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Office of General Counsel

Attorney-Client Privileged, Pre-decisional

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MEMORANDUM FOR: Alfred M. Pollard, General Counsel
THROUGH: Isabella W. Sammons, Deputy General Counsel *IWS*
FROM: Janice A. Kullman, Assistant General Counsel *JK*
SUBJECT: Inspector General Authority and Pay Scale

I. Question: Is the former Inspector General (IG) for the Federal Housing Finance Board (FHFB) the IG for the Federal Housing Finance Agency (FHFA)?

Answer: No. The Housing and Economic Recovery Act of 2008 (HERA) mandates that FHFA have a Presidentially appointed and Senate confirmed IG (PAS IG) and neither HERA nor the Inspector General Act of 1978, as amended (IG Act), provides that the former FHFB IG serve as the FHFA IG until such time as the PAS IG is nominated and confirmed.

II. Question: Does the former FHFB IG have the authority to appoint employees into the Office of the Inspector General (OIG) for the Federal Housing Finance Agency (FHFA)?

Answer: No. HERA mandates that FHFA have a PAS IG and the IG Act provides that only the PAS IG may appoint employees to the FHFA OIG.

III. Question: Under what pay rates must employees of the FHFA OIG be paid?

Answer: General Schedule. The IG Act mandates that employees appointed by a PAS IG must be paid under the General Schedule pay rates. The exception in the IG Act that allows the Federal Deposit Insurance Corporation (FDIC) PAS IG to use FDIC pay rates does not apply to FHFA.

Background

To understand the answers to the questions above, consider the following information:

Congressional Intent

- Congress provided that FHFA have a PAS IG pursuant to the IG Act, 5 U.S.C. App. 3, § 3(a). HERA § 1105(a) and (c); IG Act § 12.
- Congress did not intend for FHFA to have an Acting or interim IG pending the confirmation of a PAS IG. Note that § 1101 of HERA amending § 1312 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (Safety and Soundness Act) (12 U.S.C. 4512 (b)(5)) provides that the Director of the Office of Federal Housing Enterprise Oversight (OFHEO) be the interim Director for FHFA until a new Presidential appointee is confirmed but made no such provision for an IG.
- Congress provided that appropriated funds be used to operate and staff PAS IG Offices and has not yet done so. IG Act § 6(f); *see also* IG Act § 6(a)(9).
- Congress provided that employees of PAS IG Offices be appointed by the PAS IG and paid on the General Schedule pay scale. IG Act § 6(a)(7). Employees of IG Offices in designated Federal agencies such as the FHFB are paid according to the pay rules used by their affiliated agencies. IG Act § 8G(g)(2); H.R. REP. 100-771, 1988 U.S.C.C.A.N. 3154, 3169 (July 13, 1988). FHFA is not one of the designated Federal Agencies.
- Congress did not intend that FHFA be covered by an exception allowing it to use the FHFA pay scale for the OIG. *See* IG Act § 8C setting out a special exception for the FDIC PAS IG to appoint employees using the FDIC pay scale, but making no such provision for FHFA.
- Congress did not intend for the former FHFB IG to be the interim FHFA IG or to use the FHFA pay system. H.R. 885, a bill currently before Congress, proposes elevating the IGs of certain agencies to PAS IGs.¹ That bill specifically includes a transition provision that the non-PAS IGs currently in those agencies may continue serving until the President makes an appointment. That bill also specifies that the employees of the new PAS IGs may appoint employees using the compensation and benefits laws applicable to each agency. HERA does not include either of these provisions, nor is FHFA included in the H.R. 885.

¹ The agencies include the Board of Governors of the Federal Reserve, the Commodity Futures Trading Commission, the National Credit Union Administration, the Pension Benefit Guaranty Corporation, and the Securities and Exchange Commission.

Establishment of FHFA

- HERA provided for the transfer of FHFEB employees to the FHFA not later than the effective date of the abolishment of FHFEB, that is, one year after the enactment of HERA. HERA § 1313(a).
- HERA provided that FHFEB employees are guaranteed a position with the same status (competitive/career or excepted service status), tenure (permanent or temporary tenure), grade, and pay as that held on the day immediately preceding the transfer for one year after transfer. HERA § 1313(b).² The guarantee does not prohibit reassignments, including reassignments to positions with different titles and duties, because grade and pay is not changed in a reassignment action. Although the FHFA Director may at any time reassign the former FHFEB IG to another position, he has not done so.
- FHFEB and OFHEO employees, including the FHFEB IG and his staff, were transferred to FHFA in October 2008 before the end of the one-year deadline. The FHFEB IG was transferred along with other FHFEB employees.
- The IG for FHFEB was not appointed by the President and confirmed by the Senate. The FHFEB IG was appointed by the Chairman of FHFEB pursuant to § 8G of the IG Act because FHFEB is defined in the IG Act as a “designated Federal entity.” IG Act § 8G(a)(2), (c) and (d).
- FHFEB and OFHEO will be abolished in July 2009. HERA §§ 1311 and 1301, respectively.
- FHFA is funding the activities of the former FHFEB IG from FHFA non-appropriated funds, an arrangement informally approved by GAO.

Discussion

I. FHFA IG

Congress expressly provided that FHFA have a PAS IG pursuant to the IG Act who operates with appropriated funds. *See* HERA § 1105(a) and (c); IG Act §§ 3(a), 6(a)(9), (f), and 12. Congress did not intend for FHFA to have an Acting IG or an interim IG pending the confirmation of a PAS IG.

No Acting IG under the Federal Vacancies Reform Act of 1998

² Similar transfer and guarantee provisions apply to employees of the Office of Federal Housing Enterprise Oversight (OFHEO). HERA § 1303(a) and (b). OFHEO, an independent office within the Department of Housing and Urban Development (HUD), arguably came under the jurisdiction of the HUD PAS IG.

The Federal Vacancies Reform Act of 1998 (Vacancies Reform Act, 5 U.S.C. § 3345-3349d) sets forth how vacancies in Presidentially appointed, Senate confirmed positions within the executive branch are to be filled on a temporary basis. Under the Vacancies Reform Act, there is no vacancy in the office of the FHFA PAS IG because a PAS IG for FHFA has yet to be nominated and confirmed.

Even if the Vacancies Reform Act allowed an interpretation that the IG position was currently a “vacancy,” that law requires that the Acting IG would be the individual named as “first assistant” by the PAS IG or the individual whom the President designates as Acting IG. 5 U.S.C. 3345. The former FHFBI IG has neither been named the first assistant nor has he been designated by the President to serve as Acting IG. Although the Vacancies Reform Act contemplates that a vacancy could be temporarily filled in accordance with a provision in an agency’s organic statute, *id.*, neither the Safety and Soundness Act, HERA, nor the IG Act provide for an Acting PAS IG.³

No Interim IG Intended by Congress

Congress did not intend the former FHFBI IG to be an interim IG. Neither the Safety or Soundness Act, HERA, nor the IG Act provide for an interim IG. In addition to the express language providing for a PAS IG, congressional intent is otherwise evident in that Congress included a transitional provision for an interim FHFA Director in 12 U.S.C. § 4512(b)(5), as added by § 1101 of HERA, and could have made a similar provision for an interim IG, but chose not to do so. Congressional intent is also evidenced in that HERA does not prohibit the Director from reassigning the former FHFBI IG or any other former FHFBI employee during the one-year guarantee period to a position with the same grade and pay but with a different title and duties. *See* HERA § 1313(b) (The guarantee runs to grade and pay, not to the title and duties of the position.). If Congress had intended that the former FHFBI IG be the interim IG for FHFA, it would have prohibited his reassignment to a different position until such time as a PAS IG were nominated and confirmed.

Furthermore, by establishing a PAS IG for FHFA who must operate using appropriated funds, Congress indicated its intent to exercise control over OIG expenditures. *See* IG Act § 6(a)(9) and (f). Congress would not have intended that an interim IG expend non-appropriated funds to operate the OIG, including hiring of OIG staff, outside of the control of Congress. The fact that Congress has yet to appropriate funds for the OIG, clearly evidences that it does not intend there be an interim IG.

³ The Office of Legal Counsel at the Department of Justice, in response to an FHFA inquiry also informally opined that the former FHFBI IG could not be the Acting FHFA IG. A May 7, 2009 email from the FDIC’s IG counsel, who also counsels the former FHFBI IG also indicated that the Office of Legal Counsel had advised her that the Vacancies Reform Act did not apply to the FHFBI IG because there was no case of death, resignation or inability to perform the duties of the office.

II. Hiring Authority

Only the IG for FHFA has the authority to hire staff for the OIG. The hiring authority of all PAS IGs is set forth in the IG Act. The PAS IG is authorized to:

select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office [of Inspector General] subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

IG Act § 6(a)(7).⁴

The appointment authority language clearly authorizes only the PAS IG to appoint employees to the FHFA OIG, not the head of FHFA, and not the former FHFB IG or other FHFA employee. Any other reading would contravene congressional intent and derogate the authority of the PAS IG.

As noted above, by establishing a PAS IG for FHFA who must operate the OIG using appropriated funds, Congress indicated its intent to exercise control of OIG expenditures. Congress would not have intended that an interim IG expend non-appropriated funds to hire OIG staff outside of the appropriations process.

III. Pay Rates

Employees of the FHFA OIG are paid under the General Schedule. As quoted above, Congress, in § 6 of the IG Act, expressly provides that employees of the OIG headed by a PAS IG will be paid “subject to the provisions of Title 5, United States Code . . . relating to . . . General Schedule pay rates.” They are not paid under the FHFA pay rates, which are exempt from the General Schedule.⁵

With respect to employees of IG Offices in designated Federal agencies, such as the FHFB, Congress provides that they be paid according to the pay rates used by their affiliated agencies.⁶ IG Act § 8G(g)(2); H.R. REP. 100-771, 1988 U.S.C.C.A.N. 3154, 3169 (July 13, 1988).

⁴ The PAS IG also is authorized to hire experts and consultants pursuant to 5 U.S.C. § 3109 and pay them at a daily rate not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule. IG Act § 6(a)(8). The IG Act also authorizes the PAS IG to appoint staff as SES members. IG Act § 6(d).

⁵ See 12 U.S.C. § 4515(a) for the FHFA exemption from the General Schedule.

⁶ In passing the 1988 amendments to the IG Act that included the provisions for designated Federal entities, Congress clearly made a distinction between how PAS IG employees would be paid and how employees of IGs in designated Federal entities would be paid:

(4) Personnel Authority

While the Presidentially appointed inspectors general have full authority to select employees in accordance with appropriate civil service procedures, the committee recognizes that not all Federal entities operate under the Civil Service personnel system.

The IG Act has exceptions to the General Schedule pay rates requirement. For instance, the FDIC has a PAS IG, but § 8C of the IG Act expressly allows the FDIC PAS IG to pay OIG employees using the laws and regulations that govern pay within the FDIC.⁷ There is no such exception for FHFA in either the Safety and Soundness Act, HERA, or the IG Act. Had Congress intended to make such an exception, it would have passed a similar provision for FHFA when it established a PAS IG for FHFA, as it is attempting to do in H.R. 885. H.R. 885 proposes elevating the IGs of certain agencies to PAS IGs and specifically includes a transition provision that the non-PAS IGs currently in those agencies may continue serving until the President makes an appointment. That bill also specifies that the employees of the new PAS IGs may appoint employees using the compensation and benefits laws applicable to each agency. HERA does not include either of these provisions, nor is FHFA included in H.R. 885.

For this reason, authorities in the 1978 act under section 6(a)(7) and (a)(8), providing for the selection and hiring of employees and consultants under that system, were not extended to the designated Federal entities. Instead, a separate provision is included in H.R. 4054 to provide authority for the inspectors general in designated Federal entities to select and employ such officers and employees as may be necessary, and to obtain services of experts or consultants, under the laws and regulations that govern the entity.

H.R. REP. 100-771, 1988 U.S.C.C.A.N. 3154, 3169 (July 13, 1988).

⁷ The exception reads:

(b) Personnel.--Notwithstanding paragraphs (7) and (8) of section 6(a), the Inspector General of the Federal Deposit Insurance Corporation may select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization of experts or consultants, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the Federal Deposit Insurance Corporation.