



WHAT CORPORATE COUNSEL SHOULD KNOW ABOUT INSPECTORS GENERAL INVESTIGATIONS

by

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In the past several years, the role of the various federal inspectors general in law enforcement efforts, especially those involving federal crimes, has expanded significantly.¹ In fiscal year 2008 alone, the IGs accounted for \$4.4 billion in potential savings from investigative recoveries and receivables, more than 6,000 indictments and criminal informations, nearly 6,900 successful prosecutions, and approximately 5,000 suspensions or debarments.² Given the IG community's increasingly robust investigative agenda, it is important that legal counsel for any person or entity doing business with the federal government have a clear understanding of the IG's legal authority, mission, and goals in order to effectively respond to an IG investigation.

The Federal IGs. With the Inspector General Act of 1978³ ("the IG Act"), Congress created the first federal IGs in twelve major federal government departments, tasking them with rooting out corruption and making government more efficient, honest, and accountable. Since that time, the IG Act has been amended to expand the number of IGs, bringing today's total to nearly seventy across the federal government. In addition, other "special" IGs have been created by Congress in response to specific contingencies. Most recently, as part of the American Recovery and Reinvestment Act of 2009, Congress created the Recovery Accountability and Transparency Board, commonly known as the "RAT" Board. The Recovery Board, as it prefers to be called, is made up of the Inspectors General from thirteen of the largest federal Offices of Inspector General ("OIGs")⁴, and is empowered to audit and review stimulus spending. Other special IGs include the Special Inspector General for Iraq Reconstruction ("SIGIR"), the Special Inspector General for Afghanistan Reconstruction ("SIGAR"), and the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP"). Collectively, these new special IGs alone have generated hundreds of criminal, civil, and administrative investigations in recent years.

While the IG Act, as amended, provides that the IGs are to operate under the "general supervision" of the head of the department or agency in which they are embedded, the IGs also report directly to Congress.⁵ In

¹See, e.g., Memorandum dated May 6, 2005 from then Assistant Attorney General for the Criminal Division of the U.S. Department of Justice to all federal prosecutors highlighting the increasing role of the IGs in investigating criminal cases and discussing recent statutory changes intended to facilitate their expanding duties.

²See Council of the Inspectors General on Integrity and Efficiency 2008 Annual Report (www.ignet.gov).

³See, generally, 5 U.S.C. App. 3.

⁴Throughout this paper the terms IG and OIG are used interchangeably to refer to the office itself, as opposed to the person who leads the office.

⁵*Id.* Note, however, that the IG Act, as amended, does not apply to the "special IGs" which are governed by the separate

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reality, the IGs operate with a considerable amount of independence which is, of course, exactly what Congress had in mind when passing the IG Act, and over the years, the IGs have evolved into significant players in the overall federal law enforcement effort in certain areas.

The scope of work performed by an OIG typically includes audits, inspections, and investigations. These first two categories are generally inward-looking, in that the “target” of the audit or evaluation is usually a program or activity that exists within the relevant department or agency itself. Audits and inspections are generally planned in advance with the cooperation of agency management, and the OIG’s audit and inspection work plan for the next twelve months can typically be found on its web-page. Examples of such work include financial statement audits, inspections of IT security programs, reviews of contingency plans, tests of internal controls, and evaluations of physical security systems.

The third category of an OIG’s work, investigations, is very different from audit or inspection activity in that it often targets persons and entities outside of the agency, including government contractors and others that do business with the government, are recipients of government grants, or are otherwise subject to certain federal laws or regulations related to the operations of the agency. Unlike audits or inspections, the investigative work of an OIG is not, for obvious reasons, planned out in cooperation with agency management or anyone else, and, like other types of investigations, remains secret until and unless a criminal case or other official action is pursued. It is this category of OIG activity that is especially important for counsel to understand and be prepared to address.

OIG Investigations. Each federal OIG has an investigations division which includes a team of special agents who are in the federal government’s 1811 job series which means that they receive the same or similar training as their counterparts in the other, more well-known investigative agencies such as the FBI, Secret Service, ATF, and DEA. These special agents carry badges and firearms and are considered to be full-fledged federal law enforcement officers. The number of special agents within a particular OIG corresponds roughly to the overall size of the office and of the parent agency. For example, the largest OIGs have hundreds of agents stationed in multiple offices around the country, while the OIGs at smaller agencies have only a few, usually based in Washington, D.C. The legal authority with which OIG agents conduct investigations is, nevertheless, essentially the same from agency to agency. They are all federal law enforcement officers duly authorized by federal statute to have full access to any records, reports, or other materials necessary to investigate allegations of fraud or abuse concerning their respective agency’s programs and operations. However, as with any law enforcement agency, there are limits, both constitutional and statutory, to the OIGs’ authority and targets of such investigations have significant legal rights and protections that should not be overlooked or readily waived by counsel.

An OIG investigation typically begins with the receipt of a complaint or other information suggesting the possible existence of activity which violates federal law, relevant regulations, or other rules concerning the agency or its operations. Such information often comes to the OIG by way of a “hotline” telephone or email system set up to facilitate the anonymous communication of tips from agency employees and others. The number of anonymous complaints received by OIGs has increased in recent years in part because of regulatory changes that now require government contractors to develop a corporate ethics policy which compels the reporting of unethical conduct to the relevant OIG.⁶ Complaints about contractors made by competitors, and inquiries initiated by Congress are also common sources of OIG investigative leads.

OIGs generally conduct three types of investigations: administrative, civil, and criminal. Investigations often fall into more than one of these categories. Many investigations, even criminal investigations, are focused inward, i.e. on an agency employee. For example, the IG might investigate an agency employee for the theft of agency property, workers compensation fraud, or violations of travel regulations.

Increasingly, however, the focus of OIG investigations is on persons or entities who are outside the agency, but have, by way of contracts or other connections, a relationship with the agency that brings them within the OIG’s jurisdiction. These investigative targets can include vendors who sell goods or services to the agency, other types of contractors who have contractual relationships with the agency, entities that bill the agency for providing services to third-party beneficiaries, persons or entities who receive grant money from the agency, or others who receive benefits under programs administered by the agency. Whether a target of an OIG investigation

statutes that created them.

⁶See Federal Acquisition Regulations (“FAR”), Subpart 3.10.

or simply a witness, such persons and entities, and their legal counsel, need to be ready to appropriately respond when OIG agents contact them.

Anatomy of an IG Investigation. Typically, upon the receipt of a complaint or other indication of wrongdoing, the OIG will open a file and develop an investigative plan. This is usually done in consultation with the OIG's internal legal counsel, and sometimes in cooperation with attorneys from the U.S. Department of Justice ("DOJ"). The typical investigation then starts with witness interviews and document requests, usually by way of an administrative subpoena. It should be noted that with the exception of the new Recovery Board, the federal IGs do not have testimonial subpoena power.⁷ As is the case with a subpoena served in the course of civil litigation, the recipient of an OIG administrative subpoena has the right to make certain objections. For example, if the subpoena is vague or is overbroad, an objection may be in order. In addition, when certain types of entities, such as financial institutions, are served with an OIG subpoena, certain very specific statutory and regulatory requirements must be met by the OIG.

At some point, if the OIG concludes that it has discovered evidence of criminal wrongdoing or a civil violation, it will refer the matter to DOJ and, specifically, to the U.S. Attorney's Office in the federal district in which the investigation is taking place. Although the findings of OIG investigations are routinely referred to DOJ, only a small number of such referrals are actually accepted for criminal or civil prosecution. This is typically because the loss amount does not meet the required threshold under the applicable prosecution guidelines and/or because of evidentiary or other problems. Instead, the criminal or civil referral will most often be declined by DOJ allowing the OIG to then continue with an administrative investigation which may lead to administrative or civil penalties, such as the termination of employment of an agency employee or debarment of a contractor. With increasing frequency, however, the size and importance of the matters being investigated by the OIGs are such that DOJ is interested and is willing to accept them for prosecution. Indeed, in fiscal year 2008 alone, OIG investigations resulted in the filing of 6,404 indictments.⁸

If an OIG investigation is accepted for criminal prosecution, the matter will likely come before a grand jury which may subpoena witnesses and documents with the assistance of DOJ prosecutors. Search warrants may also be executed. If the grand jury finds that there is probable cause to believe that a crime was committed, it will return an indictment against the target(s) of the investigation and the case will progress toward trial, or other disposition.

Responding to an OIG Investigation. The first thing that counsel should do upon discovering that a federal OIG is interested in his or her client is determine the client's status in the eyes of the investigators. In other words, do the investigators view the client as a witness, a subject, or a target? Literally thousands of persons and companies will be touched in some way by an OIG investigation every year, usually as a witness. While it is far more unusual for client to become a subject or target of such an investigation, the client's status should not be taken for granted. It is important, and entirely appropriate, for counsel to engage the investigators and/or prosecutors immediately in an effort to clearly determine the client's status.

Of course, there are certain potential ramifications that result from each status. A company's (or company employee's) status as a witness is not likely to cause a corporate entity to do more than ensure cooperation, pursuant to counsel's advice, with the investigation. However, if the company or one or more of its employees is accorded subject or target status, the company may have additional obligations that flow from that status including disclosure of the matter to the board of directors, shareholders, and/or the public; conducting an internal investigation; the creation of a special committee of the board; and the retention of separate counsel for employees implicated in the investigation. Whether any of these extraordinary steps needs to be taken as a result of the government investigation is something that should be the subject of close consultation between the company and counsel experienced in such matters.

Most individuals and entities never think that they will be investigated until government agents actually show up at their doorstep. The key to effectively responding to such an investigation is to be prepared. Counsel should advise the client to designate a person within the organization to serve as its point-of-contact to interact

⁷Congress is considering proposed legislation introduced during the current Congress to provide testimonial subpoena authority to certain other IGs. See S. 1390, S. 1391, and H.R. 885.

⁸See Annual Report of the Council of the Inspectors General on Integrity and Efficiency for FY 2008.

with the investigators. The organization's general counsel, if it has one, is a logical choice for this role. If the organization does not have an in-house attorney, or does not have the requisite expertise in-house, competent, experienced outside counsel should be identified and on retainer to handle such contingencies. All company personnel should be informed that any contact with the government should be directed to this designated company representative. Often, informal, seemingly friendly contact between an agent and a company employee is met with an immediate sharing of information. While, as discussed below, cooperation with the OIG is important, it should be coordinated with the advice and close supervision of experienced counsel.

When an agent simply shows up unannounced at a company facility, it is usually a bad sign. Company employees should be trained in what to do in such situations. After notifying the designated company representative, the employee(s) with whom the agent first has contact should be trained to be cooperative with the agent, but should know that they are not to provide statements or documentary information until the company's legal counsel has had an opportunity to review the request. Company executives and counsel must also understand that cooperation with lawful requests by government agents is mandatory and that noncompliance may result in sanctions such as fines or imprisonment. Thus, a well-thought out plan for responding to investigations is critical.

As noted above, there are several different tools that OIGs use during investigations to obtain evidence, and it is important that counsel understand the differences between them. Frequently, an investigator may initially make contact with an informal request for information, either in the form of documents or a simple conversation with someone with knowledge of the subject matter of the investigation. Other tools include subpoenas which can be issued by the OIG itself or by a grand jury. A grand jury subpoena is clear sign that the investigation is criminal in nature and that DOJ attorneys are involved.

Another tool that also signals that the investigation is criminal and is being supervised by a DOJ attorney is the search warrant. There are several differences between a subpoena and a search warrant. First, while a subpoena can be issued by the investigating entity, i.e. the OIG or the grand jury, a search warrant must be approved by a judge based on probable cause before it can be executed. Second, while a subpoena simply requests that the recipient produce certain categories of documents and/or appear before the grand jury at a certain time and place, a search warrant is executed by government agents, which means that they show up at the place where the documents or other evidence are believed to be and, with the authority of the court, simply find it and take it away. Finally, a search warrant differs from a subpoena in that search warrants are typically reserved for the targets of investigations on the assumption that an invitation to produce evidence, in the form a subpoena, is not likely to result in cooperation on the part of those with something to hide. Subpoenas, on the other hand, are used to obtain evidence from witnesses who are not themselves believed to have committed any crimes, but are merely the holders of evidence that may incriminate others. The one thing that each of these tools has in common, however, is that they need to be taken very seriously, and counsel needs to understand that the penalties for failing to comply with such requests can result in severe penalties.

Conclusion. The federal OIGs are bigger and busier than ever. As OIGs continue to play a more active role in criminal investigations of all types, individuals and companies likely to run into an OIG investigation, and their counsel, need to be ready. Developing sound policies and procedures, and ensuring that key employees are aware of their, and the company's, rights and responsibilities when faced with an informal request, a subpoena, or a search warrant, is essential to accomplishing the dual goals of adequately cooperating with the government and not waiving important rights that a company and its employees might have.