

Navigating The Unique Challenges Of An OIG Investigation

By **Erik Swabb, Joel Green and Alyssa DaCunha** (December 14, 2022)

In November, the federal government announced the expansion of its Procurement Collusion Strike Force with the addition of four new members — the offices of inspectors general at the U.S. Department of Energy, the U.S. Department of the Interior, the U.S. Department of Transportation and the U.S. Environmental Protection Agency. The expansion was the latest sign of the growing importance of investigations by inspectors general.

"Recent legislation will finance billions of dollars for government procurements and grants," said Assistant Attorney General Jonathan Kanter of the U.S. Department of Justice's Antitrust Division at the time of the announcement. A Nov. 15 DOJ statement said, "Expanding the PCSF's national partnership to include these critical offices will better position the PCSF to protect taxpayer dollars and combat collusion in government spending."

In August, President Joe Biden signed into law the CHIPS and Science Act, which, among other actions, provides \$52.7 billion for American semiconductor research, development, manufacturing and workforce development.[1]

Afterward, the U.S. Department of Commerce announced that companies seeking funding under the law would be required to certify the accuracy of information provided to the government.[2]

The department's CHIPS for America website states that "companies will be subject to enforcement actions pursuant to criminal statutes related to the submission of false information to the government, the False Claims Act, and other applicable legal authorities." [3]

As for which federal agency will play a major role in these enforcement efforts, the bill itself provided an answer. Tucked into the CHIPS Act is a provision that provides \$5 million annually to the department's Office of Inspector General to assist with oversight.[4]

These developments should come as no surprise as federal OIGs are charged with investigating fraud, waste and abuse in the U.S. government.

Sometimes overlooked among higher profile enforcement actions by the DOJ and the U.S. Securities and Exchange Commission, OIG investigations present a unique challenge for government contractors and other organizations that receive federal funds.

To mitigate the risk of OIG investigations and efficiently resolve them if they arise, it is important to understand certain aspects of these inquiries, which can differ significantly from enforcement actions by other federal agencies.

Key Aspects of OIG Investigations



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Corporate counsel should be aware of certain aspects of OIGs' investigative authority.

First, OIGs have independent authority to conduct investigations, which the affiliated agency head generally cannot prohibit.[5] OIGs can issue administrative subpoenas for information and documents necessary to carry out their functions to nonfederal individuals and entities.[6]

While, with a few exceptions, OIGs generally do not have the power to compel testimony from individuals other than current federal employees, OIG investigations may involve the DOJ or other agencies that have testimonial subpoena authority and jointly request testimony or information.[7] OIGs also have the authority to access their respective agency's records, which can be used to identify potential misconduct.[8]

For example, with respect to U.S. assistance to Ukraine, in August, the then-acting U.S. Department of Defense Inspector General Sean O'Donnell said he is on high alert for indications of fraud and abuse in the contracts being awarded for support to Ukraine.[9]

He said data analytics experts employing specialized software tools and working with auditors and criminal investigators are "taking a far richer data set and looking deeper" for indications of fraud or collusion to win a contract.[10]

The DOD OIG has reportedly identified more than 7,800 contracts each under \$2 million and valued at a total of \$2.2 billion, in addition to larger contracts for advanced weapons and equipment.[11]

OIGs for the U.S. Department of State and the U.S. Agency for International Development are also involved in overseeing U.S. assistance to Ukraine.[12]

Furthermore, OIGs have the resources to conduct major investigations. Across the federal government, OIGs collectively have more than 14,000 employees.[13] The DOJ and other enforcement agencies frequently leverage this enforcement capability.

Press releases by the DOJ Civil Division's fraud section typically identify one or more OIGs who assisted with an investigation.[14] In fiscal year 2021, 75 federal OIGs closed more than 17,000 investigations, leading to approximately 4,300 indictments and criminal informations, 1,100 civil actions, 2,400 suspensions or debarments of government contractors, and \$12 billion in funds recovered.[15]

Second, OIGs receive a large amount of information that they can use to identify leads and launch investigations. OIGs regularly review programs and operations of their affiliated agencies, which can identify problems involving government contractors and other recipients of federal funding. In fiscal year 2021, OIGs issued 3,024 audit, inspection and evaluation reports.[16]

OIGs also maintain hotlines that allow anyone to report confidentially fraud, waste, abuse and other violations of law.[17] Whistleblowers, including employees of private sector government contractors and vendors, can also report retaliation against an individual for filing a complaint of wrongdoing. In fiscal year 2021 alone, OIGs collectively processed 1,433,736 hotline complaints.[18]

In addition, under the Federal Acquisition Regulation, contractors must timely disclose, in writing, to the affiliated agency's OIG credible evidence of violations of certain federal criminal laws or the False Claims Act in connection with an award, performance, or closeout

of a government contract or subcontract, or risk suspension or debarment.[19]

For example, in the first half of fiscal year 2022, the DOD OIG received 222 contractor disclosures that identified \$20.3 million in potential monetary recoveries.[20] OIGs also receive allegations and investigation requests from Congress and other parts of the executive branch.

Finally, Congress has significant influence over OIGs, which is unique among enforcement agencies in the executive branch. OIGs report to both their affiliated agency heads and Congress.[21] In semi-annual reports to Congress, OIGs summarize their activities, frequently touting their enforcement actions and funds recovered.

Many OIGs also must immediately report to their agency heads serious problems in programs and operations, which the heads must transmit to Congress within seven days.[22]

Moreover, federal laws explicitly provide many OIGs a separate appropriations account for their respective offices.[23] This requirement provides these OIGs a degree of budgetary independence from their affiliated agency[24] and incentive to be responsive to congressional requests and oversight interests.

Not surprisingly given Congress' influence, congressional oversight and OIG investigations can be mutually reinforcing. TransDigm Group Inc. is a recent example of such dynamics.

After initial media reports in early 2017 on alleged price-gouging by TransDigm,[25] Rep. Ro Khanna, D-Calif., requested that the DOD OIG investigate TransDigm.[26] In February 2019, the DOD OIG released its report.[27]

Three months later, the U.S. House of Representatives Committee on Oversight and Reform held a hearing on the report,[28] after which TransDigm reportedly refunded the U.S. government \$16.1 million.[29] Then, in June 2019, the committee requested that the DOD OIG conduct a comprehensive review of TransDigm's contracts with the DOD.[30] In January, after the DOD OIG released its second report,[31] the committee held a hearing on the report.[32]

A Multidisciplinary Approach to Addressing OIG Investigations

Given these aspects of OIG investigations, it is important for in-house counsel to take a multidisciplinary approach to mitigating the risk of OIG investigations and resolving them if they occur.

Congressional Investigations

Due to the unique relationship between Congress and OIGs, congressional oversight can prompt an OIG investigation or vice versa. Congressional investigations pose a unique set of considerations and risks for companies and individuals under scrutiny — with high stakes. Congressional inquiries often unfold quickly in the media spotlight, and are driven by political imperatives that require a strategic response different from the approach required in the courtroom or before regulators.

It is important to identify congressional equities early, so one can consider proactive measures to head off a congressional investigation or, if one is launched, to mitigate legal and reputational risks.

Government Contracts

OIG investigations frequently target government contractors, given OIGs' remit to tackle fraud involving the federal government. The complex regulatory regimes imposed on government contractors present contractual and regulatory risks with high stakes: Noncompliance can affect not only the contract at issue, but also the company's reputation with valued customers and its eligibility for future work.

A company should have a sound and well-resourced compliance program that ideally prevents problems from arising. If an OIG investigation does occur, it is critical to address any identified government contracting issues, such as potential False Claims Act violations and evidence that may trigger a mandatory disclosure under the Federal Acquisition Regulation.

White Collar Defense

As OIG investigations often involve the DOJ or other enforcement agencies, either at the outset or later, one should be prepared to mount a white collar defense. Navigating multifaceted enforcement matters requires comprehensive strategies, seamless coordination and innovative advocacy.

Crisis Management

If an OIG matter metastasizes into a full-blown crisis with congressional investigations, enforcement actions and media scrutiny, the business, legal and reputational stakes become high. A holistic strategy that addresses overlapping inquiries by different government entities is vital.

In addition, an effective response demands not only an immediate governance, communications and procedural roadmap, but also longer-term congressional, regulatory and litigation strategies to prevent issues from lingering or recurring.

While OIG investigations pose challenges, it is possible to successfully navigate them by understanding and accounting for their unique aspects.

Correction: A previous version of this article misstated the scope of OIG authority to compel testimony from individuals who are not current federal employees. The error has been corrected.

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[1] <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/>.

[2] <https://www.nist.gov/chips/taxpayer-protections>.

[3] <https://www.nist.gov/chips/taxpayer-protections>.

[4] Pub. L. 117-167, § 102 (2022).

[5] <https://crsreports.congress.gov/product/pdf/R/R45450>.

[6] See, e.g., 5 U.S.C. App. (IG Act), § 6(a)(4).

[7] <https://oversight.house.gov/news/press-releases/top-oversight-committee-members-introduce-ig-subpoena-authority-act>. A few OIGs have testimonial subpoena authority. See, e.g., 5 U.S.C. App. (IG Act), § 8(i) (Department of Defense OIG); 42 U.S.C. § 1320a-7a(j) (Department of Health and Human Services OIG); 38 U.S.C. § 312(d) (Department of Veterans Affairs OIG); Pub. L. 116-136, § 15010(e)(3)(A) (2020) (Pandemic Response Accountability Committee comprising various OIGs).

[8] See, e.g., 5 U.S.C. App. (IG Act), § 6(a)(1).

[9] <https://www.bloomberg.com/news/articles/2022-08-25/torrent-of-cash-for-ukraine-arms-puts-pentagon-watchdog-on-alert?leadSource=uverify%20wall>.

[10] <https://www.bloomberg.com/news/articles/2022-08-25/torrent-of-cash-for-ukraine-arms-puts-pentagon-watchdog-on-alert?leadSource=uverify%20wall>.

[11] <https://www.bloomberg.com/news/articles/2022-08-25/torrent-of-cash-for-ukraine-arms-puts-pentagon-watchdog-on-alert?leadSource=uverify%20wall>.

[12] <https://www.stateoig.gov/ukraine-response-oversight>.

[13] <https://www.ignet.gov/sites/default/files/files/992-011CIGIEAnnualReport-Full508.pdf>.

[14] <https://www.justice.gov/civil/fraud-section-press-releases>.

[15] <https://www.ignet.gov/sites/default/files/files/992-011CIGIEAnnualReport-Full508.pdf>.

[16] <https://www.ignet.gov/sites/default/files/files/992-011CIGIEAnnualReport-Full508.pdf>.

[17] See, e.g., <https://www.dodig.mil/components/administrative-investigations/DoD-hotline/>.

[18] <https://www.ignet.gov/sites/default/files/files/992-011CIGIEAnnualReport-Full508.pdf>.

[19] FAR 3.1003(a); FAR 52.203-13(b)(3).

[20] <https://www.dodig.mil/Reports/Semiannual-Report-to-the-Congress/Article/3046128/semiannual-report-to-the-congress-october-1-2021-through-march-31-2022/>.

[21] See, e.g., 5 U.S.C. App. (IG Act), § 4(a).

[22] See, e.g., 5 U.S.C. App. (IG Act), §§ 5(d), 8G(g)(1).

[23] <https://crsreports.congress.gov/product/pdf/R/R45450>.

[24] <https://crsreports.congress.gov/product/pdf/R/R45450>.

[25] <https://www.cnbc.com/2017/01/20/citron-research-calls-transdigm-valeant-of-the-aerospace-industry-shares-plummet.html>.

[26] <https://khanna.house.gov/media/press-releases/release-rep-khanna-calls-investigation-aerospace-defense-contractor-business>.

[27] <https://www.dodig.mil/reports.html/Article/1769041/review-of-parts-purchased-from-transdigm-group-inc-dodig-2019-060/>.

[28] <https://oversight.house.gov/legislation/hearings/dod-inspector-general-report-on-excess-profits-by-transdigm-group-inc>.

[29] <https://oversight.house.gov/news/press-releases/transdigm-to-refund-161-million-to-dod-as-a-result-of-committee-investigation>.

[30] <https://oversight.house.gov/news/press-releases/after-oversight-committee-inquiry-inspector-general-finds-rampant-price-gouging>.

[31] <https://www.dodig.mil/reports.html/article/2871623/audit-of-the-business-model-for-transdigm-group-inc-and-its-impact-on-departmen/>.

[32] <https://oversight.house.gov/news/press-releases/oversight-committee-holds-hearing-on-new-findings-of-price-gouging-by-transdigm>.