



FEDERAL HOUSING FINANCE AGENCY

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Office of the Inspector General

MEMORANDUM TO: Edward DeMarco, Deputy Director

FROM: 
Edward Kelley, FHFA OIG

SUBJECT: Inspector General Authority

DATE: July 7, 2009

Thank you for providing the FHFA General Counsel's memorandum dated June 23, 2009, regarding Inspector General Authority and Pay. With the enactment of the Housing and Economic Recovery Act (HERA) of 2009, Congress bestowed "establishment" status upon the Federal Housing Finance Agency (FHFA) and consequently brought the FHFA Office of Inspector General under the establishment provisions of Section 3 of the Inspector General Act. Section 3(g) of the Inspector General Act provides that the Office of Inspector General shall obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General. Therefore, the legal opinion of the FHFA General Counsel on the powers and authorities of the FHFA Office of Inspector General, while interesting, is not authoritative.

Background

Section 1105(d) of the Housing and Economic Recovery Act of 2008 added the Federal Housing Finance Agency to the list of executive departments with a Presidentially-appointed Inspector General. The Office of Inspector General is unique to Government, being an independent office within an agency, with responsibilities to the agency of which it is a part, as well as to the Congress. Section 4 of the IG Act imposes the duty and responsibility on each Inspector General to keep the head of the agency and Congress fully and currently informed of the administration of the programs within the agency. 5 U.S.C. App. 3 Section 4. The IG is required under Section 5 of the Act to communicate directly to the Congress, through the preparation of semiannual reports as well as the reporting of serious or flagrant problems, abuses, or deficiencies related to the administration of the programs or operations of the establishment. 5 U.S.C. App. 3 Section 5. The IG is specifically empowered to conduct audits and investigations regarding the programs and operations of the agency; the agency head may not prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation. 5 U.S.C. App. 3 Section 3(a). To fulfill these responsibilities, the Office of Inspector General is authorized to have complete autonomy to engage in budgetary, procurement, and personnel actions under its own authority.

Authority of the Senior Official in the Office of Inspector General

The Housing and Economy Recovery Act of 2008 mandates that the Federal Housing Finance Agency have a Presidentially-appointed and Senate-confirmed Inspector General. However, nothing in the statute obviates the existence of the current Office of Inspector General, or the duties and responsibilities of the OIG staff members.¹ While there is no consensus on the official designation of the former FHFB Inspector General, with the senior-most OIG official remains the responsibility to conduct the affairs of the Office of Inspector General in trust until the President of the United States appoints a new Inspector General. Until such time as a new Inspector General is appointed, the senior official within the OIG, can and must hire additional staff under the Inspector General's independent authority in order to fully and effectively perform the essential functions of the Office of Inspector General with respect to the operations of the FHFA, the regulated entities FNMC and FNHMA, and the Federal Home Loan Banks.

While the Act indicates that the Office of Inspector General, as part of the agency, is under the general supervision of the agency head, the agency head does not have the power to select, appoint, and employ OIG personnel; such authority is given solely to the Inspector General. 5 U.S.C. App. 3 Section 6. This authority promotes the independence of the OIG and its staff to point out fraud, abuse, mismanagement, or waste within the programs and operations of the agency. The Senate Committee on Government Affairs, on its report accompanying the legislation that became the IG Act, noted that the committee was intentionally deviating from standard government procedures in vesting personnel authority with the Inspector General: "The committee is aware that in most cases the authority to select and appoint officers, and employees, and enter into outside contracts rests with the agency head and is delegated as appropriate to subordinate officials. However, because of the unique function of the Inspector and Auditor General and the possibility that such authority might be denied to him, in order to hamper his operations, the committee has given him explicit authority to carry out these functions. S. Rep. No. 95-1071 (1978), 95th Cong., 2nd Sess., Committee of Government Affairs, U.S. Senate, "Establishment of Offices of Inspector and Auditor General in Certain Executive Departments and Agencies", at p. 35. Further, OMB has opined that the IG is authorized to select, appoint, and employ such officers and employees as may be necessary to carry out the functions, powers, and duties of the Office of Inspector General. Memorandum to Agency Heads of Designated Federal Agencies Inspectors General of Designated Federal Entities, from Frank Hodsoll, Deputy Director for Management, OMB, November 13, 1992.

¹ The creation of the FHFA Inspector General arose out of the existence of the former FHFB Inspector General. No other agency of the three that were consolidated to create the FHFA had an Office of Inspector General. Congress clearly intended to continue the Inspector General presence at the newly created agency. A similar issue occurred when the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC) merged in 1995. The RTC was abolished and a Presidentially appointed Inspector General position was created for the FDIC, but the staff of the RTC Office of Inspector General was subsumed into the existing FDIC Office of Inspector General.

With the enactment of the Housing and Economic Recovery Act of 2008, the Congress clearly intended the continuation of the Office of Inspector General within the Federal Housing Finance Agency. P.L. 110-289, Section 1105(d). The independence of the Office of Inspector General in its budgetary, procurement, and personnel authority is key to maintaining its integrity, and its ability to thoroughly and effectively review the programs and operations of the agency. Pursuant to the legislative history of the Inspector General Reform Act of 2008, the amendments to the Inspector General Act that relate to Inspectors General offices as independent agencies provide that Inspectors General, rather than their associated agency heads, will be considered the "agency head" with regard to Senior Executive Service, Voluntary Separation Authority, and law enforcement officer retirement exemptions. This designation, however, does not address pay. The Housing and Economic Recovery Act did not amend the pay provisions related under 12 U.S.C. Section 4515 as they applied to OHFEO, the precursor agency to the FHFA. OHFEO's pay provisions, codified to 12 U.S.C. §4515 state: "Subject to title III of the Federal Housing Finance Regulatory Reform Act of 2008, the Director may appoint and fix the compensation of such officers and employees of the Agency as the Director considers necessary to carry out the functions of the Director and the Agency. Officers and employees may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 relating to classification and General Schedule pay rates. Nothing in the Housing and Economic Recovery Act identifies the Office of Inspector General as being subject to the Classification Act. Therefore, employees of the Office of Inspector General, as FHFA employees, are entitled to receive the same pay.

The senior official of the FHFA Office of Inspector General has the duty and responsibility to conduct the affairs of the Office of Inspector General as envisioned by Congress. The Federal Housing Finance Agency has recognized FHFA OIG's authority to conduct internal reviews and investigations as well as meet statutorily mandated requirements under the Federal Information Security Management Act and compliance with Section 522 of the Consolidated Appropriations Act of 2005. In fact, any limitation by the FHFA upon the operations of the Office of Inspector General would not only be a violation of law but would severely hamper the ability of the FHFA to comply with statutorily mandated reporting requirements.

Conclusion

- 1) Under the Housing and Economic Reform Act, Congress clearly intended the continued presence of an Office of Inspector General within the Federal Housing Finance Agency and designated the FHFA as an establishment under the Inspector General Act.
- 2) The designation of the FHFA as an establishment under Section 12(2) of the IG Act gives the FHFA Office of Inspector General independence in the exercise of its personnel, budget, and procurement authority.
- 3) Pursuant to the powers and authorities of Section 6 of the IG Act, only the FHFA Office of Inspector General, or in the interim, the senior OIG official, can select and employ officials and staff within the Office of Inspector General.

4) The FHFA, Members of Congress, and OMB have acknowledged the authority of the FHFA OIG in the conduct of audits and investigations of FHFA programs and operations. Furthermore, the FHFA relies upon the existing FHFA OIG to meet Federal statutorily mandated reporting requirements.

5) FHFA OIG employees are entitled to receive the same pay as other FHFA employees.

The FHFA OIG seeks to establish a working relationship with the Agency to enhance the oversight of the regulated entities FHNMA and FHMC, the Federal Home Loan Banks, and the exercise of authority by the FHFA to ensure that the purposes of the Housing and Economic Recovery Act are carried out. As the senior-most official within the FHFA OIG, Edward Kelley will continue to lead the operations of the Office of Inspector General until such time as the President appoints a new Inspector General to the position. To do otherwise would violate Congress explicit demand for an Inspector General oversight of the Federal Housing Finance Agency at this critical juncture when the economic stability of the nation's housing industry is in jeopardy.

I would like to schedule a meeting for as soon as possible between you, Director Lockhart, me, and our legal counsels to discuss the issues included in this memorandum. One option is to have this meeting on July 13, 2009 at 4:30PM in lieu of our scheduled monthly meeting.