accountability Office (GAO) entitled: "Program Fraud Civil Remedies Act: Observations on Implementation," GAO-12-275R (January 27, 2012) (hereinafter the "GAO 2012 Report"). According to the GAO 2012 Report, which was based upon a survey GAO undertook of OIGs and interviews with Federal officials, many agencies were not using the PFCRA for several reasons including: a lack of familiarity with the statute, insufficient resources, cumbersome and time consuming procedures, availability of alternate remedies, and the absence of ALJs in certain agencies that could hear PFCRA cases.

In November 2012, CIGIE approved a cross-cutting project to explore ways to increase the use of the PFCRA to deter fraud. A survey that the working group conducted of CIGIE members in 2013 revealed that a number of the concerns identified by GAO remain, underscoring the continuing challenges that inhibit widespread use of the PFCRA to combat fraud. Though the working group focused its efforts on identifying measures to promote the use of the PFCRA within the confines of the current law, to include training for key officials in agencies across the Government, it is widely recognized that statutory changes could improve PFCRA usage. As such, CIGIE proposes several statutory changes, which have been developed in consultation with key stakeholders such as the Armed Services Board of Contract Appeals and Boards of Contract Appeals. The following is a list of specific proposals:

1. Revise the Definition of Hearing Officials.
2. Add a provision to the Act to revise the statute of limitations language in the PFCRA to be consistent with the False Claims Act.
3. Allow PFCRA recovery for "reverse false claims" cases in which a party withholds information material to that party's obligation to pay the Government.
4. Amend the statute to encourage the PFCRA as an alternative for low-dollar False Claims Act claims by specifying that a PFCRA case is an alternate remedy.
5. Add a definition of "material" to the PFCRA that is similar to the False Claims Act.
6. Allow agencies to retain PFCRA recoveries to the extent needed to make them whole.
7. Increase the efficiency of DOJ's processing PFCRA requests for authorization by allowing delegation of PFCRA approval authority at a lower level than the Assistant Attorney General.
8. Increase the dollar amount of claims subject to the PFCRA.

E. Amendment to the Privacy Act to Facilitate Oversight

The Committee proposes amending the Privacy Act of 1974 (Privacy Act) to clarify that the prevention of fraud in Federal benefits programs is an inherent purpose in administering and collecting information for the benefits program. Currently, when an investigation produces evidence that fraud was committed in a Federal benefits program, an IG may submit the investigative reports to their parent agency to take administrative action. Such an investigative report may include records controlled by another agency's Privacy Act system of records. The Office of Legal Counsel of the Department of Justice has opined that the Department of Labor has the exclusive authority to control and limit the disclosure of Federal Employee Compensation Act records held by another agency.² If an agency prohibits the use of records covered by the Privacy Act for administrative purposes

² See Memorandum for the Solicitor, "Whether the United States Department of Labor Has the Authority to Control the Disclosure of Federal Employee Compensation Act Records Held by the United States Postal Service," November 16, 2012.

because fraud prevention is “not compatible with the purpose for which the information was collected,” such outcome could frustrate the capacity of an agency to take administrative action against an employee for defrauding the program. This results in overall reduced accountability and integrity of Federal programs.

The proposed amendment would solve the problem by expanding on the current definition of “routine use” in the Privacy Act to clarify that program records collected by Federal agencies can be used to take administrative action against those who allegedly defrauded a Federal benefits program.

F. Technical Amendments to the Inspector General Reform Act of 2008

The Committee has proposed certain amendments to the *Inspector General Reform Act of 2008* (Reform Act), mainly to codify the following provisions from the Reform Act in the Inspector General Act of 1978:

1. the designated Federal entity inspector general pay provisions set forth in section 4(b) of the Reform Act; and
2. pay provisions for career Senior Executive Service personnel that become inspectors general set forth in section 4(c) of the Reform Act.

Conclusion

The Committee appreciates the opportunity to present to you this summary of important legislative initiatives. We look forward to working with you to advance legislation that will improve IG oversight. Should you have any questions or need more information, please do not hesitate to contact me directly at 202-692-2900.

Sincerely,



Kathy A. Buller
Chair
CIGIE Legislation Committee

CC:

CIGIE Executive Council
CIGIE Members and liaisons