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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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The Honorable Max S. Baucus
United States Senate

Dear Senator Baucus:

This is in response to your request that we label or designate the work of Inspectors General under the Inspector General Act of 1978 (Act) (Pub. L. No. 95-452, 92 Stat. 1101, October 12, 1978), as internal audits to the extent possible. You also ask that reports by the Inspectors General in the area of criminal investigation be labeled as reports within the jurisdiction and oversight of Congress and its oversight organizations.

This Office lacks authority to categorize Inspectors General work products as "internal audits" or by any other label. Activities of the Inspectors General are independent of this Office, except that these newly created offices must comply with General Accounting Office (GAO) audit standards and must coordinate and cooperate with us. Sections 4(b), (c).

The Inspectors General are executive branch officials. The Act creates reporting requirements to the Congress. Once the Inspectors General have complied with these, access by the Congress to specific information in the hands of the Inspectors, in our view, is governed by the same considerations which govern Congress' access to any other executive branch information.

As we read the Act, determinations as to what activities amount to internal audits must be made based upon the nature of the activities themselves. Accordingly, we do not believe it would be appropriate for this Office to attempt to designate the nature of the work product of the Inspectors General.

Further, there is an important distinction between investigations and audits, which is recognized in the Act. While an investigation may develop as a result of an audit, the two activities are conducted for different purposes and should be kept distinct. The overall objective of an audit is to bring about improvements in the management or conduct of activities and programs. Investigations, on the other hand, are conducted when there are indications of unlawful or fraudulent behavior.

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Audits generally do not deal with persons involved in questionable activities, while investigations often do.

This Office strongly urged that the title of the offices to be created by H.R. 8588, 95th Cong., the source of the Act, be "Office of Inspector and Auditor General." This recommendation was adopted in the Senate version of the bill, but was dropped in the final negotiation process with the House, apparently on the basis that the audit-investigation distinction was adequately preserved in the bill that was enacted. See 124 Cong. Rec. S 15872 (daily ed.) September 22, 1978. Clearly congressional intent was to distinguish between the two activities. For example, the Act states that:

> "Each Inspector General shall * * * appoint an Assistant Inspector General for Auditing * * * and * * * appoint an Assistant Inspector General for Investigations * * *" Sec. 3(d).

The statutory requirement for a semi-annual report from each Inspector General (section 5(a)) also distinguishes between the kind of information which should be reported for audits and the kind of information to be included for investigation reports.

These general distinctions apply to activities of each Inspector General, and identify those activities that are audits and those that are not. Whether each separate work product developed by an Inspector General's Office is an audit or an investigation must be measured against the methods and objectives actually employed. Further, the Act contemplates that much of the Inspector General activity will consist of investigations which are not audits. Traditional investigations into individual fraud or abuse matters do not meet the purposes of audit and will not be required to comply with GAO's audit standards.

The ability of your subcommittee or other committees, or subcommittees of Congress to obtain information from establishments where Offices of Inspector General have been created by this Act will not be affected, in our view, by whether we label their activities as internal audits or investigations.

Subsections 5(a) and (d) of the Act provide as follows:

> "(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semi-annual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30. Such reports shall include, but need not be limited to --

"(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

"(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

"(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

"(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

"(5) a summary of each report made to the head of the establishment under section 6(b)(2) during the reporting period; and

"(6) a listing of each audit report completed by the Office during the reporting period.

* * * * *

"(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate."

The semiannual reports required by section 5(a) include not the text but summaries of audit reports or investigations. Similarly, the reports required by subsection (d) do not necessarily include the complete underlying work product of the Office of Inspector General.

Despite the extensive concern over congressional access to information expressed in the legislative history of the Act, the only specific allusion in the Act to Congress obtaining information other than that covered by the reporting requirements quoted above is the word "otherwise" which appears in paragraph (5) of subsection 4(a) of the Act. This paragraph provides that each Inspector General has the duty and responsibility --

> "* * * to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action." (Emphasis supplied.)

It is true that Representative Jack Brooks said in the course of the final floor debate in the House that:

> "* * * we will have complete access to the records if we request them. It just will not be part of the routine." 124 Cong. Rec. H 10922 (daily ed.), September 27, 1978.

However, we do not believe that this statement necessarily means that the Act itself created congressional access to the work product of Inspectors General because it is not altogether clear from the context whether Mr. Brooks was giving a legal constructon of the Act or merely explaining the practical availability of records once Congress knows what to ask for from the reports.

The question of access was explored in some detail in the Senate Committee report (S. Rep. No. 95-1071 at 28-32). In this report the Senate Committee on Governmental Affairs recognized certain legal impediments to complete congressional access to information concerning criminal investigations:

> "* * * In any event, however, the intent of the legislation is that the Inspector and Auditor General in preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations. Similarly the Inspector and Auditor General must adhere to statutes such as

26 U.S.C. § 6013, dealing with tax returns, or Federal Rule of Criminal Procedure 6(e), dealing with grand jury information, which prohibit disclosure even to Congress. The inclusion of such information in an Inspector and Auditor General report could subject the Inspector and Auditor General to legal sanction.

"The committee recognizes, however, that in rare circumstances the Inspector and Auditor General, through inadvertence or design, may include in his report materials of this sort which should not be disclosed even to the Congress. The inclusion of such materials in an Inspector and Auditor General's report may put a conscientious agency head in a serious bind. The obligation of an agency head is to help the President 'faithfully execute the laws.' Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an Inspector General's report to Congress. However, a conflict of responsibilities may arise when the agency head concludes that the Inspector and Auditor General's report contains material, disclosure of which is improper under the law. In this kind of rare case, section 5(b) is not intended to prohibit the agency head from deleting the materials in question.

"In addition, the committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets (Nixon v. General Services Administration, 433 U.S. 425, (1977); United States v. Nixon, 418 U.S. 683 (1974)). Insofar as this privilege is constitutionally based, the committee recognizes that subsection 5(b) cannot override it. In view of the uncertain nature of the law in this area, the committee intends that subsection 5(b) will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary. The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation.

"In the rare cases in which alterations or deletions have been made, the committee envisions that an agency

> head's comments on an Inspector and Auditor General's report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore. In this manner, the appropriate subcommittees and committees could pursue the matter in whichever way would best serve the responsibilities of the Congress."
> (Id. at 32.)

As this quotation indicates, the potential legal issues of congressional access to investigations by Inspectors General can not be resolved by labeling investigations as internal audits, even if it were possible for us to do so. Also, to date, we are not aware of any problems relating to congressional access to Inspector General reports in those civilian agencies where Inspectors General are operational. It would be premature for us to attempt to comment further on the problem of access at this time since, as the Senate Report indicates, each case will have to be resolved individually.

Sincerely yours,

Comptroller General
of the United States