

## **Council of the Inspectors General on Integrity and Efficiency Q&A Guide for Addressing Inspector General Act §4(e) and §8M Reporting and Posting Requirements**

The Inspector General Empowerment Act of 2016 (IGEA) establishes new requirements for submitting and posting certain Inspector General (IG) documents. These requirements amend portions of §4 and §8M of the Inspector General Act (IG Act). The requirements discussed herein are in addition to other IGEA requirements regarding the Inspector General Semiannual Report to Congress (SARC), and the website posting requirements under the IG Act (*i.e.*, requirements which are the subject of a separate implementation guidance document). To assist Offices of Inspector General (IG Offices) with addressing these new requirements, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) created an IGEA Reporting Working Group (Working Group). The Working Group has created this implementation guide, primarily in a “Q&A” format. This guide is not binding on any IG Office. Rather, it is designed to assist IG Offices in complying with the new requirements. Moreover, with respect to the provisions of both the IGEA and the IG Act discussed herein, the guide does not represent the official legal interpretation of CIGIE, nor that of any CIGIE members. Each IG Office should make its own independent assessment of how to address the IGEA’s new requirements for submitting and posting certain documents in accordance with §4(e) and §8M of the IG Act.

The Q&A format herein is organized according to specific questions that arise from the IGEA’s provisions relating to the duty to submit and post certain documents. After incorporating the IGEA verbiage into the IG Act, the pertinent portions of the IG Act, as amended, appear below in italicized green font.

### ***§4. Duties and Responsibilities; report of criminal violations to Attorney General***

*(e)(1) In carrying out the duties and responsibilities established under this Act, whenever an Inspector General issues recommendations for corrective action to the agency, the Inspector General -*

*(A) shall submit the document making the recommendation for corrective action to -*

*(i) the head of the establishment;*

*(ii) the congressional committees of jurisdiction; and*

*(iii) if the recommendation for corrective action was initiated upon request by an individual or entity other than the Inspector General, that individual or entity;*

*(B) may submit the document making a recommendation for corrective action to any Member of Congress upon request; and*

*(C) not later than 3 days after the recommendation for corrective action is submitted in final form to the head of the establishment, post the document making a recommendation for corrective action on the website of the Office of Inspector General.*

*(2) Nothing in this subsection shall be construed as authorizing an Inspector General to publicly disclose information otherwise prohibited from disclosure by law.*

### ***§8M. Information on websites of Offices of Inspectors General***

*(b) Requirements for Inspectors General Websites.-*

*(1) Posting of reports and audits.-The Inspector General of each Federal agency and designated Federal entity shall-*

*(A) not later than 3 days after any audit report, inspection report, or evaluation report (or portion of any such report) is submitted in final form to the head of the Federal agency or the head of the designated Federal entity, as applicable, post that report (or portion of that report) on the website of the Office of Inspector General;*

#### **1. Question: What is meant in §4(e)(1) by “recommendations for corrective action”?**

**Response:** The submission requirements set forth in §4(e)(1)(A) and posting requirements set forth in §4(e)(1)(C), when triggered, remain subject to the posting limitations set forth in §4(e)(2). The triggering event occurs whenever an IG Office<sup>1</sup> completes an output product<sup>2</sup> and issues it in final form<sup>3</sup> containing “recommendations for corrective action” to the agency it oversees. In defining which output product contains “recommendations for corrective action” one could consider whether the output product addresses problems and deficiencies relating to the administration of agency programs and operations. If so, one might also consider whether the output product proposes actions that the agency should do or refrain from doing in order to remedy or mitigate such problems and deficiencies. While there is no rigid test, these considerations should capture most situations when the scope of the term “recommendations for corrective action” is not clearly evident.

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<sup>1</sup> Because §6(a)(9) of the IG Act authorizes IGs to enter into contracts and other arrangements for audits, studies, analyses and other services, the triggering event applies equally to the IG’s deliverables as well as to those of the party with whom the IG has procured the services that resulted in the deliverable in question.

<sup>2</sup> The statute uses the word “document” rather than “output product.” Since the word “document” is discussed separately in question #2, this Q&A uses the term “output product” for purposes of isolating “documents” from “recommendations for corrective action” and addressing those terms separately.

<sup>3</sup> In this context, the term “issues it in final form” describes the point at which the IG Office, or the duly authorized party acting on behalf of the IG, releases to the appropriate party at the IG’s agency, either electronically or in hard copy, a final version (non-draft) of the output product.

At least one IG Office has adopted the approach of marking the output products with captions that specify if the product does or does not contain recommendations for corrective action.<sup>4</sup> Some IG Offices have expressed an interest in establishing categories of output products that typically contain “recommendations for corrective action.” Although such a product-based approach offers the apparent benefit of simplicity, IG Offices could also consider a content-based approach. Whether a product-based or a content-based approach would best serve the needs of individual IG Offices is a matter best left to the leadership of each IG Office.

For IG Offices interested in adopting a product-based approach or a content-based approach, the Working Group has compiled two lists, neither of which is intended to be definitive. The first list includes examples of output products that potentially trigger the §4(e) reporting and posting requirements for “recommendations for corrective action.” The second list includes examples of output products that likely would not trigger the §4(e) reporting and posting requirements for “recommendations for corrective action.”

**Within the ambit of §4(e), “documents that contain recommendations for corrective action” could include the following examples:**

- A. Audit, evaluation, inspection, investigative, and other reports which recommend any of the following:
  - changes to agency programs or operations to improve economy, efficiency, effectiveness, or compliance
  - changes/updates to agency policy and procedures
  - recovery of questioned costs or funds put to better use
  - study of a subject area
  
- B. Products prompting 7-day letters,<sup>5</sup> depending on subject matter;

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<sup>4</sup> Under this approach, the marking of the output products can be factored into the workflow timelines. As such, marking the captions can become an integrated step in the staffing process for each output product.

<sup>5</sup> Some points to consider where a 7-day letter is concerned: §5(d) of the IG Act contains the 7-day letter requirement for agencies (not IGs) to report to Congress after an IG communicates to the head of the establishment, about the IG’s awareness of “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment.” The head of the establishment is then required to transmit any such report to the appropriate committees or subcommittees of Congress within 7 calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate. Over the years there has arguably been some conflating of the 7-day letter that an agency is required to submit to Congress with the IG’s initial output product which then prompted the need for the 7-day letter to Congress. Typically, the output product prompting the 7-day letter requirement has addressed failures of an agency to provide information to IGs, or other significant problems, abuses or deficiencies, which may or may not include any recommendations for corrective action. Some of the problems may already have been reported by an IG Office pursuant to a separately issued output product. If the initial output product issued by the IG Office contains recommendations for corrective action, it should be reported pursuant to §4(e) of the IG Act. On the other hand, this initial output product could be considered to fall into the “other reports” containing recommendations for corrective action. For these reasons, this guidance considers the possibility that products prompting 7-day letters may or may not fall within the ambit of §4(e), depending on the fact-specific situation.

- C. Interim communications, including early alerts to management, if the document includes recommendations and is not deliberative and pre-decisional; and/or
- D. Reports derived from non-audit services where the related output product contains recommendations for corrective action.

**The following communications/reports serve as examples which would generally fall outside the ambit of “recommendations for corrective action” as contemplated by §4(e):**

- A. Peer Review communications and internal IG quality reviews, regardless of the matter under review, as long as the communications do not result in the IG issuing recommendations for corrective action to the agency. (Note that in such situations, the reporting responsibilities regarding certain peer review information under IG Act §§5(a)(14)-(16) would still apply.)
- B. Personnel-related communications without recommendations for corrective action relating to the programs and operations of the establishment (*e.g.*, an administrative investigative report of investigation (ROI) indicating that the information contained therein is for management’s consideration and action if/as appropriate; such ROI<sup>6</sup> could be marked as containing no recommendations for corrective action);
- C. “Interim” audit/inspection/evaluation memoranda, or reports which contain recommendations for corrective action, if the IG believes the communication (*e.g.*, “management letters”; “alert memos”) is still deliberative and pre-decisional;<sup>7</sup>
- D. Communications making “observations” which the IG Office provides to agency management, but which state that no management response is required, and which do not contain recommendations for corrective action;<sup>8</sup> and/or
- E. Communications with Congress on recommended changes to draft/proposed legislation, agency regulations or policies. Note that in some instances, the essence of such communications may need to be reported under IG Act §4(a)(2) as part of the SARC.

**2. Question: What is a “document” for purposes of IG Act §4(e)?**

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<sup>6</sup> With an ROI, it is important to keep in mind that §5(a)(19) and §5(a)(22) of the IG Act now require IG Offices to report in the SARC certain information about senior government employees. These requirements are discussed in the CIGIE SARC Q&A Guide, produced separately in March 2017.

<sup>7</sup> There may be situations when “predecisional” vs. “final form” is not clear. In such situations, close coordination with the office of counsel is advisable.

<sup>8</sup> Here again, the facts of the individual situation should be considered; merely not seeking an agency response does not create a bright-line rule but rather, is an indicator of an output product which may not rise to the level of a recommendation for corrective action.

**Response:** The IG Act, does not define “document.” The Working Group notes, however, that unlike other IG Act provisions, §4(e) does not refer to specific types of IG output products, such as audit reports. Rather, the relevant inquiry, for purposes of §4(e), is the content of a communication issued to an agency (*i.e.*, whether it contains a recommendation for corrective action) and not its form or how an IG Office labels it. The IG Act does, however, refer to specific types of IG output products in §8M(b)(1)(A), by mandating website posting of “any audit report, inspection report, or evaluation report ... [submitted to the head of the agency or designated federal entity] in final form.” Accordingly, the Working Group suggests a broad interpretation of the word “document” for purposes of §4(e). Applying a broad interpretation, a document could be any written, printed, or retrievable electronic form of communication that an IG Office issues to an agency. A non-exhaustive list includes letters, memoranda (including alert memoranda), reports, and possibly emails. The Working Group, however, has not attempted to list all types of items that could be considered a document.

**3. Question: When the IG submits a document making a recommendation for corrective action, who is the “head of the establishment” for purposes of IG Act §4(e)?**

**Response:** The IG Act defines the phrase “head of the establishment” in §12(1) but does not include the IG Offices at designated federal entities (DFEs). Further guidance is available in IG Act §8G(a)(4), which defines the head of the DFE. Pursuant to §8G(g)(1) of the IG Act, §4, including the new requirements in §4(e), applies to DFEs, and the phrase “head of the designated Federal entity” is substituted for “head of the establishment.” Some IG Offices may need to consult with a list published in the Federal Register by the Office of Management and Budget pursuant to §8G(h)(1) to identify the relevant head of the establishment or head of the DFE. The Working Group also suggests consulting with legal counsel about any questions specific to an individual IG Office’s determination of who is the “head of the establishment” or the “head of the DFE” for these purposes.

**4. Question: If an IG Office provides a document containing a recommendation for corrective action to an agency official more directly responsible for responding to that recommendation, does that satisfy the requirement to “submit the document ... to the head of the establishment” within the meaning of §4(e)?**

**Response:** Another way to present this question could be, “should an IG Office submit a recommendation for corrective action only to the “head of the establishment” and the other parties identified in §4(e)?” The Working Group notes that the IG Act specifically lists in §4(e)(1)(A) the parties to whom IGs must submit documents containing corrective action. Any additional disclosures, that are permissive rather than mandatory, should be made in consultation with each IG office of counsel, in accordance with disclosure law and regulations, and applicable guidance. One of the required disclosures is to the “head of the establishment,” which is a defined term, as more fully discussed under question #3, above. Moreover, the language in the §4(e)

reporting requirements is consistent with §4(a)(5), which requires each IG “to keep the head of such establishment and the Congress fully and currently informed . . .” The Working Group does, however, offer the suggestion that for purposes of §4(e), the phrase “head of the establishment” should be interpreted in accordance with the text of the IG Act. Although there may be an inclination to identify “head of establishment” on the basis of identifying particular agency officials for whom receipt might seem most appropriate, this approach would appear to fall short of the “head of the establishment” requirement.

As for submitting the document in question to agency officials other than the head of the establishment, the Working Group notes that §4(e) does not *restrict* an IG Office from providing a document containing “recommendations for corrective action” to only the “head of the establishment” and the other parties identified in §4(e). Indeed, the text itself suggests that such documents may in fact be initially issued to other agency officials since the text refers to recommendations for corrective action that are issued “to the agency” and not “to the establishment.” The Working Group suggests that IG Offices are free to continue their established practices of issuing reports to those whom they determine are most relevant for acting upon the recommendations for corrective action. If those individuals are not those listed in §4(e)(1)(A), then IG Offices need to also transmit reports to those listed in §4(e)(1)(A). For example, an agency with multiple components could submit an audit report containing recommendations for corrective action related to one specific component to the head of the establishment and also provide copies to relevant officials within that specific component.

**5. Question: §4(e) requires online posting of a recommendation for corrective action not later than 3 days after it is submitted to the head of the establishment. What is meant by “not later than 3 days”? Should “3 days” be calculated based on calendar or business days?**

**Response:** The IG Act does not specify how time periods referenced within the Act should be calculated. In the absence of a statutory definition, IG Offices cite various reasons for interpreting “3 days” as either “3 calendar days” or as “3 duty days.” For those IG Offices interested in reconsidering the interpretation of the 3-day rule mandated in IG Act §4(e)(1)(C) for posting documents making a recommendation for corrective action), and IG Act §8M(b)(1)(A)(for posting audit, inspection and evaluation reports submitted in final form),<sup>9</sup> the Working Group offers the following list of considerations. This list is not, however, intended to be exhaustive. Moreover, different factors may offer more or less relevance to different IG Offices. Ultimately, each IG

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<sup>9</sup> The IG Act, §8M specifies requirements for IG websites and applies equally to IG agencies and DFEs. IG Act, §8M(b)(1)(A) sets a requirement to post any audit report, inspection report, or evaluation report (or portion of any such report) not later than 3 days after such report is submitted in final form to the head of the Federal agency or DFE. This 3-day requirement applies whether or not there are recommendations for corrective action, as contemplated in §4(e).

Office should consistently apply an interpretation that not only fits its business needs but is also consistent with the law.

- Rule 6 of the Federal Rules of Civil Procedure dictates that calendar days should be used for any time period found in a statute that does not specify a method of computing time. If the last day of the period falls on a Saturday, Sunday or legal holiday, then the period continues to run until the next business day.<sup>10</sup>
- To the extent that the IG Act sets limits such as 30 or 60 days, the consistent interpretation within the IG community has been to count those days as calendar days. That being the case, some IG Offices see any attempt to read “business days” into a 3-day rule as inconsistent with the common practice of interpreting 30 or 60 days as calendar days.
- Some IG Offices do not have control over their own websites and rely on their agency and/or use contractors for their publication duties. Thus, meeting a publication requirement of 3 calendar days would prove difficult, especially if the IG Office issues a high volume of reports.
- Strict adherence to a rule of 3 calendar days could also trigger a need for overtime, or other similar measures, if any of the 3 calendar days should include a weekend or a legal holiday.
- Adopting a “calendar days” interpretation could lead IGs to delay providing recommendations to the head of the establishment to prevent the “3 day” deadline from falling on a weekend or holiday. For example, if a recommendation were finalized on a Thursday, an IG Office may opt to hold the transmittal of the recommendation to the Agency until Monday, so that the publication of the recommendation would not be due on that Sunday.
- Adopting a “business days” interpretation would ensure that IGs do not run afoul of the “3 day” publication requirement when the government is shut down (*i.e.* during snow days, etc.).
- Some IG Offices contract out their audit work to independent CPA firms. In these situations, the IG Offices do not have much control over the date when the work is in final form and ready to be issued. Holding it an extra few days so as to be able to issue it early in the week arguably results in unnecessarily delaying the release of valuable information.

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<sup>10</sup> Federal Rules of Civil Procedure 6(a): (a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. (1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time: (A) exclude the day of the event that triggers the period; (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

- Some IG Offices choose not to issue reports later in the week, out of concern that reports issued close to the weekend could be interpreted as an attempt to “bury” the information.
- Some IG Offices expressed a concern that issuing reports late in the week (Thursday or Friday) does not allow the agency much duty-day time to prepare a response to any media inquiries that may result from the report. Thus out of a sense of fair play, some IG Offices try to avoid issuing reports late in the week.
- For IG Offices with these two previous concerns, the practice of issuing reports early in the week tends to moot the question of 3 calendar days vs. 3 duty days.

**6. Question: Does §4(e)(2) allow IG Offices to protect information from public disclosure?**

**Response:** This subsection allows IG Offices to withhold from public disclosure information that is prohibited from disclosure by any law. For example, IG Offices that produce IT security reports are encouraged to consult with legal counsel on the applicability of 44 U.S.C. §3555(f) in order to protect sensitive IT security information. As a caveat, protection from the public disclosure mandated in the IG Act should not be confused with disclosures in response to a FOIA request. The scope of this Q&A guide does not extend to a FOIA analysis.