Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

February 20, 2015

The Honorable Beth Cobert
Deputy Director for Management
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Ms. Cobert:

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 114th 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. The Committee continues to advocate legislative proposals that enhance the work of IGs. 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 are detailed below. In addition to the detailed proposals, CIGIE is currently examining the potential impact on IG independence of certain provisions of the Federal Information Technology Acquisition Reform Act. The enhanced authorities granted the Chief Information Officers may conflict with an IG's independent authorities related to budgeting, contracting, and hiring. We will advise you shortly of the results of our examination and whether we will need to propose legislative changes

The Committee also anticipates a continued interest by the Congress in improving the efficiency and transparency of CIGIE's Integrity Committee (IC). The IC serves as an independent review and investigative mechanism for allegations of wrongdoing brought against IGs, designated staff members of an Office of Inspector General (OIG), and the Special Counsel and Deputy Special Counsel of the Office of Special Counsel (OSC). The IG community must maintain the highest levels of accountability and integrity, and the IC strives to review allegations of wrongdoing in a timely, fair, and consistent manner to allow for a full accounting of substantiated allegations.

The IC was newly formed along with CIGIE following enactment of the Inspector General Reform Act of 2008 (P.L. 110-409). Though the IC has been able to fully meet its statutory investigative responsibilities, matters that have been addressed by the IC in recent years have

highlighted certain inefficiencies in its processes. Should a congressional debate ensue relative to adjusting the framework and streamlining the operations of the IC, CIGIE looks forward to providing the IG community perspectives on such legislative proposals to preserve the public's trust in our independent oversight efforts of Federal programs.

As indicated above, the IG community has a strong interest in several legislative proposals and will advocate for their enactment and provide technical assistance to advance related legislation in these areas:

A. Computer Matching Act
B. Paperwork Reduction Act
C. Appropriate Use of Paid or Unpaid, Non-duty Status in Cases Involving an Inspector General
D. Testimonial Subpoena Authority
E. Freedom of Information Act Exemption to Protect Sensitive Information Security Data
F. Program Fraud Civil Remedies Act
G. Technical Amendments to the Inspector General Reform Act of 2008

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

A. Computer Matching Act

This provision would amend the Inspector General Act of 1978, as amended (IG Act) to exempt the Inspectors General and also exempt an agency that is participating in a matching program with the IG from the requirements of the *Computer Matching and Privacy Protection Act of 1988* (CMPPA). The CMPPA amended the *Privacy Act of 1974*, as amended, (Act) 5 U.S.C. 552a, to add certain protections for the subjects of Privacy Act records accessed in computer matching programs. In general, the CMPPA prevents unregulated government access to personal records for purposes unrelated to the legitimate reasons for which the records were collected. A formal Computer Matching Agreement (CMA) is generally required to conduct audits, investigations, or evaluations and inspections, where the review methodology includes computerized comparisons constituting a "matching program" under the Privacy Act. This includes such programs designed to determine benefit eligibility, compliance with benefit program requirements, or recoup improper benefit payments or delinquent debts from current or former beneficiaries. The CMA requirement applies whether the match is between Federal systems of records or those systems and non-Federal agency (State and local) systems of records.

The CMPPA sets forth the procedure that must be followed if an agency is requesting information from another Federal or non-Federal agency, including: (1) the CMA must be reviewed and approved by each agency's Data Integrity Board (DIB); (2) the CMA must include a detailed Cost Benefit Analysis (CBA) that sets out the justification for the program

and the results, including a specific estimate of any savings: and,(3) if the CMA is approved, notice must be published in the Federal Register at least 30 days prior to the match taking place. If, however, the DIB disapproves the CMA, an appeal may be made to the Director of the Office of Management and Budget (OMB). If OMB disapproves a CMA proposed by the agency's IG, the IG may report the disapproval to the head of the agency and to Congress. Anecdotally, the entire process, even with DIB approval has been known to take more than a year to complete. It is important to note that the DIB of both agencies have to approve the CMA.

Members of the IG community have expressed concerns that although the IG Act established OIGs as independent offices within their host agency, provisions of the CMPPA threaten the principle of independence. For example, the CMPPA requires IG offices to obtain the approval of the agency's DIB to implement a computer matching agreement can impair independence, notwithstanding the ability to appeal a DIB decision to OMB. Although the CMPPA includes each IG as a member of his or her host agency's board, the remaining board members are not officials from the IG office. Accordingly, requiring these agency officials to approve an IG's proposed data match could allow a board to prevent the match, or to impose undue restrictions or conditions on the match, thereby compromising the IG's independent ability to determine the scope and methodology of the IG office's review. The time and effort associated with appealing a DIB decision to OMB could effectively preclude an IG from carrying out a match in a timely fashion and thereby minimize or eliminate the relevance of the match or encourage IGs to reluctantly accept conditions imposed by a DIB. Also, requiring approval from the DIB provides other agency officials who are not on the board advance notice regarding the details of IG planned actions, which could impair the performance of independent sensitive or confidential work by the IG. (See GAO, *Data Analytics For Oversight & Law Enforcement*, GAO-13680SP, p. 11-12 (July 2013), found at http://www.gao.gov/products/GAO-13-680SP).

The Do Not Pay Initiative of the *Improper Payments Elimination and Recovery Improvement Act of 2012* (IPERIA) streamlined this process to a degree. For example, a CMA may be with multiple agencies and its length was extended from a maximum of 18 months to a maximum of 3 years. Unfortunately, even with IPERIA, it appears IGs are still hindered in their efforts to investigate and prevent improper payments and fraud within their agency. IGs must still enter into a CMA with another Federal agency or non-Federal agency and submit it to each agency's DIB. Also, while a DIB is to respond to the proposed CMA within 60 days of submission, the DIB may still not approve the proposed CMA requiring the IG to appeal to OMB. In addition, while a detailed CBA, with a specific estimate of any savings under the CMA, is not required, a CBA is still required pursuant to OMB guidance issued on IPERIA. Finally, as it requires the DIBs of both agencies to the CMA to approve the Agreement, this process is still laborious, requiring a substantial expenditure of time. Even with the streamlined process in IPERIA, this is still a protracted process. This delays IGs from timely receiving needed information for an investigation, audit, or evaluation and inspection, thus delaying or severely hampering the IGs in their efforts to investigate and prevent improper payments and fraud within their agencies.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) requires a lengthy and burdensome approval process for the collection of information by a Federal agency. The CIGIE has recommended that the PRA be amended to exempt the Federal IG offices from its requirements for the purpose of collecting information during any investigation, audit, inspection, evaluation, or other review conducted by a Federal IG.

The IG Community has advocated for over a decade for a change to the PRA in order to facilitate the independent reviews of IGs. Specifically, our concern is that the PRA requires that information collections, such as OIG surveys, be subject to approval from a "senior official" of the agency and then from OMB. Subjecting IGs to the review process requirements of the PRA conflicts with their statutory mission to be independent and nonpartisan. Additionally, the protracted approval process affects IG's ability to carry out audits and evaluations required by members of Congress, through law or by requests, in a timely and effective manner.

While agency heads may generally supervise IGs, they are not to "prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation." We recognize OMB's wealth of knowledge in the formulation and conduct of surveys. Indeed, our community may wish to informally seek its advice in the areas of survey formats, techniques, and methodologies. However, application of the PRA to IGs has both process and substance implications, and we continue to support an exemption to the PRA for IGs

C. Appropriate Use of Paid or Unpaid, Non-duty Status in Cases Involving an Inspector General

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 similar specific process for IGs within designated Federal entities. These removal processes require Congressional notification not later than 30 days before any such removal. These removal standards provides an unparalleled safeguard to protect the independence of IGs to carry out, or complete any audit or investigation, or issue any subpoena during the course of any audit or investigation. 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. The existence of an investigation by either the CIGIE IC or other investigative entity alone should not be a basis or justification for placing an IG in a paid or unpaid, non-duty status. CIGIE supports an amendment to the IG Act to establish a Congressional notification requirement for use of either paid or unpaid, non-duty personnel actions involving an IG, to establish a clear

framework for the limitations on purpose of such leave for IGs, and to establish a time limitation for use of such leave in the interest of an exigent circumstance.

D. Testimonial Subpoena Authority

The amendment would authorize IGs to subpoena the attendance and testimony by certain witnesses, including any former Federal employee necessary in the performance of the functions of the IG Act. In the absence of such authority, the resignation of Federal employees has in some instances substantially hampered an audit, investigation or other review into matters within the scope of that individual's responsibilities. The new authority is most effective in assisting IG work if it does not limit the allowable recipients of a subpoena, but rather solely require that the subpoena be necessary in performance of the functions assigned to IGs by the IG Act. That would make the testimonial subpoena authority the same as 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, but rather only requires that a subpoena must be necessary in the performance of IG work. However, we agree that the authority should not include Federal employees in an IG's subpoena authority. Current Federal employees should not be subpoenaed because they are otherwise obligated to provide testimony and cooperate with the Inspector General.

E. Freedom of Information Act Exemption to Protect Sensitive Information Security Data

Since the Supreme Court's 2011 decision in Milner v. Department of the Navy, OIGs across the Federal government have raised serious concerns that information related to Federal agencies' information security may be unprotected from disclosure under the FOIA. Prior to Milner, a number of Federal agencies, including OIGs, used the "high 2" form of FOIA's Exemption 2 to protect this sensitive information, including audit workpapers and agency records related to agency information security vulnerabilities. After Milner, this exemption is no longer available. Although other FOIA exemptions apply to classified information and documents compiled for law enforcement purposes, no single exemption currently covers the extremely large area of documents that analyze, audit, and discuss in detail the information security vulnerabilities of the Federal government.

CIGIE is proposing a narrow exemption 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 tracks with existing FISMA language found in 44 USC § 3552(b)(3), and it is suggested that this intention be included in any legislative history that may be developed.

F. Program Fraud Civil Remedies Act

The 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 treble the amount of the false claim(s), whereas only double damages are available under the PFCRA. Both statutes also allow for recovery of civil money penalties for false claims; whereas the False Claims Act allows penalties of $11,000 per false claim, the PFCRA permits a $5,000 recovery for each false claim. Unlike the False Claims Act, however, 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 underutilized tool as noted in a 2012 report from the Government Accountability Office (GA0) 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 GAO concerns remain, thus 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 government, it is widely recognized that statutory changes could improve PFCRA usage. As such, CIGIE is proposing 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.
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 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.

G. 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):

- Codify the following provisions from the Reform Act in the Inspector General Act of 1978: (a) the designated Federal entity inspector general pay provisions set forth in section 4(b) of the Reform Act; (b) pay provisions for career Senior Executive Service personnel that become inspectors general set forth in section 4(c) of the Reform Act; and (c) the authority of the Integrity Committee to investigate allegations of wrongdoing against the Special Counsel or Deputy Special Counsel provided in section 7(b) of the Reform Act.

- Authorize all executive branch OIGs to fund or participate in CIGIE activities (the current language "department, agency, or entity of the executive branch" does not include certain designated Federal entities).

- Replace "agency" with "Federal agency, establishment or designated Federal entity" so that non-agency OIGs may promise to keep anonymous the identity of parties filing complaints.

- Clarify that reports that OIGs must post on their web-sites includes audit reports, inspection reports and evaluation reports, consistent with semi-annual reporting requirements.

- Repeal parts of the 2009 Omnibus Appropriations Act that conflict with codified Reform Act language regarding OIG websites.

- Amend Section 11(d) of the IG Act to designate the Special Counsel and the Director of the Office of Government Ethics, or their designees, as members of the Integrity Committee.

- Correct various typographical errors.

The Committee appreciates the opportunity to present to you this summary of important legislative initiatives. We look forward to working with you to advance our legislative

initiatives. Should you have any questions or need more information, please do not hesitate to contact me directly at 202-205-6586.

Sincerely,

Peggy E. Gustafson
Inspector General
U.S. Small Business Administration

Chair, Legislation Committee
Council of the Inspectors General on Integrity and Efficiency

Enclosure

Cc: CIGIE Executive Committee
CIGIE IGs and Liaisons