



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

September 1, 2010

The Honorable Joseph Lieberman
Chairman, Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Subject: S. 372, Whistleblower Protection Enhancement Act of 2009

Dear Senator Lieberman:

As Chair of the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), I am writing to reiterate the concerns of the Inspector General (IG) community regarding Section 120 of S. 372, the Whistleblower Protection Enhancement Act of 2009, proposing that Presidentially-appointed IGs designate a Whistleblower Protection Ombudsman (Ombudsman) within their offices.

On November 11, 2009, we provided the attached letter outlining our concerns regarding S. 372. We expressed at that time the IG community's concerns regarding the proposed Ombudsman "advocacy" and "advisory" duties noting specifically they would be in conflict with the independence and objectivity mandates of the Inspector General Act of 1978, as amended (IG Act). While the IG community is not opposed to the establishment of an Ombudsman, we continue to oppose placing an Ombudsman within an Office of Inspector General (OIG) because this would create a conflict of interest for IGs.

We understand that an amendment to S. 372 as reported in the Senate has been proposed that would make two main changes to the current IG Act. First, the proposed Section 120 would require Presidentially-appointed IGs to "designate a Whistleblower Protection Ombudsman who shall (i) educate agency personnel about prohibitions on retaliation for protected disclosures, and (ii) advise agency employees who have made or are contemplating making a protected disclosure." (Emphasis added.)

While the proposed amendment removes the "advocacy" duty previously considered, the "advise" duty is still problematic. As proposed, such an Ombudsman would serve as an advisor for the interests of agency employees who have made or are contemplating making a protected disclosure. IGs are not, however, responsible for advising any particular individual.¹ Rather, IGs are charged with operating independently and

¹ The proposed amendment provides that the Ombudsman may not act as the legal representative of such employee only "if the employee initiates any proceeding against an agency."

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objectively within their respective establishments and serving the public by investigating and reporting potential waste, fraud, and abuse to their agencies and Congress. Indeed, we believe that requiring an IG to supervise someone who is acting as an advisor to agency employees with potential claims against the Agency would represent a conflict of interest with this critical IG mandate.

Furthermore, under the IG Act, IGs may not exercise program operating responsibilities. *See* 5 U.S.C. app. 3, § 9(a)(2). The proposed Ombudsman responsibility of advising agency employees on whistleblowing appears to place IGs into a significant programmatic role that is more appropriate for agency management. Therefore, we continue to believe that the proposed Ombudsman would be better placed outside an OIG.

Second, the proposed amendment would change the language concerning the authority of an IG to “appoint” an Assistant Inspector General for Auditing and another for Investigations.² It would change this power from “appoint” to “designate.” We believe this amendment would unnecessarily confuse an IG’s current power to “appoint” such officers with the proposed power to “designate” an Ombudsman within an Office of Inspector General. To the extent the language in S. 372 was meant to give an IG the power to “designate” a current officer of an OIG as an Ombudsman rather than have to “appoint” a new officer, we would recommend that the existing “appoint” language not be changed.

The CIGIE Legislation Committee appreciates the opportunity to present these comments on this important issue to the IG community. Identical letters have been sent to Senators Daniel Akaka, Susan Collins, and Claire McCaskill. Should you have any questions or need more information, please do not hesitate to contact me directly at 202-512-2288.

Sincerely,



J. Anthony Ogden
Inspector General, United States Government Printing Office

² S. 372, as reported in the Senate, only added language giving an IG the authority to “designate” a Whistleblower Protection Ombudsman.

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Attachment

c: The Honorable Phyllis Fong, Chairperson, CIGIE
 Carl Clinefelter, Vice Chairperson, CIGIE
 The Honorable Jeffrey Zients, Deputy Director for Management, OMB



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The Honorable Joseph Lieberman
Chairman, Senate Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Subject: S. 372, Whistleblower Protection Enhancement Act of 2009 (WPA)

Dear Senator Lieberman:

As Chair of the Legislation Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), I am writing to convey the results of a recent survey conducted to assess the sense of the Inspector General (IG) community regarding a requirement under S. 372, the Whistleblower Protection Enhancement Act of 2009 (WPA), that IGs designate a Whistleblower Protection Ombudsman (Ombudsman) within their offices.

As further explained below, the survey results show IGs believe that, under the Inspector General Act of 1978, as amended (IG Act), they have an important role in educating and informing agency employees about whistleblower rights and investigating retaliation against employees that make a complaint or disclose information to an IG. However, a significant majority shares a concern that the proposed Ombudsman's "advocacy" and "advise" duties under S. 372 would be in conflict with the IG Act's independence and objectivity mandates.

Background on Whistleblower Rights and Protections

Sec. 120(a) of the WPA would amend section 3 of the IG Act and require that IGs:

"designate a Whistleblower Protection Ombudsman who shall *advocate* for the interests of agency employees or applicants who make protected disclosures of information; *educate* agency personnel about prohibitions on retaliation for protected disclosures; and *advise* agency employees, applicants, or former employees who have made or are contemplating making a protected disclosure." (Emphasis added).

Section 7 of the IG Act already addresses some of the rights of federal whistleblowers. Specifically, under this section, IGs may receive complaints or information from agency employees regarding violations of law, rules, or regulations, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety. In addition, IGs must maintain the confidentiality of an employee's identity unless the employee consents or the IG determines such disclosure is unavoidable during the course of an investigation. Finally, Section 7 prohibits retaliation against employees who make complaints or disclose information to IGs.

Under current law, the Office of Special Counsel (OSC) has primary responsibility to advocate on behalf of federal employees who make protected disclosures of information. Indeed, OSC has the authority to receive and review disclosures of information by federal employees; investigate allegations of reprisal for whistleblowing; and, unlike IGs, seek corrective action from the Merit Systems Protection Board on behalf of any employee who has been the subject of whistleblower retaliation.¹

In addition, it is important to note that the head of each agency is responsible for the prevention of prohibited personnel practices and "for ensuring (in consultation with OSC) that agency employees are informed of their rights and remedies" under the Whistleblower Protection Act, among other rights and remedies.² Furthermore, the No Fear Act of 2002 requires agencies to provide written notification and training to its employees concerning, among other things, whistleblower rights and protections.³

Survey Results

a. IGs Support Role in Educating Agency Employees about Whistleblower Rights and Protections

We surveyed the 69 CIGIE members, and received substantive responses from 45 members, reflecting a 66% participation rate. Our survey revealed that 95% of these IGs believe that, under the IG Act, they have a role in educating and informing agency employees about the IG's role in preventing and investigating fraud, waste, and abuse, including an employee's whistleblower protections. Some IGs indicated they already conduct education and outreach to agency employees on this issue to ensure employees' cooperation with IGs and employees' understanding of their rights and protections.

¹ 5 U.S.C. § 1212; 1214.

² 5 U.S.C. § 2302(c).

³ *Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002*, Pub. L. No. 107-74, § 202, 116 Stat. 566 (2002).

b. Significant Concern over "Advocacy" and "Advise" Duties of Proposed Whistleblower Protection Ombudsman

While IGs support an educational role, 80% do not support the designation of an Ombudsman within their offices to "advocate" for employees who make protected disclosures or to "advise" these employees, applicants, or former employees.⁴ The primary concern is that "advocacy" and "advise" duties would be in conflict with the IG Act tenets that OIGs are required to perform independent and objective audits and investigations of an agency's programs and operations.⁵

These IGs believe the "advise" and "advocate" duties as proposed under S. 372 would require them to "take a side" on behalf of an employee and would, therefore, threaten the OIG's role as a neutral and objective investigator or auditor of the agency's programs and operations. Some IGs specifically mentioned that the Quality Standards for Federal Offices of Inspector General and the Quality Standards for Investigations⁶, as well as the Generally Accepted Government Auditing Standards require that OIGs "be free, both in fact and appearance," from impairments to independence.

One IG succinctly summarized this general consensus: "OIGs need to be neutral and objective in order to parse the allegations [of an employee] and determine if there was wrongdoing. To be thrust into a role whereby the OIGs would have (or be perceived as having) some type of fiduciary duty as an "advocate/advisor" towards whistleblowers would be inconsistent with this objectivity." Further, another OIG had a recent experience with a designated Ombudsman within their office and determined that its function was "in conflict with the notion of an OIG to be independent and objective."

Additionally, some IGs are concerned that this new requirement would require OIGs to establish a "Chinese Wall" to keep the "advisor/advocate" role of the Ombudsman separate from the role of the OIG's independent investigators and auditors. Smaller IGs are concerned that this new requirement would put a strain on already limited resources.

⁴ The terms "ombudsman," "advocate," and "advise" are not defined in S. 372. Webster's Dictionary defines "ombudsman" as "a government official appointed to receive and investigate complaints made by individuals against abuses or capricious acts of public officials; one that investigates reported complaints, reports findings, and helps achieve equitable settlements." "Advocate" is defined as "one that pleads the cause of another; one that pleads the cause of another before a tribunal or judicial court." Finally, "advise" is defined as "to give advice to: counsel; caution, warn; recommend; to give information or notice to; inform."

⁵ 5 U.S.C. App. 3, Section 2.

⁶ The Quality Standards were developed by the President's and Executive Council on Integrity and Efficiency in 2003.

However, 20% of IGs agreed that having an Ombudsman within the OIG office would help cultivate more awareness of the IG's role in receiving employee complaints and protecting agency whistleblowers, but with perhaps a more limited role than envisioned by S. 372. For example, the Department of Defense (DoD) OIG has a Directorate of Civilian Reprisal Investigations (CRI) that "conducts and oversees allegations of whistleblower reprisal made by DoD civilian employees and submitted to the DoD IG."

CRI advocates on behalf of *whistleblowing*, not individual whistleblowers. CRI's operations promote source protection and favor neither the whistleblower nor the alleged supervisor and/or manager, who is alleged to be engaging in retaliation. Indeed, the DoD IG noted that the term "advocate" in the legislation "should be clearly defined or replaced" because it could be "interpreted to mean an OIG employee would represent the specific interests of the whistleblower in regard to the issues presented in the allegations." Instead, according to the DoD IG, the role of the Ombudsman should be "to ensure that the employee understands the administrative process and that the administrative rights of the employee are recognized and upheld." Such a role would ensure that IGs remain "independent and objective."

c. Office of Special Counsel or Senior Agency Management Ombudsman is Better Suited for "Advocate" and "Advise" Role than OIG

Over 60% of IGs who responded suggested that an entity outside or within the agency other than the OIG would be better suited to assume the role of an Ombudsman. Forty-two percent of these respondents suggested OSC as the appropriate outside entity to assume the duties of advocacy and advise for federal employees given its expertise in the area of whistleblower rights.

In addition, as one IG noted, "using OSC would prevent conflicts from occurring as it is an independent agency and would not be in the position to investigate underlying fraud or misconduct" reported on by the whistleblower.

As for an entity within the agency, the following were suggested in order of times mentioned: an agency-appointed independent ombudsman at the senior management level; an agency ethics officer; or a human capital employee.

The CIGIE Legislation Committee appreciates the opportunity to present you the results of our survey on this important issue to the IG community. An identical letter has been sent to Senator Susan Collins.

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Should you have any questions or need more information, please do not hesitate to contact me directly at 202-512-2288.

Sincerely,

J. Anthony Ogden
Inspector General, United States Government Printing Office
Chair, Legislation Committee, CIGIE

c: The Honorable Phyllis Fong, Chairperson, CIGIE
Carl Clinefelter, Vice Chairperson, CIGIE