PROGRAM MATERIALS

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Inspector General Whistleblower Investigations – How They Work & How to Manage if Under Investigation

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Inspector General Whistleblower Investigations – How They Work & How to Manage

AGENDA

- Who are Inspector Generals
- Whistleblower Laws & Regulations When Working with the Federal Government
- Investigating Whistleblower Concerns
- Responding to an Inspector General Investigation
- DoD Inspector General Whistleblower Office ADR Process
- Managing the Risk of Whistleblowers

Who Are Inspector Generals?

WHO ARE IG'S?

- Presidential appointment with Senate advice and consent
- Conduct and supervise audits and investigations of their agency's programs
- Report to DOJ if IG has "reasonable grounds" to believe a criminal violation has occurred
- Coordinate and advise on policies to promote efficiency, effectiveness and to prevent/ detect fraud and abuse
- Inform the agency head and Congress on matters within its area of responsibility

Inspector General Act of 1978 ("Act") Amended 1988 and 2008

CHALLENGING THE IG SUBPOENA

Courts role managing IG subpoena's is "sharply limited" to:

- Is the subpoena within the agency's statutory authority;
- Does the subpoena seek information "reasonably relevant" to the investigation
- Is the subpoena "unreasonably broad or burdensome";
- Does the subpoena seek information the government does not already have.

Inspector Gen., United States HUD v. Banner Plumbing Supply, Co., 34 F. Supp. 2d 682, 684 (N.D. Ill. December 9, 1998) citations omitted, citing to *U.S. v. Powell*, 379 U.S. 48 (1964)(included in materials)

Laws & Regulations on External Reporting of Concerns

Federal Government Regulations on External Reporting of Concerns

Protecting Contractor Employees From Reprisal for Disclosing

- Contractors may not discharge, demote, or otherwise discriminate against an employee in reprisal
- For disclosing to information that the employee <u>reasonably believes</u> is evidence of:
  - ✓ Gross mismanagement
  - ✓ Gross waste of funds,
  - ✓ An abuse of authority
  - ✓ A violation of law, rule, or regulation
  - ✓ A substantial and specific danger to public health or safety.

10 USC § 2409(a)(1) (relates to DoD and NASA); See also 10 USC § 1587

Where Employees May Disclose

- A Member of Congress or a representative of a committee of Congress.
- An Inspector General.
- The Government Accountability Office.
- A government employee responsible for contract oversight or management.
- An authorized official of the Department of Justice or other law enforcement agency.
- A court or grand jury.
- A management official or other employee of the contractor who has the responsibility to investigate, discover, or address misconduct.

10 USC § 2409(a)(2); See also 10 USC § 1587

Protecting Contractor Employees From Reprisal for Disclosing

- "The contracting officer shall insert the clause at 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts that exceed the simplified acquisition threshold ($150,000)."
  48 CFR § 3.908-9

- Contractors must inform their employees in writing of these requirements, in the predominant native language of the workforce.
  10 USC § 2409(d) (relates to DoD and NASA); See also 10 USC § 1587

IG Mandate to Investigate

The Inspector General must investigate the complaint unless it determines that the complaint:

- Is frivolous
- Fails to allege a violation as defined in the act
- Has previously been addressed by another government entity that was initiated by the complainant

Upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

10 USC § 2409(a)(1) (relates to DoD and NASA); See also 10 USC § 1587

Remedy and Enforcement

Within 30 days after receiving an Inspector General report the head of the agency shall determine whether there is "sufficient basis" to conclude that the contractor violated the anti-retaliation regulations

Must either:

- Deny relief – permits complainant to proceed to court
- Take action

10 USC § 2409(a)(1) (relates to DoD and NASA); See also 10 USC § 1587

Remedy and Enforcement

The IG may order:

- The contractor take affirmative action to abate the reprisal
- The contractor reinstate the complainant to the position held before the reprisal;
- The contractor to pay the complainant compensatory damages including back pay and employment benefits
- The contractor to pay the complainant costs and expenses, including attorneys' fees that were reasonably incurred

10 USC § 2409(a)(1) (relates to DoD and NASA); See also 10 USC § 1587

Time Frames

- Within 180 days of receiving the complaint, unless the complainant agrees to extend the time, the IG must submit a report of the findings of the investigation to the person, the contractor concerned, and the head of the agency.

- A complaint may not be brought more than three years after the date of alleged reprisal.
  10 USC § 2409(a)(4) (relates to DoD and NASA) See also 10 USC § 1587

DoD ADR Process

- To address a back log of whistleblower cases
- September 2017 DoD IG developed an ADR process for these types of complaints.
- A DoD IG attorney contacts the contractor complained about and asks if they want to participate in ADR to resolve the concern
- If all the parties agree, the ADR process starts.
- DoD is not a party to the resolution but just a facilitator attempting to have the parties settle the matter

*Also added more attorneys to the office to investigate.

When IG Need Not Investigate

The Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal unless

- The complainant consents
- Done consistent with Federal law
- It is necessary to investigation the claim.

10 USC § 2409(a)(3) (relates to DoD and NASA); See also 10 USC § 1587

Employers Prohibited from Requiring Employee Confidentiality

- FAR: Prohibits the federal government and prime contractors from contracting with entities that require certain types of internal confidentiality agreements
  48 CFR 3.909-3; 48 CFR 52.203-18

- SEC (Dodd-Frank): Requiring witnesses in internal investigations to sign confidentiality clauses or face termination violated SEC regulations which prohibit agreements that could impede whistleblower from communicating directly to SEC, "including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications."
  Exchange Act Release #74619

COMPLIANCE & MANDATORY DISCLOSURE

The federal acquisition regulation was amended in 2008 to require that contractors with "covered" contracts must:

1. Have a compliance program and internal control system
2. Make "timely" disclosure to the government of "credible evidence" of violations of the FCA and certain federal criminal laws

A "covered" contract is any contract that has a value of $5M or greater (including options), and a performance period of greater than 120 days.
48 CFR § 52.203-13; 3.1004

Additional Laws & Regulations on External Reporting of Concerns

INCENTIVES TO DISCLOSE -WHISTLEBLOWERS

Enacted in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) builds on the Sarbanes Oxley whistleblower requirements and allows whistleblowers who provide the SEC with original information about securities violations to obtain between 10% to 30% of any monetary sanctions in excess of $1 million recovered against a company

- Provides for anonymous reporting
- Encourages (but does not require) internal reporting prior to going to the SEC
- Includes anti-retaliation protections for whistleblowers who report possible securities laws violations
- Prohibits actions that impede whistleblower communications with the SEC including “enforcing, or threatening to enforce, a confidentiality agreement” with respect to such communications

DODD-FRANK
SECTION 21F OF SEC ACT OF 1934

- **Purpose:**
  - Monetary Incentives
  - Protect whistleblowers
- **Eligible whistleblowers:**
  - Perpetrator, auditors, third parties, clients, customers, compliance can report
  - “reasonable basis” to believe disclosing is necessary to prevent substantial financial injury

FALSE CLAIMS ACT

- Claims for payment must be accurate, complete, and up to date
- Expectation that adequate due diligence supports statements to the Government
- Government focuses on invoices; cost & pricing information; reliance on representation in proposals and certifications
- Government has the right to audit - need to have supporting documentation
- Qui tam actions permit "private" enforcement actions

31 USC §§ 3729 et seq (civil); 18 USC § 287 (criminal)

FALSE CLAIMS ACT: QUI TAM RELATORS

- The FCA authorizes the DOJ and qui tam relators to bring civil actions against any person who knowingly makes or uses a false statement or document to either obtain money from the Government or avoid paying money owed to the Government (i.e., "reverse false claims")

- Qui tam relators – sometimes acting as "whistleblowers" – are authorized by the FCA to act as private attorneys general by suing on behalf of the Government and receiving 15-30% of the recovery

FCA: STATE & LOCAL GOVERNMENTS

- The FCA is a federal statute – but more than 30 states have enacted "mini-FCAs"
- Texas, Florida, Illinois, Montana and the District of Columbia recently enacted FCA laws; other states are considering enhancing existing versions of the FCA (e.g., New York) or enacting new FCA statutes (Pennsylvania, South Carolina, Alabama, Wyoming)
- Even in those states that have not enacted their state FCAs yet, whistleblowers can still file a federal FCA case against individuals or businesses whom they believe have defrauded the federal government
- Foreign countries are considering enacting similar statues (UK and Australia)

IRS WHISTLEBLOWER REGULATION: INTERNAL REVENUE CODE 7623(B)

- Eligible for 15% to 30% of amount in dispute if provided information
- Disputed tax amount must exceed $2 million or individuals' gross income must exceed $200,000
- No limit on amount of award
- Award amount reduced to up to 10% when disclosure based on:
    - Judicial or administrative hearings
    - Governmental report, hearing, audit or investigation
    - News media
- Award reduced if whistleblower "planned and initiated" the tax issue
- Whistleblower may be asked to assist IRS
- Awards can be appealed to the U.S. Tax Court
- If amount thresholds not met, IRS can pay for information under IRC 7623(a)
- Whistleblower Annual Reports

Managing the Risk of External Reporting of Concerns

DOJ Compliance Program Factors

- Conducting risk assessment and using information to improve program
- Adequacy of policies and procedures
- Adequacy of training and communication
- Adequacy of reporting systems, to include confidentiality of system
- Incentives and discipline to drive behavior
- Efforts to determine root cause of the wrongdoing
- Efforts to remediate the wrongdoing
- Senior leadership and management commitment to ethics and compliance
- Adequacy of resources
- Capability, independence of those responsible for the program
- Managing third parties, to include in the M&A process

Instill Trust With Employees

- Develop and distribute standards of conduct are published
- Have an effective internal concern reporting system
- Encourage reporting to HR, legal, compliance, finance, board
- Track reporting of all issues raised not just to help line
- Develop intake and screening protocols
- Develop internal investigation protocols
- Communicate and train leaders and employees on the program
- Protect those who raise genuine concerts against retaliation
- If possible, inform the person who reported the concern and other employees of the investigation results
- Monitor and audit procedures to assess performance
- Develop a culture of open communication

HELPLINES

- Capabilities for anonymous reporting
- Case management system - track and close concerns
- Method to notify and close out with person who raised concern
- Clear message of no retaliation
- Broadly communicated across many mediums
- Method to run reports, queries
- Regular review for patterns and analysis of data
- Should help identify trends, needs for improvement
- Method to develop reports to leadership and to the board
- Outside parties should be able to report concerns and ask questions

QUESTION?

THANK YOU FOR YOUR TIME.

CASSIDY LAW PLLC

Department of Defense Inspector General Must Investigate Certain Whistleblower Complaints – But Sometimes DoD Will Offer Contractors Alternative Dispute Resolutions

If you are a Department of Defense contractor you are subject to a unique law that requires the DoD Inspector General to investigate complaints against your organization if someone claims that you fired, demoted or in any way discriminated against or punished them, whether they are your employee or not, for raising concerns about government fraud, waste, abuse of authority, violations of laws or danger to health and safety.

By way of background on the law, DoD procurement laws prohibit any DoD contractor, subcontractor, grant recipient or subgrant recipient (for the rest of this article, I will refer to this group as simply “contractors”) from taking any sort of negative action against a person for disclosing information that the person “reasonably believes” is evidence of fraud, waste, abuse of authority; violations of law, regulations or policies; or is a substantial and specific danger to public health or safety. 10 USCS § 2409.

Once a person raises such a concern, if they are then somehow punished in anyway or discriminated against for doing so, they may file a complaint with the DoD Inspector General.

So, if you do business with DoD or others in the DoD ecosystem, you need to be sure your company is aware of the potential for these types of Inspector General investigations. In fact, the law says that DoD must ensure that all contractors know about these requirements and that contractors inform their employees about these requirements.

But, you should not only be aware of this complaint and Inspector General investigative process, but you should assure that your company is ready to defend in the event it gets notified it is under DoD inspector general investigation for one of these types of whistleblower matters.

Once a person files a complaint with DoD, the DoD office that reviews these complaints the Whistleblower Reprisal Investigations Directorate (WRI) MUST investigate the complaint unless:

- The complaint has no merit
- The complaint has been previously addressed by another federal or state judicial or administrative proceeding initiated by the complainant.

After completing the investigation, the IG must submit a report with its findings to the person who complained; to the contractor who was the subject of the complaint; and to the head of the government agency at issue.

The IG must complete the report within 180 days of receiving the complaint.

If the IG cannot finish its investigation and report within 180 days, the IG and the person raising the complaint can agree that the 180 days will be extended to complete the report.

Within 30 days of receiving the IG report, the head of the agency involved must determine if there is enough evidence to find that the contractor involved has retaliated against the person who made the complaint. If not, the head of agency issues an order denying the complaining person any relief.

If the agency head finds that there was adverse action against the complaining person, then the agency head must issue an order to the contractor to:

- Affirmatively end any adverse actions against the person and/or
- Reinstate the complaining person to the position that the person held before the adverse action was taken and provide any compensatory damages, including back pay, employment benefits, and any other employment terms in place if the person had not been retaliated against
- Pay the complainant the total of all reasonable costs and expenses including attorneys' fees and expert witnesses' fees that the complaint incurred to bring the complaint.

If the head of the agency does not issue an order within 120 or otherwise lets the complaint time expire, and, if the time did not expire for any “bad faith” reason, then the complainant can sue in federal court.

WRI handles a lot of these types of complaints. So many that when the Government Accountability Office (GAO) conducted a review to determine if DoD IG was getting the investigations done with in the 120 days required by law, it discovered DoD IG was blowing the 120 days deadline. GAO discovered the investigations were taking about 285 days to complete.

DoD IG has undertaken a couple of measures to shorten the timeline for its investigations.

First, it increased the number of employees in the WRI office.

Second, in September 2017 it started an alternative dispute resolution (ADR) process for these types of complaints. The process is supposed to mediate settlement for some of these complaints rather than having the lengthy and expensive IG process take place for every case.

Now, lest all the government watchdog types get concerned that this may just be a move to hide government waste, fraud, and abuse, remember complaints are of all shapes and sizes.

Many times complaints made to any reporting system just don't require that investigative resources be expended in every case. So, in my opinion, the ADR process actually helps assure government resources are not wasted and instead are expended on serious matters that merit the use of government resources.

Under the ADR process, a WRI attorney contacts the contractor complained about and asks if they want to participate in ADR to resolve the concern. Then, if all the parties agree, the ADR process starts. DoD is not a party to the resolution but just a facilitator attempting to have the parties settle the matter.

The ADR process may be a good way for a contractor to go, depending on the case.

Contractors who get alerted to one of these complaints against them and DoD is willing to send the matter through ADR will likely save time, money and employee morale by going through the ADR process rather than through an IG investigation.

Remember, if you are contacted by an ADR attorney, you now know that the IG has at the very least determined that the complaint merits some type of review – most likely.

So, if you are asked to go through ADR when facing a DoD IG whistleblower investigation, even if you think your company has done no wrong, the question you should ask is: do I really want to wait for some investigation to play out over the course of months or possibly even in excess of a year to be completed to only have the IG close it down

An IG investigation like all investigations will require lawyer time, IT professional's time, forensic accountant's time, employee time for interviews. Investigations are costly and disruptive to normal business operations.

An IG investigation will impact employee morale. Employees will be required to respond to IG subpoenas, possibly even be interviewed by the IG – subpoena responses and interviews will take a significant amount of employee time.

Further, employees will be distracted by the investigation, they will not really know why there is an investigation but many will likely hear something is going on; they will talk, they will form suspicions about one another and about their employer. Ultimately, employee morale is usually low during the course of the investigation because of the extra work – employees assigned to gather information to produce as part of the investigation often will still have their "day" job to do. It is also low because of the gossip and suspicion that percolates through out the organization, no matter how close hold the investigation is.

Further, many federal government contractors are required either pursuant to their contracts with the government or with their prime contractor to disclose when they are under investigation, even if it may be a small matter. Similarly, contractors may be required to disclose that they are under DoD investigation to their bankers; to joint venture partners; to executives or directors they are recruiting; in the course of due diligence for a merger or acquisition; or in many other business relationships. Identifying to whom the contractor must disclose the investigation, making the disclosure as well as gathering documents and having witnesses interviewed will also eat up time and money and morale.

Publicity is another factor to consider when deciding to accept the ADR process or not. Although the ADR process may still result in publicity it may not be as big a splash as a full on Inspector General investigation. A matter settled in ADR presumably is not as significant as matters DoD does not funnel through the ADR process and, as a result, DoD may be less inclined to use an ADR matter as a public example of what not to do.

Either way, remember, for any company, no matter how a government investigation goes, they are usually complex and have the potential to expose your company, your leaders, your employees and even your business partners to a number of legal sanctions. So, it's usually in your best interest to consult a lawyer.

Even so, what should you consider if you learn your company is under DoD whistleblower investigation and, you have been offered the ADR process? Here are some questions, that depending on the answers, may help you decide if you should take ADR:

- What are the facts alleged by the complainant?
- If the alleged facts are accurate, how damaging will the IG findings be to your reputation – even if ultimately the IG decides the claims doesn't hold water?
- If the facts are accurate, would your company or employees be suspended or debarred or even criminally prosecuted if the IG investigates?
- Who is the complainant – employee, subcontractor, competitor; and where do you see your company's relationship with the complainant going?
- Why is the complainant raising the concern - is there genuinely a problem or, are they aggrieved about something else?
- Are business leaders, directors, shareholders involved in the matter?
- Are government employees been involved in the matter?
- What laws, regulations, policies, contractual terms does the complainant claim were violated?

Once you consider these factors, then you need to decide is the matter something you are willing to settle over with the whistleblower. Having contemplated these questions and whether you want to settle – should help you decide if the ADR process is best for your organization given the complaint it faces.

U.S. Department of Justice
Criminal Division
Fraud Section

Evaluation of Corporate Compliance Programs

Introduction

The Principles of Federal Prosecution of Business Organizations in the United States Attorney's Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporate entity, determining whether to bring charges, and negotiating plea or other agreements. These factors, commonly known as the "Filip Factors," include "the existence and effectiveness of the corporation's pre-existing compliance program" and the corporation's remedial efforts "to implement an effective corporate compliance program or to improve an existing one."

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation that triggers the application of the Filip Factors, the Fraud Section does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case.

There are, however, common questions that we may ask in making an individualized determination. This document provides some important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program. The topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.

Many of the topics below also appear in the United States Attorney's Manual ("USAM"), in the United States Sentencing Guidelines ("USSG"), in Fraud Section corporate resolution agreements, in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("FCPA Guide") published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), in the Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development ("OECD") Council on February 18, 2010, and in the Anti-Corruption Ethics and Compliance Handbook for Business ("OECD Handbook") published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank.

Sample Topics and Questions

1. Analysis and Remediation of Underlying Misconduct

- **Root Cause Analysis** – What is the company's root cause analysis of the misconduct at issue? What systemic issues were identified? Who in the company was involved in making the analysis?

- **Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues? What is the company's analysis of why such opportunities were missed?

- **Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

2. Senior and Middle Management[1]

- **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How does the company monitor its senior leadership's behavior? How has senior leadership modelled proper behavior to subordinates?

- **Shared Commitment** – What specific actions have senior leaders and other stakeholders (*e.g.*, business and operational managers, Finance, Procurement, Legal, Human Resources) taken to demonstrate their commitment to compliance, including their remediation efforts? How is information shared among different components of the company?

- **Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

3. Autonomy and Resources[2]

- **Compliance Role** – Was compliance involved in training and decisions relevant to the misconduct? Did the compliance or relevant control functions (*e.g.*, Legal, Finance, or Audit) ever raise a concern in the area where the misconduct occurred?

- **Stature** – How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions?

- **Experience and Qualifications** – Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?

- **Autonomy** – Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors? How often do they meet with the board of directors? Are members of the senior management present for these meetings? Who reviewed the performance of the compliance function and what was the review process? Who has determined compensation/bonuses/raises/hiring/termination of compliance officers? Do the compliance and relevant control personnel in the field have reporting lines to headquarters? If not, how has the company ensured their independence?

- **Empowerment** – Have there been specific instances where compliance raised concerns or objections in the area in which the wrongdoing occurred? How has the company responded to such compliance concerns? Have there been specific transactions or deals that were stopped, modified, or more closely examined as a result of compliance concerns?

- **Funding and Resources** – How have decisions been made about the allocation of personnel and resources for the compliance and relevant control functions in light of the company's risk profile? Have there been times when requests for resources by the compliance and relevant control functions have been denied? If so, how have those decisions been made?

- **Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? What has been the rationale for doing so? Who has been involved in the decision to outsource? How has that process been managed (including who oversaw and/or liaised with the external firm/consultant)? What access level does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

4. Policies and Procedures[3]

a. Design and Accessibility

- **Designing Compliance Policies and Procedures** – What has been the company's process for designing and implementing new policies and procedures? Who has been involved in the design of policies and procedures? Have business units/divisions been consulted prior to rolling them out?

- **Applicable Policies and Procedures** – Has the company had policies and procedures that prohibited the misconduct? How has the company assessed whether these policies and procedures have been effectively implemented? How have the functions that had ownership of these policies and procedures been held accountable for supervisory oversight?

- **Gatekeepers** – Has there been clear guidance and/or training for the key gatekeepers (*e.g.*, the persons who issue payments or review approvals) in the control processes relevant to the misconduct? What has been the process for them to raise concerns?

- **Accessibility** – How has the company communicated the policies and procedures relevant to the misconduct to relevant employees and third parties? How has the company evaluated the usefulness of these policies and procedures?

b. **Operational Integration**

- **Responsibility for Integration** – Who has been responsible for integrating policies and procedures? With whom have they consulted (*e.g.*, officers, business segments)? How have they been rolled out (*e.g.*, do compliance personnel assess whether employees understand the policies)?

- **Controls** – What controls failed or were absent that would have detected or prevented the misconduct? Are they there now?

- **Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

- **Approval/Certification Process** – How have those with approval authority or certification responsibilities in the processes relevant to the misconduct known what to look for, and when and how to escalate concerns? What steps have been taken to remedy any failures identified in this process?

- **Vendor Management** – If vendors had been involved in the misconduct, what was the process for vendor selection and did the vendor in question go through that process? See further questions below under Item 10, "Third Party Management."

5. Risk Assessment[4]

- **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faced?

- **Information Gathering and Analysis** – What information or metrics has the company collected and used to help detect the type of misconduct in question? How has the information or metrics informed the company's compliance program?

- **Manifested Risks** – How has the company's risk assessment process accounted for manifested risks?

6. Training and Communications[5]

- **Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees that addressed the risks in the area where the misconduct occurred? What analysis has the company undertaken to determine who should be trained and on what subjects?

- **Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the intended audience? How has the company measured the effectiveness of the training?

- **Communications about Misconduct** – What has senior management done to let employees know the company's position on the misconduct that occurred? What communications have there been generally when an employee is terminated for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

- **Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

7. Confidential Reporting and Investigation[6]

- **Effectiveness of the Reporting Mechanism** – How has the company collected, analyzed, and used information from its reporting mechanisms? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

- **Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?

- **Response to Investigations** – Has the company's investigation been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

8. Incentives and Disciplinary Measures[7]

- **Accountability** – What disciplinary actions did the company take in response to the misconduct and when did they occur? Were managers held accountable for misconduct that occurred under their supervision? Did the company's response consider disciplinary actions for supervisors' failure in oversight? What is the company's record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the type(s) of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?

- **Human Resources Process** – Who participated in making disciplinary decisions for the type of misconduct at issue?

- **Consistent Application** – Have the disciplinary actions and incentives been fairly and consistently applied across the organization?

- **Incentive System** – How has the company incentivized compliance and ethical behavior? How has the company considered the potential negative compliance implications of its incentives and rewards? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied) as a result of compliance and ethics considerations?

9. Continuous Improvement, Periodic Testing and Review[8]

- **Internal Audit** – What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often has internal audit generally conducted assessments in high-risk areas?

- **Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct, including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties? How are the results reported and action items tracked? What control testing has the company generally undertaken?

- **Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?

10. Third Party Management [9]

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?

- **Appropriate Controls** – What was the business rationale for the use of the third parties in question? What mechanisms have existed to ensure that the contract terms specifically described the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

- **Management of Relationships** – How has the company considered and analyzed the third party's incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them? How has the company incentivized compliance and ethical behavior by third parties?

- **Real Actions and Consequences** – Were red flags identified from the due diligence of the third parties involved in the misconduct and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues? How has the company monitored these actions (*e.g.*, ensuring that the vendor is not used again in case of termination)?

11. Mergers and Acquisitions (M&A)[10]

- **Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What has been the M&A due diligence process generally?

- **Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?

- **Process Connecting Due Diligence to Implementation** – What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company's process for implementing compliance policies and procedures at new entities?

[1] USSG § 8B2.1(b)(3); FCPA Guide, p.57; USAM 9-28.800 Comment; OECD Handbook, C.1, p.16 *et seq*.

[2] USSG § 8B2.1(2)(B)-(C); FCPA Guide, p.58; USAM 9-28.800 Comment; OECD Handbook, C.3, p. 23 *et seq*.

[3] USSG § 8B2.1(b)(1); FCPA Guide, pp.57-58; OECD Handbook, C.4 and C.5, p.27 *et seq*.

[4] USSG § 8B2.1(b)(5)(7) and (c); USAM 9-28.800 Comment; OECD Handbook, B, p.10 *et seq*.

[5] USSG § 8B2.1(b)(4); FCPA Guide p. 59; USAM 9-28.800 Comment; OECD Handbook, C.8, p. 54 *et seq*.

[6] USSG § 8B2.1(b)(5)(C); FCPA Guide, p. 61; OECD Handbook, C.10, p.60 *et seq*.

[7] USSG § 8B2.1(b)(6); FCPA Guide, pp.59-60; USAM 9-28.800 Comment; OECD Handbook, C.11, p. 68 *et seq*.

[8] USSG § 8B2.1(b)(5)(A)(B); FCPA Guide, pp.61-62; USAM 9-28.800 Comment; OECD Handbook, C.12, pp.72 *et seq*.

[9] FCPA Guide, p.60-66; OECD Handbook, C.6, pp.38 *et seq*.

[10] FCPA Guide, p.62.

Department of Defense
DIRECTIVE

NUMBER 5106.01
April 20, 2012

DA&M

SUBJECT: Inspector General of the Department of Defense (IG DoD)

References: See Enclosure 1

1. PURPOSE. This Directive reissues DoD Directive (DoDD) 5106.01 (Reference (a)) to update the mission, organization and management, responsibilities and functions, relationships, and authorities of the IG DoD, in accordance with sections 113 and 141 of title 10, United States Code (U.S.C.) (Reference (b)) and the Inspector General Act of 1978, as amended, title 5, U.S.C. Appendix (Reference (c)).

2. APPLICABILITY. This Directive applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the IG DoD (OIG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities in the DoD (hereinafter referred to collectively as the "DoD Components").

3. MISSION. The OIG DoD was established by Congress in section 1117 of Public Law (PL) 97-252, "Department of Defense Authorization Act, 1983," which is codified at Reference (c), as an independent and objective unit within DoD to conduct and supervise audits, investigations, evaluations, and inspections relating to the programs and operations of the DoD. In support of the mission of the DoD, the IG DoD performs the duties, has the responsibilities, and exercises the powers specified in Reference (c).

4. ORGANIZATION AND MANAGEMENT. The OIG DoD is an independent and objective organizational component of the DoD. The OIG DoD shall consist of:

a. The IG DoD, a civilian appointed by the President, with the advice and consent of the Senate, who shall serve as head of the OIG DoD.

b. A Principal Deputy Inspector General (IG) who shall serve as the Acting IG DoD when the IG DoD dies, resigns, or is otherwise unable to perform the functions and duties of the office, in accordance with sections 3345 through section 3349d of title 5, U.S.C. and DoDD 3020.04

(References (d) and (e)), and also perform the duties of the IG when the IG DoD dies, resigns, or is otherwise unable to perform the functions and duties of the office and there cannot be an Acting IG DoD pursuant to Reference (d).

c. Deputy IGs for Audit and Investigations in fulfillment of the requirement for an "Assistant Inspector General for Auditing" and an "Assistant Inspector General for Investigations," respectively, pursuant to Reference (c), and a Chief of Staff and such other Deputy and Assistant IGs as the IG DoD determines may be necessary for carrying out the OIG DoD mission, functions, responsibilities, and duties within assigned resources.

d. A General Counsel and Office of General Counsel that shall provide legal advice and counsel on all matters relating to the missions, functions, responsibilities, and duties of the OIG DoD. The General Counsel to the IG DoD is appointed by and reports directly to the IG DoD, in accordance with Reference (c).

e. Such other officers and employees, as may be necessary, to carry out the mission, functions, responsibilities, and duties assigned by statute or herein, within assigned resources.

5. RESPONSIBILITIES AND FUNCTIONS. The IG DoD shall:

a. Serve as the principal advisor to the Secretary of Defense on all audit and criminal investigative matters and for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the DoD, in accordance with section 141 of Reference (b) and Reference (c).

b. Initiate, conduct, supervise, and coordinate such audits, investigations, evaluations, and inspections within the DoD, including the Military Departments, as the IG DoD considers appropriate.

c. Provide policy and direction for audits, investigations, evaluations, and inspections, relating to fraud, waste, abuse, program effectiveness, and other relevant areas within OIG DoD responsibilities, pursuant to Reference (c).

d. Coordinate and clarify policy regarding OIG DoD duties, responsibilities, and functions with the DoD Components.

e. Monitor and evaluate the work of all DoD activities and non-Federal auditors relating to audits, investigations, evaluations, and inspections of DoD programs, missions, functions, and internal reviews, in accordance with Reference (c), and chapter 75 of title 31, U.S.C. (also known and hereinafter referred to as "The Single Audit Act of 1984, as amended" (Reference (f)).

f. Consider requests from DoD Components for the issuance of Subpoenas Duces Tecum seeking information from sources outside the Federal Government and Subpoenas Ad Testificandum seeking testimony from individuals not currently employed by the Federal

Government or on active military duty, necessary for the performance of duties assigned by Reference (c).

g. Investigate, as the IG DoD considers appropriate, fraud, waste, and abuse uncovered as a result of contract and internal audits, investigations, evaluations, and inspections.

h. Establish policy, monitor and evaluate program performance, and provide guidance with respect to all DoD activities relating to criminal investigation and law enforcement programs, including coordination with the Department of Justice, pursuant to DoD Instruction (DoDI) 5525.07 (Reference (g)).

i. Establish guidelines for determining when non-Federal auditors may be used to ensure the appropriate use of non-Federal auditors and compliance with applicable auditing standards.

j. Coordinate and monitor access afforded to auditors, investigators, evaluators, or inspectors from DoD Components, non-DoD Federal agencies, or contracted companies for any review that requires access to DoD records or other information from DoD Components.

k. Develop policy regarding working with the Government Accountability Office (GAO) when the GAO conducts surveys, reviews, and other audit activities within the DoD. Serve as the DoD central liaison with the Comptroller General of the United States on all matters concerning GAO surveys, reviews, reports, and activities. Monitor and distribute information regarding GAO activities, with a view toward avoiding duplication and ensuring effective coordination and cooperation, consistent with DoDI 7650.02 (Reference (h)). In cases where the IG DoD is unable to facilitate resolution of disagreements among OSD Principal Staff Assistants and Heads of DoD Components regarding such surveys, reviews, reports, or activities, the IG DoD shall elevate the matter to the Secretary of Defense or Deputy Secretary of Defense for decision.

l. Establish policy, evaluate program performance, and monitor actions taken by all DoD Components in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States; and non-Federal auditors performing audits under The Single Audit Act of 1984, as amended. Establish policy and procedures for follow-up on the findings and recommendations of the GAO, the OIG DoD, and other DoD internal audit organizations, consistent with DoDD 7650.3 (Reference (i)).

m. Monitor and give particular regard to the activities of the internal audit, investigation, evaluation, inspection, and IG units of DoD Components (including those of the Military Departments), with a view toward avoiding duplication and ensuring effective coverage, coordination, and cooperation. This shall not limit or restrict the responsibilities and functions of the IG DoD, as stated elsewhere in section 5 of this Directive or authorized in Reference (c).

n. Review existing and proposed legislation and regulations relating to DoD programs and operations and make recommendations concerning their impact on the economy and efficiency, or on the prevention and detection of fraud, waste, and abuse, in DoD programs and operations, in accordance with Reference (c).

o. Establish DoD policies for, and conduct, supervise, or coordinate other activities, carried out or financed by the DoD to promote economy and efficiency in administration, and to prevent and detect fraud, waste, and abuse in its programs and operations.

p. Establish DoD policies describing the relationships between DoD and other Federal agencies; State, tribal, and local governmental agencies; and nongovernmental entities with respect to:

(1) All matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud, waste, and abuse in, programs and operations administered or financed by the DoD; or

(2) The identification of participants in such fraud, waste, or abuse.

q. Keep the Secretary of Defense and the Congress fully and currently informed, including through the IG DoD Semiannual Report to Congress as required by Reference (c), of fraud, abuses, and deficiencies relating to the administration of programs and operations managed or financed by the DoD, including:

(1) Recommending corrective action in cases of fraud, abuse, or deficiency.

(2) Reporting on the progress made in implementing corrective actions.

r. Operate the Defense Hotline Program and direct its implementation in DoD Components, ensuring that inquiries resulting from allegations are conducted in accordance with applicable laws, DoD regulations, and policies. Receive and investigate, in accordance with Reference (c) and DoDI 7050.01 (Reference (j)), complaints or information concerning:

(1) Alleged violations of laws, rules, or regulations;

(2) Mismanagement, gross waste of funds, or abuse of authority; or

(3) A substantial and specific danger to the public health and safety involving the DoD.

s. Maintain a whistleblower protection program in DoD that encourages personnel to report fraud, waste, and abuse to appropriate authorities; provides mechanisms for addressing complaints of reprisal; and recommends remedies for whistleblowers who encounter reprisal, consistent with applicable laws, regulations, and policies.

(1) Receive and investigate complaints of reprisal made by civilian appropriated-fund employees in a manner generally in accordance with sections 1221(e) and 2302 of Reference (d) and Reference (c).

(2) Provide oversight, as appropriate, on investigations conducted by DoD Components into allegations of reprisal made by civilian appropriated-fund employees, to include employees of Defense Intelligence Components.

(3) Receive and investigate complaints of reprisal for making disclosures protected by statute, consistent with sections 1034, 1587, and 2409 of Reference (b), as implemented by DoDD 7050.06, DoDD 1401.03, subpart 3.9 of the Federal Acquisition Regulation, or Defense Federal Acquisition Regulation Supplement 203.9, as applicable (References (k) through (n), respectively).

(4) Receive and investigate complaints of improper mental health evaluation referrals of members of the Military Services, in accordance with section 546 of PL 102-484, and DoDD 6490.1 (References (o) and (p)).

(5) Provide oversight, as appropriate, on investigations conducted by DoD Components into allegations of improper mental health evaluations made by military personnel.

t. Serve as the initial point of contact within the DoD for Defense contractors and subcontractors to disclose potential civil or criminal fraud-related matters that affect their contractual relationships with the DoD; and manage the DoD Contractor Disclosure Program, in accordance with DoDI 5505.15 (Reference (q)).

u. Receive and evaluate, consistent with section 8H of Reference (c), complaints or information with respect to an urgent concern, which may have been, or may be reported to Congress, by an employee of the Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency (NGA), National Reconnaissance Office (NRO), National Security Agency/Central Security Service (NSA/CSS), or a contractor of any of those Defense Agencies.

v. Receive and investigate allegations of misconduct made against senior DoD officials, in accordance with DoDD 5505.06 (Reference (r)). Provide oversight, as appropriate, on investigations conducted by the DoD Components into allegations against senior officials.

w. Ensure that DoD Intelligence IGs are granted access to DoD information necessary for the performance of their duties.

x. Audit, evaluate, monitor, and review the programs, policies, procedures, and functions of the DoD Intelligence Components to ensure that intelligence resources, including those funded through the National Intelligence Program, are properly managed. Such actions shall be coordinated, as appropriate, with the Assistant to the Secretary of Defense for Intelligence Oversight to determine respective areas of responsibility, in accordance with DoDD 5148.11 (Reference (s)).

y. Investigate computer intrusion matters affecting the Global Information Grid, as the IG DoD considers appropriate.

z. Participate in appropriate initiatives and advisory groups to promote economy, efficiency, and integrity, and reduce vulnerability to waste, fraud, and abuse.

aa. Share information as broadly as possible, except where limited by law, regulation, or policy, by presenting information in a visible, accessible, and understandable manner, in accordance with DoDD 8320.02 (Reference (t)).

ab. Organize, direct, and manage the OIG DoD and all its assigned resources.

ac. Serve as the proponent for the Joint IG system for IGs assigned to all DoD Components to include:

(1) Coordinating and clarifying DoD policy regarding IG duties, responsibilities, functions, and training.

(2) Developing, coordinating, conducting, and providing uniform training and certification, as IG DoD considers appropriate, regarding Joint IG duties, responsibilities, and functions.

(3) Other responsibilities and functions regarding the Combatant Command IGs, pursuant to DoDD 5106.04 (Reference (u)).

ad. Respond to requests for investigation, pursuant to section 1213 of Reference (d), from the Special Counsel, Office of the Special Counsel, relating to allegations of violations of law, gross mismanagement, and certain other matters, in accordance with DoDD 5500.19 (Reference (v)).

ae. Pursuant to DoDD 5205.07 (Reference (w)), maintain a sufficient dedicated cadre of SAP-trained personnel to perform inspection, investigation, evaluation, and audit functions for DoD SAP and SAP-related activities.

af. Perform all other duties the Secretary of Defense may direct, consistent with Reference (c) and other applicable laws and regulations.

6. RELATIONSHIPS

a. In the performance of assigned responsibilities and functions, the IG DoD shall:

(1) Pursuant to section 3(a) of Reference (c), report to and be under the general supervision of the Secretary of Defense and the Deputy Secretary of Defense, but shall not report to, or be subject to supervision by, any other officer of the DoD. Neither the Secretary of Defense nor the Deputy Secretary of Defense shall prevent or prohibit the IG DoD from initiating, carrying out, or completing any audit, investigation, evaluation, or inspection, or from issuing any subpoena during the course of any audit or investigation, except as specified in section 8(b) of Reference (c).

(2) Coordinate actions, as appropriate, with other DoD Components and, unless precluded by the nature of the matter, notify the Heads of the DoD Components concerned before conducting audits, investigations, evaluations, or inspections of matters normally under the jurisdiction of the Heads of the DoD Components.

(3) Give particular regard to the activities of the Comptroller General of the United States, the Office of Special Counsel, and the Intelligence Community Inspector General, with a view toward avoiding duplication of effort and ensuring effective coordination and cooperation.

(4) Report expeditiously to the Attorney General whenever the IG DoD has reasonable grounds to believe there has been a violation of Federal criminal law.

(5) Report expeditiously any suspected or alleged violations of the chapter 47 of Reference (b) (also known as "The Uniform Code of Military Justice") to the Secretary of the Military Department concerned and the Secretary of Defense.

b. Nothing in this Directive shall be construed as limiting the authority and/or operational control of the Secretaries of the Military Departments and the Under Secretary of Defense (Comptroller)/Chief Financial Officer, Department of Defense, over their respective organizations.

7. <u>AUTHORITIES</u>. Pursuant to, or in addition to, the authorities provided in Reference (c), the IG DoD is delegated authority to:

a. Execute warrants and make arrests pursuant to guidelines issued by the Attorney General for special agents of the Defense Criminal Investigative Service (DCIS), in accordance with section 1585a of Reference (b).

b. Access all records (electronic or otherwise), reports, investigations, audits, reviews, documents, papers, recommendations, or other information or material available to any DoD Component.

(1) Except as specifically denied in writing by the Secretary of Defense, pursuant to the authority contained in section 8 of Reference (c) and subparagraph 6.a.(1), no officer, employee, or Service member of any DoD Component may deny the IG DoD, or officials assigned by the IG DoD, access to information, or prevent them from conducting an audit, investigation, evaluation, or inspection.

(2) OIG DoD officials shall possess the appropriate security clearance and access authorization when classified information is requested.

c. Communicate directly with personnel of other DoD Components on matters related to Reference (c) and this Directive. To the extent practicable, and consistent with the responsibilities and functions of the Military Departments as described in paragraph 6.b., the

Head of the DoD Component concerned shall be kept informed of such direct communications. The communication to the Head of the DoD Component may be made through the IG of the Component, if applicable.

d. Request assistance, as needed, from other audit, investigative, evaluation, or inspection units of the DoD Components. In such cases, assistance shall be requested through the Head of the DoD Component concerned.

e. Request information or assistance from any Federal, State, tribal, or local governmental agency, or unit thereof.

f. Obtain sworn statements from individuals on matters that the IG DoD considers appropriate for investigation, pursuant to Reference (c), with due regard for rights and witness protections established by law.

g. Authorize OIG DoD personnel to carry firearms, in accordance with DoDD 5210.56 (Reference (x)).

h. Establish, in DoDIs and one-time Directive-Type Memorandums (DTMs), DoD policy within the authorities and responsibilities assigned herein, including authority to identify collateral responsibilities of other OSD Principal Staff Assistants and the Heads of the DoD Components. This authority shall not be redelegated.

(1) Such DoDIs and DTMs shall be fully coordinated, in accordance with DoDI 5025.01 (Reference (y)).

(2) Further, in areas of assigned responsibilities and functions, the IG DoD has authority to approve and sign other DoDIs, DoD Manuals, and one-time DTMs, in accordance with Reference (y), that implement policy approved by the Secretary of Defense.

(3) Instructions to the Military Departments shall be issued through the Secretaries of the Military Departments. Instructions to the Combatant Commands normally shall be communicated through, and coordinated with, the Chairman of the Joint Chiefs of Staff.

i. Exercise the administrative authorities contained in Enclosure 2.

8. <u>RELEASABILITY</u>. UNLIMITED. This Directive is approved for public release and is available on the Internet from the DoD Issuances Website at http://www.dtic.mil/whs/directives.

9. EFFECTIVE DATE

a. This Directive is effective upon its publication to the DoD Issuances Website.

b. If this Directive is not otherwise reissued or cancelled in accordance with Reference (y), it will expire effective April 20, 2022 and be removed from the DoD Issuances Website.

Ashton B. Carter
Deputy Secretary of Defense

Enclosures
1. References
2. Delegations of Authority
Glossary

ENCLOSURE 1

REFERENCES

(a) DoD Directive 5106.01, "Inspector General of the Department of Defense," April 13, 2006 (hereby cancelled)
(b) Sections 113, 141, 1034, 1585a, 1587, 2409, and chapter 47, of title 10, United States Code
(c) Inspector General Act of 1978, as amended, title 5, United States Code, Appendix
(d) Sections 1213, 1221 (e), 2302, and 3345-3349[1] of title 5, United States Code
(e) DoD Directive 3020.04, "Order of Succession Pursuant to Executive Order 13533 and the Federal Vacancies Reform Act of 1998," August 25, 2010
(f) Chapter 75 of title 31, United States Code (also known as "The Single Audit Act of 1984," as amended")
(g) DoD Instruction 5525.07, "Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes," June 18, 2007
(h) DoD Instruction 7650.02, "General Accounting Office (GAO) Reviews and Reports" November 20, 2006
(i) DoD Directive 7650.3, "Follow-up on General Accounting Office (GAO), DoD Inspector General (DoD IG), and Internal Audit Reports," June 3, 2004
(j) DoD Instruction 7050.01, "Defense Hotline Program," December 17, 2007
(k) DoD Directive 7050.06, "Military Whistleblower Protection," July 23, 2007
(l) DoD Directive 1401.03, "DoD Nonappropriated Fund Instrumentality (NAFI) Employee Whistleblower Protection," April 23, 2008
(m) Subpart 3.9, Federal Acquisition Regulation, "Whistleblower Protections for Contractor Employees," October 1, 1998
(n) Defense Federal Acquisition Regulation Supplement 203.9, "Whistleblower Protections for Contractor Employees," January 15, 2009
(o) Section 546 of Public Law 102-484, "National Defense Authorization Act for Fiscal Year 1993," October 23, 1992
(p) DoD Directive 6490.1, "Mental Health Evaluations of Members of the Armed Forces," October 1, 1997
(q) DoD Instruction 5505.15, "DoD Contractor Disclosure Program," June 16, 2010
(r) DoD Directive 5505.06, "Investigations of Allegations Against Senior Officials of the Department of Defense," April 10, 2006
(s) DoD Directive 5148.11, "Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO))," September 20, 2010
(t) DoD Directive 8320.02, "Data Sharing in a Net-Centric Department of Defense," December 2, 2004
(u) DoD Directive 5106.04," Combatant Command Inspectors General," June 19, 2006
(v) DoD Directive 5500.19, "Cooperation with the United States Office of Special Counsel (OSC)," May 24, 2004
(w) DoD Directive 5205.07, "Special Access Program (SAP) Policy," July 1, 2010.

[1] Sections 3345-3349 are also known as "The Federal Vacancies Reform Act of 1998"

(x) DoD Directive 5210.56, "Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities," April 1, 2011

(y) DoD Instruction 5025.01, "DoD Directives Program," October 28, 2007

ENCLOSURE 2

DELEGATIONS OF AUTHORITY

Pursuant to the authority vested in the Secretary of Defense, and in accordance with DoD policies and issuances, the IG DoD or, in the absence of the IG DoD, the person acting for the IG DoD, is hereby delegated authority, as required to acquire, organize, employ, direct, and manage all resources assigned to the OIG DoD for the efficient administration and operation of the OIG DoD, and within assigned resources, to:

a. Use advisory committees and employ temporary or intermittent experts or consultants, as approved by the Secretary of Defense or the Director of Administration and Management, for the performance of OIG DoD functions, in accordance with sections 173 and 174 of title 10, U.S.C.; section 3109(b) of title 5, U.S.C.; and the Federal Advisory Committee Act, as amended, title 5, U.S.C. Appendix; and DoDI 5105.04.

b. In accordance with Executive Order 10450, "Security Requirements for Government Employment," April 27, 1953; Executive Order 12968, "Access to Classified Information," August 2, 1995; and DoDD 5200.2, as appropriate:

(1) Designate any position in the OIG DoD as a "sensitive" position.

(2) Authorize, in exceptional circumstances where official functions must be performed prior to the completion of an investigation and adjudication process, temporary access to a sensitive position in the OIG DoD for a limited period to individuals for whom an appropriate investigation is underway.

(3) Initiate personnel security investigations and, if necessary in the interest of national security, suspend access to classified information for personnel assigned, detailed to, or employed by the OIG DoD. Any actions described in this subparagraph shall be taken in accordance with procedures prescribed in DoD 5200.2-R.

c. Authorize and approve:

(1) Travel for OIG DoD civilian personnel in accordance with Joint Travel Regulations (JTR), Volume 2, "Department of Defense Civilian Personnel," current edition.

(2) Temporary duty travel only for military personnel assigned to or detailed to the OIG DoD in accordance with the Joint Federal Travel Regulations, Volume 1, "Uniformed Service Members," current edition.

(3) Invitational travel to persons serving without compensation whose consultative, advisory, or highly specialized technical services are required in a capacity that is directly related to or in connection with OIG DoD activities, pursuant to section 5703 of title 5, U.S.C., and JTR, Volume 2.

d. Approve the expenditure of funds available for travel by military personnel assigned or detailed to the OIG DoD for expenses incident to attendance at meetings of technical, scientific, professional, or other similar organizations in such instances where the approval of the Secretary of Defense, or designee, is required by section 412 of title 37, U.S.C. and sections 4110 and 4111 of title 5, U.S.C. This authority cannot be redelegated.

e. Develop, establish, and maintain an active and continuing Records Management Program, pursuant to section 3102 of title 44, U.S.C. and DoDD 5015.2.

f. Authorize the publication of advertisements, notices, or proposals in newspapers, magazines, or other public periodicals and public media as required for the effective administration and operation of the OIG DoD, in accordance with section 3702 of title 44, U.S.C.

g. Establish and maintain appropriate property accounts for the OIG DoD and appoint boards of survey, approve reports of survey, relieve personal liability, and drop accountability for OIG DoD property contained in the authorized property accounts that has been lost, damaged, stolen, destroyed, or otherwise rendered unserviceable, in accordance with applicable laws and regulations.

h. Issue the necessary security regulations for the protection of property and places under the jurisdiction of the OIG DoD, pursuant to DoDI 5200.08.

i. Establish and maintain, for the functions assigned, an appropriate publications system for the promulgation of common supply and service regulations, instructions, and reference documents, and changes thereto, pursuant to the policies and procedures prescribed in DoDI 5025.01.

j. Enter into support and service agreements with the Military Departments, other DoD Components, or other Government Agencies, as required, for the effective performance of responsibilities and functions assigned to the OIG DoD.

k. Enter into and administer contracts directly or through the Military Departments, a DoD contract administration services component, or other Federal agency, as appropriate, for supplies, equipment, and services required to accomplish the OIG DoD mission.

l. Exercise Top Secret-Original Classification Authority, in accordance with Executive Order 13526. This authority may not be redelegated.

m. Issue credentials and other identification to officers and employees of the OIG DoD; and contractor employees directly supporting the DCIS Asset Forfeiture Program.

n. Issue photographic identification cards to retired law enforcement officers, in accordance with DoDI 5525.12 and section 926C of title 18, U.S.C.

o. Maintain an official seal and attest to the authenticity of official records under the seal.

p. Redelegate these authorities, as appropriate, and in writing, except as otherwise specifically indicated above or as otherwise provided by law or regulation.

GLOSSARY

ABBREVIATIONS AND ACRONYMS

DCIS	Defense Criminal Investigative Service
DIA	Defense Intelligence Agency
DoDD	DoD Directive
DoDI	DoD Instruction
DTM	Directive-Type Memorandum
GAO	Government Accountability Office
IG DoD	Inspector General of the Department of Defense
IG	Inspector General
JTR	Joint Travel Regulations
OIG DoD	Office of the Inspector General of the Department of Defense
NGA	National Geospatial-Intelligence Agency
NRO	National Reconnaissance Office
NSA/CSS	National Security Agency/Central Security Service
U.S.C.	United States Code

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July 23, 2018

INSPECTOR GENERAL INSTRUCTION 5145.05

WHISTLEBLOWER REPRISAL ALTERNATIVE DISPUTE RESOLUTION PROGRAM

FOREWORD

This instruction establishes policy, responsibilities, and an organizational and functional overview of the Alternative Dispute Resolution Program in the Whistleblower Reprisal Investigations Directorate for the DoD Office of Inspector General.

This instruction will expire 10 years from its issuance date.

The office of primary responsibility for this instruction is Administrative Investigations. This instruction is effective immediately.

FOR THE INSPECTOR GENERAL:

Steven A. Stebbins
Chief of Staff

2 Appendices

A. Purpose. This instruction establishes policy and responsibilities for the Alternative Dispute Resolution (ADR) Program in the Whistleblower Reprisal Investigations (WRI) Directorate for the DoD Office of Inspector General (OIG).

B. Issuance. This is a new instruction.

C. Applicability. This instruction applies to the OIG.

D. References. (See Appendix A.)

E. Acronyms and Abbreviations. (See Appendix B.)

F. Background. The OIG maintains the Whistleblower Protection Program for the DoD according to reference (a). This includes providing mechanisms for addressing complaints of reprisal according to reference (b). The OIG recognizes that in appropriate circumstances, there may be more effective methods to resolve whistleblower reprisal complaints, avoiding the potential cost, delay, and unpredictability of the investigative process. (See references (c) and (d).) The voluntary use of ADR processes, such as mediation, may often provide faster, less expensive, and more effective resolution of such disputes. In recognition of this, the OIG supports ADR and affirms the WRI Directorate will offer ADR services in a good faith effort to achieve consensual resolutions of complaints.

G. Policy. The WRI ADR Program:

1. offers ADR processes as an alternative to formal administrative investigations to address whistleblower reprisal complaints, when appropriate;

2. allows participants to voluntarily opt out of the ADR process for any reason prior to resolution; and

3. maintains and protects personally identifiable information collected during the course of an ADR process according to references (e) and (f).

H. Responsibilities.

1. The **Director, WRI:**

a. exercises overall responsibility for the ADR Program, ensuring its full implementation;

b. advises and represents the Inspector General on WRI ADR matters;

c. ensures the adherence to ADR and conflict management principles appropriate to the resolution of whistleblower reprisal complaints; and

d. supports and utilizes the ADR Program, to the maximum extent possible, and encourages the regulated community to participate.

2. The **ADR Supervisor:**

a. manages the ADR Program, developing appropriate procedures and serving as an ADR attorney in resolving cases;

b. ensures the provision of timely, consistent, and responsive ADR service by promptly assigning cases to ADR attorneys and ensuring they adhere to ADR principles; and

c. supervises ADR attorneys in the conduct of their duties.

3. The **ADR Attorneys:**

a. maintain their neutrality at all times;

b. maintain the confidentiality of ADR proceedings, not voluntarily disclosing dispute resolution communications unless otherwise required by law;

c. conduct an intake session with the participants to discuss the circumstances, issues, and desired outcomes;

d. give thorough information and help participants assess their options and appropriate avenues for ADR resolution;

e. advise all participants of their rights and responsibilities regarding voluntary participation, confidentiality, and possible limitations;

f. provide customized conflict resolution interventions to fit the unique needs of ADR participants, as needed;

g. assess the appropriateness of the particular ADR process to the dispute, and communicate with the participants to ensure that each is able to participate effectively within the context of ADR and is willing to do so in good faith; and

h. conduct ADR processes consistent with law, reference (d), this instruction, and applicable rules of professional conduct.

APPENDIX A
REFERENCES

a. DoD Directive 5106.01, *Inspector General of the Department of Defense (IG DoD),* April 20, 2012, as amended August 19, 2014

b. Sections 1-13 of Title 5, United States Code, *Inspector General Act of 1978,* as amended December 5, 2008

c. Section 571 of Title 5, United States Code, *Administrative Dispute Resolution Act of 1996*, October 19, 1996

d. DoD Instruction 5145.05, *Alternative Dispute Resolution (ADR) and Conflict Management*, May 27, 2016

e. DoD Directive 5400.11, *DoD Privacy Program*, October 29, 2014

f. DoD 5400.11-R, *Department of Defense Privacy Program*, May 14, 2007

APPENDIX B
ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
OIG	Office of Inspector General
WRI	Whistleblower Reprisal Investigations

Inspector Gen., United States HUD v. Banner Plumbing Supply, Co.

United States District Court for the Northern District of Illinois, Eastern Division

December 9, 1998, Decided ; December 11, 1998, Docketed

No. 98 C 1319

Reporter
34 F. Supp. 2d 682 *; 1998 U.S. Dist. LEXIS 19642 **

Inspector General, United States Dept. of Housing and Urban Development, Petitioner, v. Banner Plumbing Supply, Co., Inc., Respondent.

Disposition: [1]** HUD-OIG's motion for summary enforcement granted and Banner's request for relief denied.

Core Terms

subpoena, investigate, documents, inspector general, records, administrative subpoena, audit, federal funds, false claim, contractor, contends, disputed, funds, subpoena power, federal government, contracted, programs, supplies, rejects, operating revenue, improper purpose, court finds, operations, suspicion, agency's, plumbing, parties

Case Summary

Procedural Posture
Petitioner housing inspector filed a motion for summary enforcement of an administrative subpoena duces tecum that it issued to and served on respondent plumbing contractor.

Overview
Petitioner housing inspector initiated an investigation of respondent plumbing contractor and issued and served an administrative subpoena duces tecum demanding production of various documents. Respondent partially complied with the subpoena, but refused to produce the remainder of the requested documents, claiming that petitioner did not have the authority to investigate respondent and that petitioner subpoenaed the documents for an improper purpose. Petitioner filed a motion for summary enforcement of its administrative subpoena duces tecum. The court granted petitioner's motion, holding that under petitioner's broad investigatory powers, petitioner was entitled to the requested documents because petitioner had reasonable grounds to believe there had been a violation of federal criminal law by respondent.

Outcome
Motion granted because under petitioner housing inspector's broad investigatory powers, petitioner was entitled to the requested documents from respondent plumbing contractor as petitioner had reasonable grounds to believe there had been a violation of federal criminal law by respondent.

LexisNexis® Headnotes

Administrative Law > Judicial Review > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN1[] **Administrative Law, Judicial Review**

The court's role in a subpoena enforcement proceeding is sharply limited. Generally, administrative subpoenas will be enforced as long as the subpoena: 1) is within the agency's statutory authority; 2) seeks information reasonably relevant to the inquiry; 3) is not unreasonably broad or burdensome; and 4) seeks information the government does not presently possess.

Public Health & Welfare Law > Housing & Public Buildings > General Overview

Real Property Law > Financing > Federal Programs > US

Department of Housing & Urban Development Programs

Real Property Law > Financing > Federal Programs > General Overview

HN2[] **Public Health & Welfare Law, Housing & Public Buildings**

The Office of the Inspector General for the Department of Housing and Urban Development has the duty and responsibility to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the Department of Housing and Urban Development (HUD) and to conduct, supervise, or coordinate other activities carried out or financed by HUD for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations. *5 U.S.C.S. App. 3* § 4(a)(1) & (3).

Public Health & Welfare Law > Housing & Public Buildings > General Overview

HN3[] **Public Health & Welfare Law, Housing & Public Buildings**

The Inspector General may institute an investigation relating to the administration of the programs and operations of the Department of Housing and Urban Development if, in the judgment of the Inspector General, such investigation is necessary or desirable. *5 U.S.C.S. App. 3 § 6(a)(2)*. Accordingly, an Inspector General may investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Public Health & Welfare Law > Housing & Public Buildings > General Overview

HN4[] **Discovery, Subpoenas**

See *5 U.S.C.S. App. § 6(a)(4)*.

Governments > Federal Government > Employees & Officials

HN5[] **Federal Government, Employees & Officials**

The normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

Governments > Courts > Court Personnel

Public Health & Welfare Law > Housing & Public Buildings > General Overview

HN6[] **Search & Seizure, Warrantless Searches**

The Inspector General of the Department of Housing and Urban Development is required to report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law. *5 U.S.C.S. App. 3* § 4(d).

Counsel: For INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, petitioner: Kurt N. Lindland, Young B. Kim, United States Attorney's Office, Chicago, IL.

For BANNER PLUMBING SUPPLY CO., INC., respondent: Mark W. Solock, Attorney at Law, Chicago, IL.

Judges: JOAN B. GOTTSCHALL, United States District Judge.

Opinion by: JOAN B. GOTTSCHALL

Opinion

[*683] **MEMORANDUM OPINION AND ORDER**

Petitioner, the Office of the Inspector General for the Department of Housing and Urban Development ("HUD-OIG"), moves this court for summary enforcement of an administrative subpoena *duces tecum* that it issued to and served on respondent Banner Plumbing Supply ("Banner") on August 5, 1997. Banner partially complied with the subpoena, which demanded the production of various documents, but has refused to produce a number of these documents on two grounds. First, Banner contends that the OIG has no authority to investigate Banner or to subpoena those records Banner has refused to produce. Second, Banner contends that the OIG subpoenaed the records for an improper purpose. For the following reasons, the **[**2]** court grants HUD-OIG's motion for summary enforcement and denies Banner's request for relief.

I. BACKGROUND [1]

On October 19, 1993, the Chicago Housing Authority ("CHA"), then an Illinois Municipal Corporation subject to the supervision and regulation of the Illinois Housing Authority, [2] awarded Banner a contract to supply and deliver plumbing and heating-related supplies. That contract required Banner to provide requested plumbing supplies at a 54.11% discount off the manufacturers' list prices, as defined by the trade guide "Trade Service's Modern Contractor's Trade Net Guide." From October 1993 to October 1994, the time period at issue, Banner provided various supplies to CHA, and the CHA paid Banner $ 1,689,965.27 pursuant to the contract. CHA also received federal funds during this time period. Specifically, HUD provided CHA with federal **[**3]** funds via its Comprehensive Grant Program and its operating subsidy fund, funds that were commingled with other monies in CHA's general operating revenues. CHA paid Banner out of these general operating revenues.

In early 1994, CHA's Office of Inspector General ("CHA-OIG") obtained information suggesting that Banner was violating the contract by supplying products that were inferior to those billed pursuant to CHA's audit of all plumbing supplies in its warehouse. According to Banner, the CHA's director then "unilaterally empowered" a CHA employee, "designated as the inspector general," to subpoena contractor records. Respondent's **[*684]** Memorandum at 2. This employee then issued a subpoena to Banner requesting several documents. Banner produced contracts with the CHA pertaining to the relevant time period, purchase orders it received from CHA, invoices it had sent to CHA, and the relevant trade guide. Banner refused to produce its financial **[**4]** statements; tax records; records of payments received form the CHA; and records of purchases from suppliers, including purchase orders, invoices, and payment records.

The CHA subsequently filed an action in Cook County Circuit Court to enforce the subpoena. On September 7, 1995, Judge Reid ruled in favor of Banner, sustaining Banner's objections to the subpoena in finding that the disputed documents were "confidential and proprietary information and not the proper subject for disclosure pursuant to said Administrative Subpoena and Petition to Enforce." Respondent's Memorandum, Exhibit B at 1. By this point, Banner contends, HUD had gained control of CHA and, disappointed by the ruling, improperly requested at some later date that HUD-OIG use its subpoena power to gain access to the disputed documents, thereby circumventing Judge Reid's ruling.

HUD-OIG admits that it learned about concerns regarding Banner's conduct in regard to the CHA contract from other sources, specifically, from CHA-OIG and the U.S. Attorney's Office ("USAO"), both of which, according to HUD-OIG, "requested HUD-OIG's assistance in their investigation of Banner for violation of the False Claims Act." Petitioner's **[**5]** Memorandum at 3. Upon reviewing the facts, however, HUD-OIG maintains that it "determined that it had an independent investigative interest in determining whether Banner defrauded the CHA and HUD." *Id.* Accordingly, in July 1997, HUD-OIG commenced its own investigation of Banner for violations of the federal False Claims Act, 31 U.S.C. § 3739 et seq.

After concluding that it needed to examine various documents related to the contract, HUD-OIG issued the subpoena *duces tecum* now at issue. HUD-OIG's request appears to be coextensive with the subpoena that CHA had issued, which means HUD-OIG's subpoena requests the same documents that Judge Reid denied CHA. Banner has taken the same position with respect to HUD-OIG's subpoena as with the CHA subpoena. Accordingly, the same documents previously in dispute are now the subject of the dispute in this court.

HUD-OIG contends: 1) that it has authority to issue the subpoena; 2) that it has complied with the relevant procedural requirements for issuance; 3) that the disputed documents are relevant as necessary to support (or eliminate) its suspicion that Banner violated the False Claims Act or other applicable laws, regulations, and **[**6]** HUD requirements; and 4) that the subpoena is neither unreasonably broad nor burdensome. Banner apparently contests only the first of these points, namely, that HUD-OIG lacks the authority to subpoena the disputed documents. Banner further contends that HUD-OIG issued the subpoena for an improper purpose.

II. ANALYSIS

As an initial matter, the court notes that the Seventh Circuit has described *HN1*[] the court's role in a subpoena enforcement proceeding as "sharply limited." *EEOC v. Tempel Steel Co., 814 F.2d 482, 485 (7th Cir. 1987)*. Generally, administrative subpoenas will be enforced as long as the subpoena: 1) is within the agency's statutory authority; 2) seeks information

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[1] The court takes the facts included in this section from the parties' pleadings and attached affidavits, indicating which facts and allegations are contested.

[2] On or before June 2, 1995, CHA apparently came under the control of HUD.

reasonably relevant to the inquiry; 3) is not unreasonably broad or burdensome; and 4) seeks information the government does not presently possess. *See* U.S. v. Powell, 379 U.S. 48, 57, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964); *see also* EEOC v. Quad/Graphics, Inc., 63 F.3d 642, 645 (7th Cir. 1995) (stating that courts generally will "enforce an administrative subpoena if it seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency's authority"). **[**7]** As Banner contests only one prong of this test-HUD-OIG's authority to issue the subpoena-the court will not discuss the other prongs.

Banner contends that HUD-OIG lacks authority to investigate and issue a subpoena to Banner. According to Banner, HUD-OIG's authority to investigate does not reach it **[*685]** because it contracted with CHA, an Illinois Municipal Corporation, rather than with HUD, a federal entity. Banner claims that HUD cannot "regulate the individual contractors whom the local authorities contract with for the purchase of needed goods." Respondent's Memorandum at 5. HUD-OIG, however, contends that it has both the responsibility and authority to investigate Banner and subpoena documents under Banner's control because it must ferret out fraud and abuse in programs that receive HUD, i.e., federal, money. Banner counters by arguing that it did not participate in HUD's low-income housing program. According to Banner, "entering into an agreement with a local housing authority and being paid by that authority from its general operating revenues" does not constitute participation in HUD's low-income housing program. *Id.* at 6. Banner further argues that any funds it received from **[**8]** CHA in payment on the contract cannot be considered federal funds. According to Banner, the funds HUD gave CHA "lost their identity as federal funds" because they constituted only a small percentage of CHA's general operating revenues and were commingled with monies from other sources. *Id.* at 7.

The court finds that HUD-OIG has authority to investigate Banner and issue the subpoena in question. Congress has given ***HN2***[] HUD-OIG the "duty and responsibility" to "conduct, supervise, and coordinate audits and investigations relating to the programs and operations of [HUD]" and to "conduct, supervise, or coordinate other activities carried out or financed by [HUD] for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations." *5 U.S.C. App. 3* § 4(a)(1) & (3); *see also* *Inspector General, U.S. Dept. of Housing and Urban Development v. St. Nicholas Apts., 947 F. Supp. 386, 389 (C.D. Ill. 1996)*. ***HN3***[] The Inspector General may institute an investigation "relating to the administration of the programs and operations of [HUD]" if, "in the judgment of the Inspector General," such investigation is "necessary **[**9]** or desirable." *5 U.S.C. App. 3* *§ 6(a)(2)*. Accordingly, an Inspector General may investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *St. Nicholas Apartments*, 947 F. Supp. at 389 (citing *U.S. v. Morton Salt, 338 U.S. 632, 642-43, 94 L. Ed. 401, 70 S. Ct. 357 (1950))*.

HUD-OIG has the authority to investigate Banner because Banner has received money originating from an authorized HUD program and HUD-OIG suspects that Banner has violated the federal False Claims statute or has otherwise defrauded the federal government. Congress has given HUD statutory authority to provide funds to public housing agencies to help them modernize public housing, 42 U.S.C. § 14371, which HUD does through its Comprehensive Grant Program, as well as the authority to provide such agencies specifically with funds to cover the costs of operating public and low-income housing projects, *42 U.S.C. § 1437g*, which HUD does through its operating subsidies program. HUD provided federal funds to CHA under both of these programs, and CHA used some of those funds to pay Banner for plumbing supplies, a cost of improving and operating housing **[**10]** projects. Once HUD disbursed federal funds to CHA for improving and operating public housing, HUD-OIG came under an obligation to investigate allegations of fraud in where that money went. And that is precisely what HUD-OIG seeks to do in this case.

The court rejects Banner's argument that HUD-OIG's authority to investigate does not extend to Banner because it contracted with CHA rather than with HUD. Banner has provided this court with no authority holding that an Inspector General may not investigate a party who contracts with a local housing authority, and this court is aware of no such authority. Indeed, the only cases Banner cites- *U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943)*, *U.S. v. Candella, 487 F.2d 1223 (2d Cir. 1973)*, and *U.S. v. Beasley, 550 F.2d 261 (5th Cir. 1977)*-all *sanctioned* federal government pursuit of parties under federal false claims statutes even though those parties had contracted with state or local authorities because the parties were paid at least in part with funds the federal government provided to the **[*686]** state or local authority. [3]

[3] To the extent that Banner attempts to carve out from this line of cases a rule that an administrative subpoena cannot be enforced against a party who contracts with a state or local authority where 1) the contractor does not know that the federal government shoulders some of the costs and 2) the federal government does not directly reimburse the state or local government, the court rejects such a rule in the context of administrative subpoenas. *Marcus, Candella*, and *Beasley* involve the propriety of conviction under federal false claims statutes, not the propriety of issuing an administrative subpoena. While the issue of a contractor's knowledge goes to the question of the contractor's specific intent to defraud the federal government and thus

Moreover, as cases like *St. Nicholas* and *Morton Salt* indicate, an **[**11]** Inspector General's investigative authority is broad and may be predicted solely on a suspicion of illegality.

The court also rejects **[**12]** Banner's argument that the federal funds HUD provided to CHA lost their identity as federal funds because they represented only a small percentage of CHA's general operating revenues and were commingled with funds from other sources. Banner cites absolutely no authority for this proposition, and the court is aware of none. Moreover, the statute, which broadly authorizes inspection to ferret out fraud and abuse, imposes no such limitations on an Inspector General's investigative power.

Having found that HUD-OIG has the authority to investigate Banner, the court also finds that it has the authority to issue a subpoena to Banner. ***HN4***[] The Inspector General Act of 1978 grants Inspector Generals the authority to require by administrative subpoena the production of records "necessary in the performance of the functions assigned by [the] Act" and further provides that such subpoenas "shall be enforceable by order of any appropriate United States district court." *5 U.S.C. App. § 6(a)(4)*. Courts have construed this subpoena power broadly. [4] *See, e.g.,* *U.S. v. Aero-Mayflower Transit Co., 646 F. Supp. 1467, 1472 (D.D.C. 1986)* (noting that the subpoena power is extensive and that it may serve **[**13]** as the most important tool for ferreting out waste, fraud, and abuse), *aff'd*, *265 U.S. App. D.C. 383, 831 F.2d 1142 (D.C. Cir. 1987)*; *U.S. v. Westinghouse Elec. Corp., 788 F.2d 164, 170 (3d Cir. 1986)* (holding that "[a] constricted interpretation [of the subpoena power] would be at odds with the broad powers conferred on the Inspector General by the statute"). In order to investigate the alleged fraud in this case, HUD-OIG will undoubtedly find helpful documents showing what items Banner ordered from its suppliers, for instance, so that HUD-OIG can compare these items with those that it actually received. [5]

[14]** Banner's citation of *Bowsher, Comptroller General of the U.S. v. Merck & Co., Inc., 460 U.S. 824, 75 L. Ed. 2d 580, 103 S. Ct. 1587 (1983)*, does not persuade this court to the contrary. *Bowsher* addressed the General Accounting Office's right to demand access to documents, not the Inspector General's subpoena power. Both the GAO and Inspectors General may request documents pursuant to investigations for fraud or abuse, but the statute granting the GAO access rights does so in a limited fashion, in stark contrast to the broad wording of the Inspector General Act. *See* *Bowsher, 460 U.S. at 831* (holding that Congress in relevant part limited GAO's access power to documents that "directly pertain to and involve transactions relating to, the contract or subcontract"). No such limitation exists in the Inspector General Act.

The court also rejects Banner's second ground for refusing to produce the documents in question: its contention that HUD-OIG issued the subpoena for an improper purpose. In this regard, Banner argues that HUD-OIG has conceded that "HUD and the U.S. Attorney first requested OIG to obtain **[*687]** the records before OIG initiated this investigation and issued their subpoena" **[**15]** and that this concession demonstrates that HUD-OIG had an improper purpose in issuing the subpoena. Banner further argues that HUD is using HUD-OIG's investigatory powers to perform HUD's regulatory operations, an activity Banner contends is inappropriate given HUD-OIG's mandate to audit and supervise HUD. The court disagrees on both counts.

First, the court finds that HUD-OIG has not conceded that either HUD or the USAO asked HUD-OIG to subpoena the disputed records. Rather, HUD-OIG has stated that "CHA-OIG and the United States Attorney's Office requested HUD-OIG's assistance in their investigation of Banner for violation of the False Claims Act." Petitioner's Memorandum at 3. *See also id.* at Exhibit 1 PP 12, 17 (Declaration of Special Agent Marguerite Smith) (averring that CHA-OIG and the USAO requested HUD-OIG's participation in investigating Banner). As an initial matter, the court notes that Banner seems to be conflating HUD and CHA-OIG. HUD-OIG did not state that HUD requested HUD-OIG to obtain the disputed records, Banner's representations notwithstanding. Rather, HUD-OIG said that *CHA-OIG* (not HUD) approached HUD-OIG with information about Banner's conduct.

Banner **[**16]** also incorrectly argues that HUD-OIG has conceded that HUD and the USAO "requested OIG to obtain the records before OIG initiated this investigation and issued their subpoena." *See supra*. HUD-OIG has never indicated that *anyone* requested it to obtain the disputed records or to issue the subpoena. Rather, HUD-OIG has stated that CHA-OIG and the USAO requested HUD-OIG's help *in their investigation. See supra*.

to the propriety of conviction for making a false claim, it has nothing to do with the enforceability of an administrative subpoena.

[4] Indeed, some case law suggests that the subpoena power reaches even third parties "not expressly within [an agency's] regulatory jurisdiction," provided that the agency seeks information "relevant and necessary to the effective conduct of [its] authorized and lawful inquiry." *See* *U.S. v. Art Metal-U.S.A., Inc., 484 F. Supp. 884, 887 (D. N.J. 1980)*.

[5] As the court previously noted, as to the subpoena, Banner challenges only HUD-OIG's issuing authority and does not argue that the documents therein requested are irrelevant to HUD-OIG's investigation. Accordingly, the court need not discuss relevancy.

The court further rejects Banner's suggestion that HUD-OIG's investigation and subpoena have somehow been rendered illegitimate because other entities first brought the matter to HUD-OIG's attention and requested HUD-OIG's help in their own investigations. As discussed below, the court is not persuaded that any impropriety exists by virtue of asking HUD-OIG for assistance, and Banner has provided the court with nothing but innuendo to suggest otherwise. Moreover, HUD-OIG has offered an affidavit attesting that HUD-OIG made an independent decision to investigate and subpoena Banner after learning about CHA-OIG's suspicions regarding Banner's conduct.

The key question is not how or from whom HUD-OIG learned about Banner but rather whether HUD-OIG has the authority to **[**17]** investigate and subpoena Banner and whether such activity is for a legitimate purpose. Having already found that HUD-OIG has the authority to investigate and subpoena Banner, the court now finds that HUD-OIG's reason for doing so is legitimate. HUD-OIG has stated that it decided to institute its own investigation of Banner pursuant to information it learned when CHA-OIG and the USAO requested HUD-OIG's help in their own investigations of Banner. [6] **[**18]** The court has been given no reason to doubt HUD-OIG's assertion that it made an independent decision to investigate Banner and therefore to issue the subpoena in question. [7] Innuendo and speculation do not suffice to override "***HN5***[] the normal presumption of good faith that, in courts of law, government officials still enjoy, that must be refuted by well-nigh irrefragable proof." *See* *Starr v. FAA, 589 F.2d 307, 315 (7th Cir. 1978)*. As Banner has provided this court with nothing but innuendo, the court accepts HUD-OIG's assertion of independence. *Accord St. Nicholas Apartments*, 947 F. Supp. at 391 (accepting **[*688]** HUD-OIG's assertion of independence where nothing but innuendo supported respondent's claim of improper purpose).

Second, the court rejects Banner's argument that HUD is improperly using HUD-OIG's investigatory powers to perform HUD's regulatory operations and is thereby compromising its independence. HUD-OIG is seeking to investigate a specific allegation of fraud, not to conduct a general screening of CHA contractors in a fishing expedition to catch the lawless. To the extent that Banner relies on *Burlington Northern RR Co. v. Office of the Inspector General, 767 F. Supp. 1379 (N.D. Tex. 1991)*, to support its position, the court finds the case inapposite and further notes that it actually supports HUD-OIG's position. In *Burlington Northern*, OIG undertook a general audit of railroad companies to determine whether they were properly contributing to various railroad programs. *See* *id. at 1380*. The Fifth Circuit held that "an **[**19]** Inspector General lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance investigations or audits." *Burlington Northern, 983 F.2d 631, 642 (5th Cir. 1993)*. In so holding, the Fifth Circuit specifically distinguished situations in which the Inspector General has specific reason to suspect fraudulent or abusive conduct. *See* *id. at 640*. Unlike in *Burlington Northern*, the court cannot conclude from the evidence before it that HUD-OIG issued the subpoena in question as a regulatory instrument because HUD-OIG has identified specific reasons for investigating Banner and has further averred that it made an independent decision to investigate and subpoena Banner. [8] *Accord St. Nicholas Apartments*, 947 F. Supp. at 390 (finding *Burlington Northern* inapposite where HUD-OIG instituted "an audit of a particular HUD insured mortgagor which was suspected of equity skimming" rather than conducting the audit as "part of a long-term, nationwide audit").

[20]** The court similarly finds that HUD-OIG's interaction with the USAO has not been improper. [9] Once again, Banner

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[6] HUD-OIG Special Agent Marguerite Smith averred that "in February 1997, CHA OIG and the United States Attorney's Office requested HUD OIG participation in its investigation of Respondent. Upon review and discussion of the facts of the case, HUD OIG had an independent investigative interest in determining whether Respondent perpetrated a fraud against the CHA and HUD. As such, HUD OIG commenced a formal investigation of Respondent in July 1997." *Declaration of OIG Special Agent Marguerite Smith, Petitioner's Memorandum at Exh. 1 P 19*.

[7] While the timing of HUD-OIG's investigation might, as in St. Nicholas Apartments, "raise concerns regarding the independence of the audit," *see St. Nicholas Apartments*, 947 F. Supp. at 390, the record is devoid of any other evidence suggesting improper HUD-OIG action.

[8] In addition to Special Agent Smith's declaration, HUD-OIG further specified in its reply brief that it "commenced its investigation of potentially fraudulent activities by Banner on the basis of information provided by the United States Attorney's Office, and, thus, the OIG's investigation does not constitute a regulatory compliance audit." Petitioner's Reply at 10.

[9] To the extent that Banner relies on *Marshall v. Barlow's, Inc., 436 U.S. 307, 56 L. Ed. 2d 305, 98 S. Ct. 1816 (1978)*, to support its contention of improper cooperation, the court finds this reliance misplaced. In *Marshall*, the Court refused to permit OSHA to conduct a warrantless inspection of a company's business premises because, among other reasons, the search did not fit the "closely regulated" business warrant exception. *See* *id. at 313-15*. *Marshall* is obviously distinguishable in several respects, including the fact that no government official is attempting to enter and search Banner's premises without a warrant. Moreover, the court notes that OSHA admitted having no particular reason to search Barlow's, whereas HUD-OIG has specifically asserted suspicions of fraud as grounds

incorrectly characterizes HUD-OIG's assertions about its interaction with the USAO regarding Banner's conduct. Banner states that "the OIG concedes that they were asked by the U.S. Attorney to obtain records on behalf of the U.S. Attorney and to aid in an investigation of Banner." Respondent's Memorandum at 11. What HUD-OIG actually stated, however, as indicated above, is that the USAO requested HUD-OIG's assistance in investigating Banner. Moreover, Banner has cited this court to, and the court is aware of, no authority holding that cooperation and/or coordination between an Inspector General and the USAO is improper. Indeed, analogous authority is to the contrary. *See, e.g., Aero Mayflower Transit Co.*, 831 F.2d at 1146 (stating that "no body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority"). Moreover, at least some degree of cooperation appears necessary given the statutory requirement that *HN6*[] Inspectors General **[**21]** "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *5 U.S.C. App. 3* § 4(d).

[22]** Nor does the court find impropriety in HUD-OIG's decision to seek the same documents **[*689]** Judge Reid refused to allow CHA to obtain. Judge Reid refused a CHA request for enforcement of a CHA subpoena; neither HUD nor HUD-OIG were involved. Moreover, Banner has not explained why Judge Reid denied enforcement of the CHA subpoena except to say that he found the disputed documents to be proprietary and confidential and not the proper subject of a CHA administrative subpoena. This court need not arrive at the same decision with respect to HUD-OIG's request for enforcement. No issue of res judicata or collateral estoppel has been raised, [10] and, as the court previously discussed, HUD-OIG has broad investigative and subpoena powers, powers it has properly exercised in this case.

[**23] III. CONCLUSION

For the foregoing reasons, the court grants HUD-OIG's request for summary enforcement of its subpoena *duces tecum*. Banner shall comply with the subpoena by January 11, 1999.

ENTER:

JOAN B. GOTTSCHALL

United States District Judge

DATED: December 9, 1998

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supporting the issuance of the subpoena.

[10] To the extent that Banner may be trying to suggest that CHA and either HUD or HUD-OIG are in privity, the court notes that Banner has made no showing that CHA was authorized to represent HUD in the adjudication of the issue. *See generally* *Facchiano Const. Co., Inc. v. U.S. Dept. of Labor, 987 F.2d 206, 212 (3rd Cir. 1993)* (holding that HUD and DOL were not in privity for purposes of giving res judicata effect to HUD order debarring contractor so as to preclude subsequent government-wide debarment order by DOL because HUD, which had more limited debarment authority than DOL, did not have authority to represent the U.S. in final adjudication of the issue in controversy: government-wide debarment).