CCH®
FEDERAL ETHICS *Report*

Volume 18, Issue 6 June 2011

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Growing Old Together: Inspector General and Ethics Counsel — Changing Environments and Challenges

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Introduction

Both the Inspector General Act and the Ethics in Government Act date from 1978, an important year for "good government," with the concurrent creation of the Merit Systems Protection Board and the Office of Special Counsel.[1] The past thirty-three years have given Inspector General ("IG") Counsels and Designated Agency Ethics Officials ("DAEO") the opportunity to work together and iron out some of the problems we noted in our article of 1995.[2] Nevertheless, questions continue to arise because of the different roles each plays. The purpose of this article is to revisit basic issues and report on the legal and practice changes that have occurred in the intervening years. Our goal is to provide an update, overview, and some suggestions for best practices regarding the IG Counsel/DAEO relationship and respective roles. In addition to identifying relevant statutes and policies, we intend to clarify misunderstandings and restate our common objectives.

The IG Counsel Develops

The Inspector General Act of 1978 ("IG Act") mandated only three positions within each Office of Inspector General ("OIG"): the Inspector General and Assistant Inspectors General for Auditing ("AIGA") and Investigations ("AIGI").[3] Neither the original statute, nor its first major amendment in 1988, mentioned the role of counsel within an OIG. Indeed, many IGs initially received legal advice and representation from attorneys working in their agency's Office of General Counsel ("OGC").[4] However, because independence is the cornerstone of the OIGs, independence of counsel was a recurring issue.

While some IGs initially relied on OGC counsel, IGs recognized the value of having their own counsel. Since the IG Act gave IGs broad authority to hire employees, contract with persons with appropriate knowledge and skills, and organize their own offices, in the decades following the IG Act's passage, many IGs eventually shed their assigned OGC at-

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torneys and hired attorneys to work exclusively as part of the OIG staff.[5]

Congress Considers Independent IG Counsel

The Federal Acquisition Streamlining Act of 1994 ("FASA") was a key turning point leading to IG Act amendments requiring presidentially appointed IGs to have independent counsel.[6] Section 6007 of the FASA directed the Comptroller General to review the independence of legal services provided to presidentially appointed IGs.

The GAO Reports on Inspector General Legal Services

Consistent with the FASA's requirement, the Government Accountability Office ("GAO") issued GAO Report GAO/OGC-95-15, "Inspectors General: Independence of Legal Services Provided to IGs," in March 1995.[7] In this report to Congress, GAO compared the independence of legal services provided to IGs by attorneys located in agency OGCs with those provided by attorneys hired by and located in OIGs. GAO asked whether agency attorneys could provide the independent legal services necessary for an official who is statutorily required to independently review that agency's programs and operations.

GAO reviewed the premise of federal IG functions from the IG Act, reporting that the intent was to establish OIGs in departments and agencies to consolidate the audit and investigative functions of those departments and agencies in an independent office under the leadership of a senior official, the IG.

Based on a survey of 27 OIGs, and interviews with 5 IGs whose legal advisors were located in the OGC and 7 whose legal advisors were on the OIG staff, GAO concluded that there was no evidence that the composition and duties of the legal staffs of the IG Offices reviewed were significantly different based on their organizational location.[8] Further, GAO reported that it was the preference of the individual IGs that influenced the functions and activities of their counsel. Finally, GAO found no indication that attorneys located in agency OGCs were less able than those within OIGs to provide independent legal services.[9] So with that result, no changes were made to the status of IG Counsel.

The Homeland Security Act of 2002 Gives IGs Independent Law Enforcement Authority

The structure and authority of the OIGs received a major boost in 2002 with the second major IG Act amendment.[10] The Homeland Security Act of 2002 ("Homeland Security Act") amended section 6 of the IG Act to allow the Attorney General, after an initial determination of need (for certain IGs not exempted), to authorize full law enforcement pow-

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Federal Ethics Report (ISSN 1080–210X) is published monthly by CCH, a Wolters Kluwer business. The publication can be obtained as a stand-alone newsletter or in conjunction with Ethics in Government Reporter. A subscription to the newsletter is available for $454 per year. A subscription to Ethics in Government Reporter, a four-binder looseleaf publication that includes Federal Ethics Report, is available for $1,346 per year (Government rate available). Subscribers may purchase additional copies of Federal Ethics Report, deliverable to the SAME address, for $95 per year.

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ers for eligible personnel of each of the various offices of presidentially appointed IGs.[11] As required by the Homeland Security Act, the Attorney General issued guidelines governing the exercise of such law enforcement powers.[12] The "Attorney General Guidelines for Offices of Inspectors General with Statutory Law Enforcement Authority" provide that OIGs have primary responsibility for the prevention and detection of waste and abuse, and concurrent responsibility with the Department of Justice ("DOJ") for the prevention and detection of fraud and other criminal activity within their agencies and their agencies' programs.[13]

Before the Homeland Security Act was enacted, the IG Act had not provided firearms, arrest, or search warrant authority for IG investigators. Rather, the IGs of the various executive agencies had relied on Memorandums of Understanding that provided temporary grants of law enforcement power through deputations. As the volume of investigations warranting such police powers increased, deputations were authorized on a "blanket" or OIG office wide basis.[14] Nevertheless, before 2002, certain IGs, such as the IG for the Department of Defense, enjoyed – and today continue to enjoy – specific grants of statutory authority under which they exercise law enforcement powers.[15]

Congress Mandates Independent IG Counsel

In 2008, it was the lawyers' turn. The third major IG Act amendment, the IG Reform Act of 2008 ("Reform Act"), addressed a number of matters related to enhancing the independence and prestige of the IGs.[16] Among them was a provision for independent counsel to support IGs. Section 6 of the Reform Act amended Section 3 of the IG Act to add:

> "(g) Each Inspector General shall, in accordance with applicable laws and regulations, governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General."

With this provision, IGs no longer had to rely for confidential legal advice on attorneys employed by and reporting to someone else – the General Counsel. This provision gave each IG a dedicated IG Counsel whose job, job assignments, and professional loyalty belonged exclusively to the IG.

In his signing statement, President Bush addressed the different roles of the agency and IG Counsel as follows:

> It is important that Inspectors General have timely and accurate legal advice. It is also important that agencies have structures through which to reach a single, final authoritative determination for the agency of what the law is. This determination is subject to the authority of the Attorney General with respect to legal questions within, and the President's authority to supervise the executive branch and, of course, the courts in specific cases or controversies. To this end, the "rule of construction" in section 6 ensures that, within each agency, the determinations of the law remain ultimately the responsibility of the chief legal officer and the head of the agency.[17]

With these words, the President emphasized that even though the OIG is independent, the IG does not determine law for the agency; nor does the IG Counsel. The IG Counsel's role is to advise and represent only the IG. The agency General Counsel is the sole attorney with authority to interpret the agency's law.

Independence of the IG

In addition to the aforementioned amendments that enhanced IG independence, the IG Act contains other provisions designed to ensure that IGs carry out their responsibilities independently. For example, IGs do not report to those directly responsible for carrying out the programs and activities subject to audit and investigation. Rather, they report to, and are under the general supervision of, the agency head or the official next in rank, if such

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authority is delegated.[18] OIGs have their own hiring authority, as well as the authority to enter into contracts and to structure their offices and perform their mission as they see fit. With few exceptions, neither the agency heads nor subordinates are to prevent or prohibit IGs from initiating, carrying out, or completing any audit or investigation or from issuing any subpoena.[19] Further, IGs may not accept cash awards or bonuses from the agency head.[20] Presidentially appointed IGs must be appointed by the President with the advice and consent of the Senate "without regard to political affiliation and solely on the basis of integrity and demonstrated ability" in fields critical to OIG functions.[21] They may be removed from office only by the President, who is required to inform both Houses of Congress not later than 30 days before the removal.[22] In addition, all IGs are required to report at least semiannually to Congress (and some IGs are required to report quarterly), [23] but Congress cannot order or prohibit the IG from conducting an investigation, audit or other review, or from issuing a subpoena, except through legislation. OIGs are prohibited from carrying out agency programs and operations so that they can objectively and independently audit and investigate such programs and operations.[24] Moreover, OIGs in the establishments have a separate budget authority that the agency head must submit to the President.[25] Finally, the IG Reform Act established the "watchdog of the watchdogs," the Council of Inspectors General on Integrity and Efficiency ("CIGIE").[26] The Integrity Committee within CIGIE receives, reviews and refers for investigation allegations of wrongdoing made against an IG or OIG employees.[27] In short, all these provisions were intended to ensure that IGs are able to fulfill their mission without interference from senior officials, such as General Counsels and management.

The DAEO's Role

Title 5 of the Code of Federal Regulations ("C.F.R."), Part 2600, implements the Ethics in Government Act of 1978, as amended ("Ethics in Government Act"), the statute that created the Office of Government Ethics ("OGE"), the overseer of ethics regulation in the Executive Branch.[28] As the agency responsible for directing ethics programs in executive departments and agencies, OGE issues rules, directives, and advisory opinions on ethics matters. It partners with executive branch agencies and departments to prevent conflicts of interest on the part of executive branch employees and resolves the conflicts of interest that occur. Pursuant to the authority of Title IV of the Ethics in Government Act, OGE directs the administration of agency ethics programs and agency DAEOs. Title 5 of the C.F.R., section 2638.201, *et. seq.*, mandates that each agency shall have a DAEO (and alternate DAEO) to coordinate and manage the agency's ethics program and provide liaison with the OGE regarding such ethics program. The Director of OGE and agency DAEOs have different roles from that of the IG and the IG Counsel. With noteworthy exceptions, the Director of OGE directs, and the agency DAEO and deputy DAEOs implement, the Ethics in Government Act. The DAEO's mission is to provide ethics advice and preventive legal assistance to agency employees. Specifically, as described in 5 C.F.R. 2638.203, the DAEO's duties include liaison with OGE, review of financial disclosure reports (one of the most unappreciated and tedious tasks in government), initiation and maintenance of ethical education and training programs, and monitoring of administrative actions and sanctions.

Like IGs and their counsel, the functions and authorities of OGE and agency DAEOs have grown in scope and prestige since 1978. For example, while requiring executive branch appointees to sign an ethics pledge is not new, DAEOs now have more discretion today in implementation. To illustrate, recently issued Executive Order ("EO") 13490, "Ethics Commitments by Executive Branch Personnel," requires every full-time political appointee appointed on or after January 20, 2009, to sign an Ethics Pledge, committing the appointee to comply with seven ethics obligations generally involving lobbying, employment actions and post-employment.[29] Following the model in the Ethics in Government Act, the OGE Director is charged with providing government-wide guidance as to how DAEOs and their agency heads should implement the EO. In addition to recounting ethics re-

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strictions applicable to the appointees and the procedural steps for oversight and enforcement, Section 3(a) of the Executive Order vested waiver authority with the Director of the Office of Management and Budget, ("OMB") in consultation with the Counsel to the President.[30] Shortly thereafter, however, a DAEOgram informed agencies that OMB had authorized DAEOs of each executive agency to exercise waiver authority in consultation with the Counsel to the President.[31] As a result, DAEOs' authority grew to include a new authority – to waive the ethics pledge requirement for certain executive employees.[32]

DAEOs Provide Written Ethics Advice

As part of a program of formal advice to all agency employees, one of the DAEO's most critical functions is to develop and provide counseling on ethics and Standards of Conduct ("Standards"). Most ethics restrictions are found in sections 202 to 209 of Title 18 of the U.S. Code and in EO 12674 as modified by EO 12731.[33] The Standards, found at 5 C.F.R. Part 2635, cover the basic ethical obligations of public service, including rules regarding gifts from outside sources and between employees, conflicting financial interests, impartiality in performing official duties, outside employment and activities, post-employment, and misuse of position.[34] The regulations require the DAEO to keep records on advice rendered "when appropriate."[35] To ensure a productive relationship with the OIG, however, a DAEO should strive to record and maintain consistent written advice to employees and communicate promptly regarding administrative actions. Written records evidencing the facts conveyed by an employee, and limitations and restrictions identified in the ethics advice given by the DAEO in response to those facts, play a vital role in ethics investigations. This is because OIG investigators and DOJ attorneys rely on them in prosecution, as may an employee in his or her defense.

Although not requiring ethics officials to maintain written documentation of ethics advice, OGE has consistently emphasized the importance of doing so.[36] In DAEOGram DO-05-019, OGE explained that "cases involving ethics laws can succeed or fail depending on the efficacy of the written documentation by ethics officials." In this same DAEOgram, OGE also described the advantages of documenting ethics advice: it protects employees, who may rely on the advice, and it also protects the integrity of the ethics program. Good practice would include:

> (1) an indication of when the advice was given; (2) a summary of the relevant facts as described by the employee; (3) citation of the applicable legal authority; (4) an analysis describing how the law applies to the facts; and (5) a conclusion.[37]

In DAEOgram DO-08-025, OGE "strongly encouraged" agency ethics officials to document ethics advice. Moreover, OGE instructed ethics officials to establish close working relationships with their OIGs, including, when needed, providing OIG employees with information about ethics advice given and also perhaps providing training and other assistance to help the OIG "understand better the criminal conflict of interest laws, standards of conduct, and pertinent supplemental agency regulations."

The DAEOs Have a Special Relationship with the IG

The federal ethics regulations recognize a special relationship between DAEOs and IGs. In carrying out their agency ethics programs, DAEOs are required by the Standards to review information developed by the OIG and other auditors.[38] The purpose of such review can be to determine whether there is a need to revise the agency's supplemental Standards or take corrective action to remedy actual or potential conflict of interest situations. Thus, if an OIG audit identifies a recurring conflict situation unique to the agency, and it is not addressed by the Standards, then the DAEO might consider a curative supplemental regulation. If an OIG investigation finds that an agency contracting officer has violated the Standards by, for instance,

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purchasing stock in a firm with which the agency contracts, the DAEO might be asked by management to recommend appropriate remedial or corrective action.

DAEOs are in an excellent position to refer to the IG allegations of criminal, civil, or administrative ethics violations that they encounter in their daily work, including violations of the Standards. When employees come to the DAEO for prospective ethics advice, there is usually no need to refer the matter to the IG. However, the DAEO might choose to proactively discuss concerns with the IG; after all, disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege.[39] When agency employees inform the DAEO of past transgressions, or explain what prospective mischief they are planning, however, the DAEO is obligated to make sure that "prompt and effective action" is taken to remedy the potential or actual violation.[40] The best thing that the DAEO can do at this point is to refer all information, documentary and otherwise, to the IG, pursuant to the Standards and the agency's own regulations. This is because, first, the DAEO is required to use the services of the agency's OIG, including the referral of matters to and acceptance of matters from the OIG.[41] Second, an agency's internal investigative authority resides with the IG, and the IG must be given the opportunity to investigate.

DAEOs Refer Investigations to the IG through the Agency Head

The law regarding the OGE Director's responsibilities provides that when the OGE Director believes an employee is in violation of a conflict of interest or Standards regulation, he or she may recommend that the agency head investigate possible violations and take disciplinary action.[42] Section 403(a) of the Ethics in Government Act states that the Director has the authority to request assistance from the inspector general to conduct ethics investigations. In these cases, the usual practice for an agency head in receipt of such a request is to ask the OIG to investigate.

This is for two main reasons. First, even though the OGE Director is authorized to undertake administrative investigations of ethics violations, the Ethics in Government Act prohibits the Director *or any designee* (italics supplied) from finding that any provision of Title 18 of the U.S. Code or any U.S. criminal law has been or is being violated.[43] Most of the ethics rules on which the Standards are based are located in Title 18 U.S.C. Sections 201, *et seq.*, and are criminal violations, although rarely prosecuted as such. Accordingly, while an ethics violation may constitute a regulatory violation, it could also be a crime and require a criminal investigation. Neither the OGE Director nor agency DAEOs are, or have on their staff, internal criminal investigators. This is the exclusive province of the OIG and outside the jurisdiction and scope of employment of a DAEO.

What Does the IG Investigate?

The IG Act authorizes IGs to conduct criminal, civil, and administrative investigations. This broad investigative authority is the same for the presidentially appointed IGs generally at the larger departments and agencies, and agency head-appointed IGs at the generally smaller "designated federal entities" and "federal entities."

The IGs' investigative authority is found in several places in the IG Act. For example, section 2(1) of the IG Act authorizes IGs "to conduct and supervise audits and investigations relating to the programs and operations of [their agencies]." Section 7(a) provides that an IG may receive and investigate complaints or information from employees about an array of activities. These are described as activities that could constitute, "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."[44]

Section 4(d) of the IG Act requires the IGs to report "expeditiously" to the Attorney General when they have reasonable grounds to believe that there is a violation of federal criminal law. IGs interpret this section to mean referrals for prosecution. Thus, an IG may, although may not always choose

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to, undertake significant investigative work to determine whether an allegation can be substantiated before presenting evidence of a violation of federal criminal law to the DOJ or an Assistant United States Attorney for prosecution. The Attorney General and the Federal Bureau of Investigation have authority to investigate any violation of federal criminal law, including those involving government officers and employees.[45]

To carry out their investigative authority, IGs are given some helpful law enforcement tools. For example, section 6(a)(1) of the IG Act permits IGs to access all records, reports, documents, etc., available to the agency relating to the programs and operations for which the IG has responsibility.[46] IGs interpret this section to mean that anything the agency can access, the IG can access also. If the agency does not have the material, then the IG can subpoena it if it is held privately.[47] If the record is in the custody of another federal entity, the IG may not issue a subpoena, but may request and expect to receive the information.[48]

With one exception, IGs do not yet have testimonial subpoena authority. Thus, IGs may require agency employees to speak with them about official matters within the confines of the constitutional privilege against self-incrimination, but, except for the Department of Defense OIG, they cannot subpoena a private citizen to speak with OIG agents.[49] Section 6(a)(2) of the IG Act allows IGs "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are . . . necessary and desirable."[50] As investigations are completed, IGs may issue reports and make recommendations for prosecution, administrative discipline, systemic internal controls, or anything else that would help the agency improve operations, prevent or detect fraud, or save money.

What Constitutes an Investigation?

Agency Counsel and DAEOs may justifiably assert that they correctly understand the requirement to refer criminal allegations to the OIG, and to request approval to undertake administrative investigations when the IG decides not to pursue an investigation. Agency Counsel and DAEOs also may argue that, based on the information before them, they cannot always determine whether an allegation rises to a criminal level or is simply a management issue. The DAEO or OGC attorney then might interview witnesses, request documents, and do other things an IG investigator might do, and later decide whether to refer to the IG. This can present problems for an OIG if the allegation is eventually referred to or discovered by the OIG after an agency lawyer has gathered evidence and talked with witnesses. The IG investigator may find witnesses tainted, documents altered or destroyed, and confidentiality nonexistent. Moreover, agency attorneys gathering evidence rarely provide the employee the necessary and proper warnings, and they likely are not as skilled at using the tried-and-true investigative techniques that professional law enforcement employs. Accordingly, some agency OIGs have endeavored to specify in internal policies exactly what should be referred to the IG and when. Others use a rule of thumb, such as if the OGC attorney needs to talk with more than one other person to substantiate an allegation, then he or she should refer the matter to the OIG.

What Happens When IGs Do Not Investigate Allegations?

On occasion, IG investigators do not investigate allegations of administrative ethics violations and instead focus solely on criminal violations, sometimes based on the advice of the U.S. Attorney's office. In such cases, if no one is investigating, the DAEO should be advised at the right time, so he or she can pursue administrative remedies and inform the Director of OGE. *This does not mean that the DAEO can undertake an investigation on his or her own, as discussed above, however, without the IG's approval.* A DAEO may be able to use the IG's evidence to recommend administrative action against an employee, e.g., discipline or counseling. If the issue is one that affects many agency employees, the DAEO can

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ensure that training and written advice address the troublesome issues.

It might be hard to determine immediately the effects of an unexplored allegation of an ethics violation. At the least, however, failure to deal with such allegations and to administer appropriate discipline when they are substantiated, runs counter to the purpose of the Ethics in Government Act and may diminish the overall ethical culture that the DAEOs try to foster. Furthermore, it could hurt national security and significantly harm government operations. For example, if an employee in a "public trust position" commits a certain ethics violation and the violation is not taken seriously and investigated, that employee – and the government – might not recognize the potential harm until it is too late. The employee may be encouraged by the lack of oversight to commit another violation, or lackadaisically or unwittingly create additional vulnerabilities. A public trust position includes those involved in policy making, major program responsibility, public safety and health, law enforcement, fiduciary responsibilities or "other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain."[51] An employee in such a position is particularly able to cause harm through continued access to or control of critical systems, records, and information. No matter the reason for the possible violation, failing to investigate could lead to serious national security consequences. Therefore, it is not only in the OIG's and agency's best interest to explore all potential violations, but also it helps protect national security.

IGs Should Cooperate with DAEOs

Communications cannot be a one-way street. The DAEO is required by regulation to be aware of all ethics infractions, and must maintain a list of all situations that have resulted or may result in noncompliance with ethics laws and regulations.[52] This list must be published within the agency and made available to the public. Thus, the IG must inform the DAEO of all ethics infractions the IG has verified to enable the DAEO to fulfill his or her regulatory obligations.

This does not mean the IG must notify the DAEO immediately each time he opens an investigation involving a violation of the Standards. Nor must the IG advise the DAEO at any particular point in an investigation. Nevertheless, the Quality Standards for Federal Offices of Inspector General (October 2003) state that the OIG "should make a special and continuing effort" to keep the DAEO informed about OIG activities, including "the results of investigations and allegations of ethical misconduct where appropriate, that relate to the ethics official's responsibilities for the agency's ethics program."[53] When an IG investigation uncovers an ethics violation, the DAEO may serve as a consultant for OIG investigators on technical issues of ethics law. OIG investigators and counsel might both consult the DAEO, within the confines of the Privacy Act, about what constitutes a violation, whether a violation has occurred, and what remedy or corrective action is usual within the agency.

IGs also may refer to DAEOs audit or investigative findings regarding the agency's ethics program, e.g., which employee grades and classifications are required to submit financial disclosure forms, which employees are not receiving their confidential forms or whether an employee is not filling them out properly or in a timely manner.

IG Counsels May Serve as Deputy DAEOs

In many large agencies, DAEOs delegate Deputy DAEO ("DepDAEO") authority to attorneys in various agency sub-components, including the OIG, pursuant to 5 C.F.R. 2638.204(a). OIGs can benefit from having a DepDAEO in-house. A DepDAEO in the OIG who is aware of the OIG's special needs and mission can help the DAEO implement the agency's ethics program. In addition, having a DepDAEO in-house might appear to enhance an IG's independence. Finally,

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OIG employees may feel more comfortable seeking advice from the OIG DepDAEO than with the DAEO. This comfort may encourage employees to seek advice and, as a result, have a preventive effect.

In addition to the advantages, however, OIGs should consider a few issues when implementing an agency's ethics program in-house. First, the OIG must decide whether it will seek an official delegation from the DAEO, as the regulations dictate. Based on the regulations, each agency has only one primary DAEO and one alternate DAEO, and DepDAEOs must receive their authority through delegation. The DAEO must keep a list of persons to whom delegations have been made to provide to OGE upon request.[54] OIGs that have DepDAEOs in-house serving without a delegation may lack the support of the Ethics in Government Act.

Second, because of the nature of the DAEO's duties, OIGs with DepDAEO functions in the IG Counsel's office might risk at least a perceived conflict of interest. When and if IG Counsels adopt this role, they must be cautious. IG Counsels may give ethics advice to IG employees, which may provide a "safe harbor." The regulations state that disciplinary action for violating ethics rules "will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances."[55] However, if an IG Counsel were to give a "safe harbor" opinion to an IG employee, and that employee relied on the advice to commit an act later investigated by the IG, the DepDAEO must be careful to recuse himself or herself from any ensuing investigation. If not, not only could the investigation be jeopardized, but also the attorney risks violating rules of professional conduct. Accordingly, the soundest way to prevent conflicts of interest within the OIG is for IG Counsel not to accept the DepDAEO role or to undertake the responsibilities, but limit advice to informal ethics advice and communicate the limits of such advice to the employee. Additionally, the IG Counsel DepDAEO should recuse himself or herself from any investigations involving matters in which he or she gave advice. Finally, when the OIG's DepDAEO faces a novel or complex issue, or when an employee requires a written opinion, he or she should refer it to the agency's DAEO.

Reporting Requirements

Reporting requirements are imposed on both OIGs and DAEOs. In accordance with §402(b)(2) of the Ethics in Government Act, the Director of OGE, in consultation with the Attorney General and the Office of Personnel Management, promulgated regulations pertaining to conflicts of interest in the executive branch. These regulations require agencies to notify the OGE Director when any matter involving an alleged violation of federal conflict of interest laws is referred to the Attorney General in accordance with 28 U.S.C. §535.[56] This is usually accomplished by OIG submission of OGE Form 202 (7/94), "Notification of Conflict of Interest Referral," at the time formal referral is made to the DOJ. The form indicates that it is to be used in cases involving possible violation of 18 U.S.C. §§203, 205, 207-209 by current or former executive branch employees. As discussed above, under §4(d) of the IG Act, OIGs are required to report violations of federal criminal law to the Attorney General.

OIGs and DAEOs Can Work Together Better

To summarize, the federal OIG and ethics communities have flourished, making important contributions to government integrity. Employees dedicated to ethics issues have earned high degrees of respect and deference as valued experts within their individual agencies and as sources of high-level insight at the federal level. As the DAEOgram discussing the DAEOs' new waiver authority of the President's ethics pledge stated, "This designation reflects the high degree of trust and confidence with which the experience and professional judgment of the DAEOs is viewed."[57] OIGs' and OGE's combined efforts and achievements have been individually recognized by statutory and executive

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enhancements to their responsibilities and authorities. Together, IG Counsel and DAEOs can continue to improve government by adopting or maintaining the following best practices.

-IG Counsels and DAEOs should maintain ongoing communications

It may be trite, but it is true—regular communication can solve a lot of problems. When IG Counsel and DAEOs build and maintain strong relationships, problems can be resolved by informal discussion before they blossom into full-fledged headaches. IG Counsels should keep DAEOs informed of the progress of relevant ethics investigations and whether documents and/or testimony may be requested. For their part, DAEOs should consult with IG Counsel and refer potential ethics violations to the IG for investigation.

-IG Counsels and DAEOs should do joint training

DAEOs are required to provide annual ethics training, and many IG's present integrity awareness briefings. Combining the two provides agency employees with the continuum from ethics education and advice to investigation and prosecution of violations. Such cooperation fosters a stronger ethical culture, which in turn breeds employees who care about doing the right thing, whether the action is guided by a Standard or not. IGs can publish internal web newsletters highlighting recurring issues and reminding agency staff of common pitfalls. DAEOs can write articles for their agency web and social networking sites to make agency employees aware of current ethics issues. OGE has always graciously invited IGs and IG Counsels to participate and present at annual OGE conferences. This cooperation is valuable to everyone and should be continued.

-DAEOs should promptly document ethics advice to employees.

Friction between IGs and DAEOs can be avoided when written records of advice relevant to an allegation are available. In these cases, disputed testimony about whether the DAEO's advice indicated the activity was permitted or prohibited can be eliminated and potential for prosecution can be preserved.

-DAEOs should refer investigations to the OIG.

DAEOs can potentially complicate OIG investigations if they undertake their own investigations without OIG approval and before referring allegations to the OIG. By exposing confidential information, they can inadvertently allow wrongdoers to destroy evidence, fabricate stories, and taint testimony. Thus, DAEOs should *always* refer investigations to the OIG.

-IG Counsels should be cautious if they act as DepDAEOs.

IG Counsel and DAEOs roles are not the same, so when an IG Counsel is confronted with an unusual, complicated, or novel ethics issue that could be referred to the OIG for investigation, he or she should also refer it to the agency DAEO.

–IG Counsels should consult with DAEOs on ethics investigations.

Recognizing that DAEOs are ethics experts, IG Counsel assisting with investigations involving ethics violations should consult with and exchange information with DAEOs. IG Counsel can be a bridge between OIG investigators and the DAEO. Through training and education targeting specific problems, IG Counsel can further the DAEO mission, even without being formally delegated DepDAEOs. Moreover, by sharing information with the DAEO, an OIG ensures that no ethics violation will go unnoticed. Such vigilance serves not only to promote an ethical culture, but also can help protect national security. ■

Endnotes

[1] IG Act, 5 U.S.C. app., Pub. Law No. 95-542, 92 Stat. 1101 (1978), as amended; Ethics in Government Act, 5 U.S.C. app., Pub. Law No. 95-521, 92 Stat. 1824 (1978), as amended. The Merit Systems Protection Board and the Office of Special Counsel were created by the Civil Service Reform Act of 1978, Pub. Law No. 95-454.

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[2] The substance of this article was presented in lectures given to ethics attorneys at the Interagency Ethics Council on May 4, 1995, and at the Office of Government Ethics ("OGE") Annual Conferences in 1995 and 1996 in, respectively, Philadelphia and Williamsburg, Virginia. The original article, which sought to provide a comprehensive description of statutory and regulatory rules that define the roles of federal government attorneys serving in ethics and Office of Inspector General ("OIG") counsel positions was published as "The Role of Inspectors General in Ethics: Inspector General Counsel and Ethics Counsel Interface" (without copyright restrictions) in the August 1995 edition of the *Federal Ethics Report.* A second publication, essentially a restatement of the original, was published as "Legal Eagles: Ethics" in the Spring 1996 edition of *the Journal of Public Inquiry.*

[3] IG Act, 5 U.S.C. app., Sec. 3(d).

[4] GAO/OGC-95-15, March 1, 1995, "Inspectors General-Independence of Legal Services Provided to IGs," Appendix IV, pp. 19-20.

[5] 5 U.S.C. app., Sec. 6(a)(7), (9).

[6] Pub. Law No. 103-355.

[7] GAO/OGC-95-15, p. 12.

[8] *Id.*

[9] *Id.*

[10] Pub. Law No. 107-296. Section 812 of the Homeland Security Act amended section 6 of the IG Act to provide full, statutory law enforcement powers.

[11] Section 812(a), Homeland Security Act; 5 U.S.C. app., 6(e)(1)-(2). The OIGs listed in section 6(e)(3) of the IG Act are exempt from this requirement of an initial determination of need.

[12] Section 812 of the Homeland Security Act; 5 U.S.C. app., 6(e)(1), (4); "Attorney General Guidelines for Offices of Inspectors General with Statutory Law Enforcement Authority," Dec. 8, 2003.

[13] *Id.*, p. 1.

[14] *Id.*

[15] *Id.*

[16] IG Reform Act of 2008, Pub. Law No. 110-409, 122 Stat. 4302.

[17] Statement on Signing the Inspector General Reform Act of 2008, 44 Weekly Compilation of Presidential Documents 1345 (Oct. 14, 2008).

[18] 5 U.S.C. app., Sec.3(a).

[19] 5 U.S.C. app., Sec.3(a). Under the IG Act, the heads of only six agencies – the Departments of Defense, Homeland Security, Justice, and the Treasury, plus the U.S. Postal Service and the Federal Reserve Board – may prevent the IG from initiating, carrying out, or completing an audit or investigation, or issuing a subpoena. These agency heads may only exercise this authority for specific reasons, including to protect national security interests or ongoing criminal investigations.

[20] 5 U.S.C. app., Sec. 3(f).

[21] *Id.*

[22] 5 U.S.C. app., Sec. 3(b).

[23] 5 U.S.C. app., Sec. 5.

[24] 5 U.S.C. app., Sec. 9(a).

[25] 5 U.S.C. app., Sec. 6(f).

[26] 5 U.S.C. app., Sec. 11.

[27] 5 U.S.C. app., Sec. 11(d)(1).

[28] 5 U.S.C. app.; Pub. Law No. 95-521, 92 Stat. 1824.

[29] EO 13490 was issued on January 21, 2009. For example, registered lobbyist-appointees are required to recuse themselves for two years after appointment from any particular matter lobbied during the two years prior to appointment, and all appointees must agree not to lobby certain executive branch officials for as long as President Obama is in office. Notably, former President Clinton had required every senior appointee to sign a stricter ethics pledge. For instance, Clinton mandated five year restrictions on lobbying on all appointees, not just lobbyists, as well as a permanent bar from participating in an activity on behalf of a foreign government or political party.

[30] Executive Order 13490, Sec. 3.

[31] DAEOgram DO-09-008, "Authorizations Pursuant to Section 3 of Executive Order 13490," February 23, 2009. A DAEOgram is an OGE memorandum to the DAEOs. Starting in January 2011, "OGE Advisories" replaced DAEOgrams.

[32] *Id.*

[33] The Executive Order is implemented by regulations at 5 C.F.R. 2635.

[34] 5 C.F.R. 2635. *et. seq.,* Standards of Ethical Conduct for Employees of the Executive Branch.

[35] 5 C.F.R. 2638.203(b)(8).

[36] *E.g.,* OGE List Serve Message to Agency Ethics Contacts, No. 279, Jan. 17, 2008; Ethics Program Review Guidelines, Oct. 2004, pp. 18-19; DAEOgram DO-05-019, "Documenting Ethics Advice," Nov. 17, 2005; DAEOgram DO-08-025, New GAO Report; Documenting Ethics Advice, Aug. 26, 2008.

[37] DAEOgram DO-05-019, p. 3.

[38] 5 C.F.R. 2638.203(b)(11).

[39] 5 C.F.R. 2635.107(b).

[40] 5 C.F.R. 2638.203(b)(9).

[41] 5 C.F.R. 2638.203(b)(12).

[42] 5 U.S.C. 402(f)(2)(A)(ii)(I). If the employee involved is the agency head, however, any such recommendation must be submitted to the President.

[43] 5 U.S.C. 402(f)(5).

[44] 5 U.S.C. app., Sec. 7(a).

[45] 28 U.S.C. 535.

[46] 5 U.S.C. app., Sec. 6(a)(1).

[47] 5 U.S.C. app., Sec. 6(a)(3).

[48] 5 U.S.C. app., Sec. 6(a)(3).

[49] The National Defense Authorization Act for Fiscal Year 2010, Pub. Law No. 111-84, enacted on October 28, 2009, at Title X, Subtitle D, Section 1042, amended Section 8 of the Inspector General Act to grant the Defense Department IG testimonial subpoena authority.

[50] 5 U.S.C. app., Sec. 6(a)(2).

[51] 5 C.F.R. § 731.106(b).

[52] 5 C.F.R. 2638.203(b)(5).

[53] Quality Standards for Federal Offices of Inspector General, President's Council on Integrity and Efficiency, October 2003, pp. 30-31.

[54] 5 C.F.R. 2635.107(b).

[55] 5 C.F.R. 2635.107(b).

[56] 5 C.F.R. 2638.603(b).

[57] DAEOgram DO-09-008, Authorizations Pursuant to Section 3 of Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," Feb. 23, 2009.

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