



March 22, 2019

The Honorable Margaret Weichert
Executive Chair
Council of the Inspectors General on Integrity and Efficiency
Office of Management and Budget

Ms. Weichert,

As Chair of the Legislation Committee (the 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 116th Congress. We appreciate any feedback you may have and look forward to your support for the advancement of these initiatives.

As background, our Committee is dedicated to providing helpful and timely information to the Inspector General (IG) community about congressional initiatives; soliciting the views and concerns of the IG community in response to congressional initiatives and requests; and presenting views and recommendations to congressional entities and the Office of Management and Budget on legislative matters. The Committee provides technical assistance on legislative proposals that enhance the work of IGs and, more generally, government oversight. Presented below is a list of legislative proposals that CIGIE considers of high priority to strengthen oversight of Federal programs or resolve challenges that IGs face under current law.

In addition to the CIGIE Legislative Priorities described below, the Committee works with stakeholders on general legislative matters that affect the IG community. For example, as Congress continues to consider appropriate funding levels for agencies and their respective Offices of Inspectors General (OIGs), the Committee will continue to encourage appropriately prioritizing risk-based oversight. Legislatively mandated reviews by OIGs, and congressional requests for information from OIGs, can and should be 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 relation to the scope of the programs it oversees. Also, Congressional oversight committees are often interested in ensuring OIGs have adequate funding to match oversight needs. Given the recent lapse in appropriations, OIG oversight may benefit from additional budgetary flexibilities that could assist IGs to maintain appropriate oversight during such lapses. We have enjoyed a constructive dialogue with congressional oversight committees in the past and anticipate that dialogue will continue.

In the beginning of fiscal year 2018, the IG community launched Oversight.gov, providing for the first time a searchable public database for IG reports from across the federal government. While CIGIE received a one-time appropriation for expenditures related to enhancements to

Oversight.gov, CIGIE's overall operations would benefit from its funding being directly appropriated. Since its establishment following the Inspector General Reform Act of 2008 (IG 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, CIGIE operations are dependent on contributions from approximately 70 individual IGs and revenues from training fees it charges its members. These funding sources have not provided the transparent, stable stream of funding CIGIE needs to better fulfill its statutory mission. Direct funding would enable CIGIE to perform more effective long-term planning and hire the personnel necessary to undertake or improve these important activities – activities that will benefit the IG community by saving money, optimizing work, and supporting CIGIE's responsibilities for the Integrity Committee process pursuant to the IG Empowerment Act. The Committee anticipates continuing to discuss the provision of further direct appropriations for CIGIE.

Finally, the IG community has a strong interest in several specific legislative proposals – our Legislative Priorities. 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. Reforming the Program Fraud Civil Remedies Act.
- D. Notification to Congress of decision to place an IG on paid or unpaid, non-duty status.
- E. Protection against reprisal for federal subgrantee employees.
- F. Statutory exclusion for felony fraud convicts to protect federal funds.
- G. Enhancing Lead IG oversight for Overseas Contingency Operations.
- H. 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 U.S.C. § 3552(b)(3), and CIGIE suggests that this intention be included in any legislative history that may be developed.

B. Testimonial subpoena authority

OIG oversight can be substantially hampered by the inability to compel the testimony of witnesses who have information that cannot be obtained by other means. The amendment would authorize IGs to subpoena the attendance and testimony by certain witnesses, as necessary, in the performance of the functions of the Inspector General Act of 1978 (IG Act)¹. An example of where this authority is especially important is in cases where a Federal employee resigns. Without testimonial subpoena authority, that employee's resignation can substantially hamper an IG audit, investigation or other review into matters pertaining to 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 testimonial subpoena authority should not include within an IG's subpoena purview current Federal employees or non-Federal employees² employed by designated Federal entities. Such employees should not be subpoenaed because they are already obligated to provide testimony and cooperate with the IG. This authority would enhance access to testimonial evidence, which is often a critical component of IG oversight.

C. 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 the Department of Justice (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, 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

¹ CIGIE believes it is important that legislation to provide testimonial subpoena authority encompasses all IGs who are members of CIGIE.

² For example, the Smithsonian Institution considers employees of its trust to be non-Federal employees, though those employees are already under Smithsonian OIG's purview.

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). 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, in many agencies, the absence of ALJs to adjudicate 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 Civilian Board of Contract Appeals. The following is a list of specific proposals:

1. Increase the dollar amount of claims subject to the PFCRA.
2. 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.
3. Add a provision to the Act to revise the statute of limitations language in the PFCRA to be consistent with the False Claims Act.
4. Allow PFCRA recovery for "reverse false claims" cases in which a party withholds information material to that party's obligation to pay the Government.
5. Add a definition of "material" to the PFCRA that is similar to the False Claims Act.
6. Revise the definition of Hearing Officials.
7. Allow agencies to retain PFCRA recoveries to the extent needed to make them whole.
8. 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.

D. Notification to Congress of decision to place an IG 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." Section 8G(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 a head of a designated Federal entity in instances involving an IG of a designated Federal entity. CIGIE supports amending the IG Act to establish a congressional notification requirement for when an IG is placed in a paid or unpaid, non-duty status.

E. Protection against reprisal for federal subgrantee employees

The National Defense Authorization Act of 2013 enhanced whistleblower protections for Federal contractor, subcontractor, and grantee employees on a pilot program basis.³ Subsequent amendments in 2016⁴ both made the program permanent and sought to enlarge the group of protected individuals to include Federal subgrantee employees. However, while Federal subgrantee employees were added to the list of protected individuals, coordinating changes were not made in the statute's related sections addressing to whom the disclosures must be made; the entity or company to whom OIG provides the report of investigation; the remedy provisions; and the rights notification provision.

Adding language to explicitly include Federal subgrantees in each of these provisions would clarify and strengthen whistleblower protections in the federal grants area and eliminate uncertainties for agencies, OIGs, and Federal subgrantee whistleblowers with respect to investigating and processing such complaints.

F. Statutory exclusion for felony fraud convicts to protect federal funds

CIGIE proposes enhancing existing law by making exclusion actions automatic for those convicted of violating certain felony fraud statutes involving any agency contract, grant, cooperative agreement, loan or other financial assistance. Under current law, there is no mandatory exclusion for individuals convicted of, or who plead guilty to felony fraud against the government. Instead, both the Federal Acquisition Regulation and the Non-Procurement Common Rule allow agencies to take discretionary, time-limited actions to exclude felony fraud convicts from receiving federal grants and contracts through government-wide suspensions or debarments.

Many felony fraud convictions involving Federal program funds do not result in suspension or debarment action against the felon. While a lack of resources or information may also be to blame, the current law has allowed a substantial portion of felony fraud convicts to continue to be eligible to receive Federal funds after their criminal activities involving Federal funds.

CIGIE proposes to set a floor by which the most egregious bad actors are automatically prohibited from receiving additional federal program funds for 3 years. Further, applying the mandatory exclusion to a limited number of felony convictions involving government programs ensures that the individual has already been provided due process for the underlying misconduct in the Federal criminal justice system and that the misconduct involved a question of integrity with respect to Federal programs.

Similar mandatory actions are already required in other contexts, though they are typically focused on fraud or misconduct relating to particular operations or programs or may be limited in the scope of the exclusion.⁵ CIGIE recommends that this new authority not diminish those other authorities, or the authorities held by both the agency heads and agency suspension and

³ Pub. L. 112–239, div. A, title VIII, §828(a)(1), 126 Stat. 1837 (Jan. 2, 2013), codified at 41 U.S.C § 4712.

⁴ Pub. L. 114–261, §1(a)(2), (3)(A), 130 Stat. 1362 (Dec. 14, 2016).

⁵ E.g., 10 U.S.C. § 2408 (providing for limited 5-year exclusion of individuals who are convicted of fraud or any other felony arising out of a defense contract); 15 U.S.C. § 645 (Misrepresentation of size or status in order to obtain small business preferences); 38 U.S.C. § 8127 (Misrepresentation of small business owned and controlled by veteran/service disabled veteran).

debarment officials to take additional discretionary action. CIGIE also recommends that this authority expressly protect the authorities in other exclusion authorities, which may allow the head of an Agency to exempt an individual from exclusion under those authorities or require notifications when an exemption is granted. Further, while CIGIE believes this particular authority can be limited to individuals, it would not restrict or interfere with the current authority of agencies to take discretionary actions against companies and to address affiliated individuals or businesses.

Finally, to address resource challenges and improve efficiencies, CIGIE proposes placing responsibility for administering the new authority on the Administrator of the General Services Administration, which oversees the national database of excluded parties, and the Attorney General.

G. Enhancing Lead IG oversight for Overseas Contingency Operations

Since 2013, Section 8L of the IG Act has required the IGs of the Department of Defense, the Department of State, and the U.S. Agency for International Development to conduct oversight of an overseas contingency operation through a lead IG. Responsibilities of a lead IG are triggered by the commencement or designation of a military operation as an overseas contingency operation. When an overseas contingency operation lasts more than 60 days, the Chair of CIGIE is required to designate a lead IG from the three IGs specified in the IG Act. The lead IG arrangement was established to provide a coordinated, adaptable mechanism for time-sensitive, multi-agency oversight. Coordinated oversight assists Congress and agency leaders in making informed program, policy, and funding decisions.

Current provisions of law create unique challenges in implementing efficient and effective oversight of overseas contingency operations. Specifically, most lead IG employees are hired on a time-limited basis because overseas contingency operations are temporary missions. Five-year statutory term restrictions for temporary employees do not necessarily align with timeframes for contingency operations. Without a legislative amendment, lead IGs can be forced to terminate and hire new temporary employees during key periods of overseas contingency operation oversight.

Communication and collaboration challenges also impact oversight of overseas contingency operations. Current provisions of law impede lead IGs ability to ensure the timely activation and conclusion of oversight. The Chair of CIGIE is required to designate a lead IG for overseas contingency operations that exceed 60 days, but there is no mechanism to ensure the CIGIE Chair is notified when an overseas contingency operation begins or is designated. In addition, section 8L(e) of the IG Act bases the sunset of lead IG authority on a reduction in appropriations rather than termination of the mission. Other amendments to section 8L of the IG Act will clarify responsibilities of the lead IG and other IGs. Specifically, the IG Act does not address how oversight will be coordinated if none of the lead IG agencies have principal jurisdiction of an overseas contingency operation program. Furthermore, current law can be amended to facilitate enhanced communication and encourage comprehensive oversight by providing the lead IG with a tailored authority to obtain information from other OIGs who may be conducting overseas contingency operation oversight.

The following is a list of specific proposals:

1. Improving Employee Recruitment and Retention
2. Enhancing Oversight by Clarifying Responsibilities and Facilitating Coordination
3. Formalizing Notification Procedures

H. Technical amendments to the Inspector General Reform Act of 2008

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

1. the designated Federal entity inspector general pay provisions set forth in section 4(b) of the IG Reform Act of 2008; and
2. pay provisions for career Senior Executive Service personnel that become inspectors general set forth in section 4(c) of the IG Reform Act of 2008.

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