Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

July 27, 2009

The Honorable Edolphus Towns
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 1507, The Whistleblower Protection Enhancement Act of 2009

Dear Chairman Towns:

As Chair of the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), I am writing to convey some concerns of the Inspector General (IG) community about the proposed new IG requirements under Section 10 and 11 of H.R. 1507, the "Whistleblower Protection Enhancement Act of 2009." The Legislation Committee surveyed the IG community specifically about these provisions which relate to investigations of whistleblower reprisal allegations by employees or former employees of Executive agencies whose disclosure "consists in whole or in part of classified or sensitive information" and amendments to the Federal Property and Administrative Services Act of 1949 covering contractor employees.

While the IG community recognizes the importance of whistleblower protection for Federal employees, as further explained below, a majority of the 46 IGs who responded to the survey are primarily concerned that the legislation as drafted would impose strict time requirements to investigate whistleblower reprisal complaints thereby undermining the ability to independently set priorities on OIG case investigations.[1] In addition, about 70% of IGs believe that they should have the discretion, as they do for other complaints from employees, to not conduct an investigation. In addition, a substantial majority of IGs do not believe they should be required to make conclusions on burdens of proof concerning whistleblowing reprisal violations. Finally, a substantial majority of IGs also believe a complainant's access to an IG's investigative file should be limited in accordance with any applicable laws, regulations, or established privileges.

A. Section 10 Requirement to Investigate Whistleblowing Reprisal Allegations of Agency Employees Who Make Disclosures Consisting of Classified or Sensitive Information

Section 10 of H.R. 1507 requires IGs of covered agencies (the FBI and elements of the intelligence community) to investigate whistleblowing reprisal allegations by employees or former employees of those covered agencies within 120 days of the filing of the complaint.

[1] CIGIE IG membership is currently 68. The 46 respondents represent 68% of the current membership.

In addition, if an employee or former employee of any other Executive agency discloses any covered information that consists "in whole or in part of classified or sensitive information", that person shall be entitled to the same protection, rights, and remedies of Section 10 as if that agency were a covered agency. Therefore, Section 10 IG requirements may apply to all Executive agency IGs depending on the type of information that employees from their agencies disclose.

We surveyed IGs' views on this investigation requirement. Sixty-two percent of respondents said they did not support this requirement or favored having discretion to investigate these complaints under the current standard, section 7(a) of the Inspector General Act of 1978, as amended.[2] Some of the respondents stated that the investigation mandate would undermine an IG's ability to independently set priorities and direct resources to high-risk cases. Other respondents cited the U.S. Office of Special Counsel as the appropriate and expert agency for investigating whistleblowing reprisal complaints.

All IGs who responded believed that a 120-day time frame is not appropriate to investigate and report on allegations of reprisal for disclosures regarding classified or sensitive information.[3] Approximately 60% of respondents believed that the time frame should be at an IG's discretion based on investigative priorities. The remaining 40% believed that, if a time frame is established, it should be extended to 180 days with an opportunity to extend for a further 180 days at an IG's discretion.[4]

B. Section 11 Requirements Regarding Investigation of Contractor Employee Complaints of Whistleblowing Reprisal

Section 11 would amend the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 265) to enhance contractor employee whistleblower rights. In particular, Section 11(b)(2)(A) would require IGs to investigate non-frivolous complaints of contractor employees who disclose wrongdoing related to a federal contract or grant within 180 days. It further requires that if an IG is unable to complete an investigation within 180 days, it may only extend this investigation time period with the approval of the complainant.

Overall, 85% of respondents disagreed with the 180-day time frame to investigate and report on complaints of reprisal by contractor employees. A substantial majority (70%) believed that the time frame should be at an IG's discretion based on investigative priorities. Some IGs commented that, if a time frame is established, the legislation should include language to allow IGs discretion to extend the timeframe when necessary for investigative purposes.

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[2] Section 7(a) states that an "Inspector General ***may*** receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety." (Emphasis added.)

[3] It was also noted that the legislation does not define "sensitive information," which makes it difficult to determine whether a complainant's disclosure would be covered under this provision.

[4] This time frame mirrors the provision in section 1553(b)(2)(B) of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) for investigations of whistleblowing reprisal allegations by state, local, and contractor employees whose employers receive covered stimulus funds.

Further, every respondent stated that an IG's investigation time frame should not be subject to a complainant's approval. Some IGs believe that allowing a complainant to dictate investigative time frames would impact an IG's independence by undermining their ability to set priorities and direct limited resources to high-risk cases.

Public Law 111-5, the American Recovery and Reinvestment Act of 2009, also imposed new responsibilities on IGs to investigate allegations of reprisal by contractor employees related to stimulus funding. However, Section 1553(b)(3) of the Act provides that an "inspector general may decide not to conduct or continue an investigation . . . upon providing to the person submitting the complaint and the non-Federal employer a written explanation . . . for such decision."

We surveyed IGs on whether similar discretion should be afforded under Section 11 of H.R. 1507. Approximately 70% of respondents believed that IGs should have similar discretion to decline or discontinue an investigation provided they submit a written explanation of their decision to the complainant and the contractor. One IG further commented that IGs should not be required to conduct parallel investigations if a complainant has filed a complaint in another forum.

C. Section 11 Requirements for Making Corrective Action Recommendations

Section 11(b)(3)(B) requires IGs investigating contractor employee complaints of reprisal to make burdens of proof determinations and recommend corrective action in their investigation reports if reprisal is affirmatively established (i.e., evidence shows an official took action against an employee knowing of a disclosure, and the action occurred within a reasonable time after such knowledge to conclude the disclosure was a contributing factor in the taking of the action.) However, Section 11(b)(3)(C) provides that an IG does not have to make this corrective action recommendation if the contractor can show by clear and convincing evidence that the personnel action against the employee would have been taken absent the disclosure.

Sixty seven percent of respondents did not believe IGs should be required to reach conclusions as to whether burdens of proof have been met in whistleblowing reprisal investigations and make corrective actions recommendations. Only 15% thought IGs should make burden of proof determinations and the remaining 11% had no opinion on the issue.

The majority of IGs who commented noted that an investigator's role should be fact-finding and that requiring IGs to make burden of proof determinations is adjudicatory, and therefore should be left to agency management officials. Others noted that evaluating investigatory evidence and determining whether to take action based on that evidence has traditionally been, and should remain, the role of the agency head.[5]

[5] Section 1553(b) of the American Recovery and Reinvestment Act of 2009 only requires IGs to investigate complaints and "submit a report of the findings of the investigation…" Similarly, Section 10 of H.R. 1507 only requires IGs to provide a "report of the findings of the investigation to the employee…and the head of the covered agency."

D. Access to IG Investigation File

Finally, Section 11(b)(4) provides that a complainant shall have access "to the complete investigation file of the Inspector General in accordance with section 552a of title 5, United States Code (popularly referred to as the 'Privacy Act')" when an employee files an appeal to "an agency head or court of competent jurisdiction."

The majority of respondents (85%) believed that other laws or regulations should be taken into consideration when determining whether to provide complainant with access to the "complete" investigation file. Information in the file may be protected from disclosure under different laws, regulations, or established privileges. For example, some of the laws mentioned by IGs are: laws that protect the disclosure of classified information; the Freedom of Information Act (FOIA); 26 U.S.C. § 6103 of the Tax Code (Confidentiality and Disclosure of Returns): Section 6(e) of the Federal Rules of Criminal Procedure (Grand Jury subpoena information); 38 U.S.C. § 7332 (Confidentiality of Certain Medical Records); 20 U.S.C. §1232g (Confidentiality of Education Records); 12 U.S.C. § 3401 (Confidentiality of Financial Records); and 42 U.S.C. § 290dd-2, (Confidentiality of Drug and Alcohol Abuse).

Therefore, the Legislation Committee recommends that language, such as "and any other applicable laws, regulations, or established privileges", should be added to Section 11(b)(4) after "Privacy Act." This would make clear that complainants do not have the right to access protected information in the IG investigation file.

The CIGIE Legislation Committee appreciates the opportunity to present you with the views of the IG community on H.R. 1507. We are also providing our comments to Ranking Member Issa and to the Committee on Homeland Security. Should you have any questions or need additional information, please do not hesitate to contact me at 202-512-2288 or at togden@gpo.gov.

Sincerely,

J. Anthony Ogden
Inspector General
United States Government Printing Office

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