Statutory Offices of Inspectors General (IGs): Methods of Appointment and Legislative Proposals

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Summary

This report addresses the duties and functions of statutory Inspectors General (IGs); the numbers of each type of IG; the differences between IGs appointed by the President and those appointed by the agency head; considerations for whether certain IGs should be appointed by the President as opposed to the agency head; and the Inspector General Reform Act of 2008 (Reform Act), P.L. 110-409. In October 2008, Congress enacted the Reform Act, which created additional protections and authorities for IGs with regard to removal or transfer of an IG, budgets, law enforcement authority, pay, subpoena power, and websites.

This report also addresses proposed changes affecting offices of inspectors general (OIGs) or establishing new OIGs in select bills in the 111th Congress: H.R. 885/S. 1354, the Improved Financial Commodity Markets Oversight and Accountability Act; H.R. 3126, the Consumer Financial Protection Agency Act of 2009; and H.R. 3962, the Affordable Health Care for America Act. On March 25, 2009, the House Committee on Oversight and Government Reform's Subcommittee on Government Management, Organization, and Procurement held a hearing entitled, "The Roles and Responsibilities of Inspectors General within Financial Regulatory Agencies," at which the subcommittee discussed H.R. 885 and other issues. The House passed H.R. 885 on a voice vote under suspension of the rules on June 8, 2009.

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Overview

There are more than 60 offices of inspectors general (OIGs) in executive and legislative branch agencies, as well as special inspectors general (SIGs), who are responsible for audits and investigations related to particular programs or expenditures. Inspectors General (IGs) draw their authorities and duties, either in whole or in part, from the Inspector General Act of 1978, as amended (IG Act).[1] For example, while several legislative branch IGs have been created in separate statutes, their establishing acts reference several of the provisions of the IG Act. Similarly, Congress has established SIGs such as the SIG for Iraq Reconstruction (SIGIR), the SIG for Afghanistan Reconstruction (SIGAR), and the SIG for the Troubled Asset Relief Program (SIGTARP), and has granted these IGs many of the authorities and responsibilities listed in the IG Act.

The IG Act addresses the authorities and duties of two types of IGs: (1) federal establishment IGs, who are appointed by the President with the advice and consent of the Senate and may be removed only by the President; and (2) designated federal entity (DFE) IGs,[2] who are appointed and may be removed by the agency head.[3] The latter are typically found in the smaller agencies. IGs have been granted a substantial amount of independence, authority, and resources in their statutes to combat fraud, waste, and abuse. IGs operate under only the “general supervision” of the agency head, who is prohibited (with a few exceptions) from preventing or prohibiting an IG from carrying out an audit or investigation or issuing a subpoena.[4]

The statutory purposes of the OIGs include: conducting and supervising audits and investigations within an agency; providing policy recommendations for activities to promote the economy, efficiency, and effectiveness of agency programs and operations; and conducting, supervising, or coordinating activities designed to prevent and detect fraud and abuse in agency programs and operations.[5] IGs must also keep the agency head and Congress “fully and currently informed” about problems with the administration of agency programs and operations through specified reports and otherwise (which includes testifying at hearings and meeting with Members and staff).[6] The reports include semi-annual reports as well as immediate reports regarding “particularly serious or flagrant problems.”[7] The connections between IGs and Congress may enhance legislative oversight capabilities and provide IGs with potential support for their findings and recommendations for corrective action.

To carry out these and other duties, IGs have access to agency information and subpoena power for records and documents, as well as independent law enforcement authority. IGs must report

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[1] 5 U.S.C. Appendix.

[2] DFE IGs were created in the Inspector General Act Amendments of 1988, P.L. 100-504.

[3] Section 3 of the IG Reform Act of 2008 establishes a requirement that the President or the agency head must notify Congress in writing at least 30 days before removing or transferring an IG. P.L. 110-409. This report does not address potential constitutional concerns with this provision. Additionally, either an establishment or DFE IG may be impeached.

[4] 5 U.S.C. App. § 3(a).

[5] Although IGs oversee agency programs and operations, they do not have program operating responsibilities. *See* 5 U.S.C. App. §§ 8G(b), 9(a)(2); H.R. Rep. No. 100-1020, at 28 (Sept. 30, 1988) (Conf. Rept.).

[6] 5 U.S.C. App. §§ 2, 4(a)(5).

[7] 5 U.S.C. App. § 5(d).

suspected violations of federal criminal law immediately to the Attorney General.[8] Agencies may also have a separate office that is responsible for conducting criminal investigations under the statutes that the agency is responsible for administering and enforcing, which may make recommendations for further investigation and prosecution to the U.S. Department of Justice.

Types of IGs

Including the newest IG for the Federal Housing Finance Agency, there are presently 30 establishment IGs that have been appointed by the President. They are located in the following departments and agencies: (1) Agriculture; (2) Commerce; (3) Defense; (4) Education; (5) Energy; (6) Health and Human Services; (7) Housing and Urban Development; (8) Interior; (9) Justice; (10) Labor; (11) State; (12) Transportation; (13) Homeland Security; (14) Treasury; (15) Veterans Affairs; (16) Environmental Protection Agency; (17) General Services Administration; (18) National Aeronautics and Space Administration; (19) Nuclear Regulatory Commission; (20) Office of Personnel Management; (21) Railroad Retirement Board; (22) Federal Deposit Insurance Corporation; (23) Small Business Administration; (24) Corporation for National and Community Service; (25) Agency for International Development; (26) Social Security Administration; (27) Federal Housing Finance Agency; (28) Tennessee Valley Authority; (29) Export-Import Bank; and (30) Treasury Inspector General for Tax Administration.[9] The IG Act also provides that IGs may be established in commissions created under 40 U.S.C. § 15301, which are the Southeast Crescent Regional Commission, the Southwest Border Regional Commission, and the Northern Border Regional Commission.

Not including the IG for the Federal Housing Finance Board, as that agency has become part of the new Federal Housing Finance Agency, there are currently 29 DFE IGs, appointed by the agency head and located in the following agencies: (1) Amtrak; (2) Appalachian Regional Commission; (3) Board of Governors of the Federal Reserve System; (4) Commodity Futures Trading Commission; (5) Consumer Product Safety Commission; (6) Corporation for Public Broadcasting; (7) Denali Commission; (8) Equal Employment Opportunity Commission; (9) Farm Credit Administration; (10) Federal Communications Commission; (11) Federal Election Commission; (12) Election Assistance Commission; (13) Federal Maritime Commission; (14) Federal Labor Relations Authority; (15) Federal Trade Commission; (16) Legal Services Corporation; (17) National Archives and Records Administration; (18) National Credit Union Administration; (19) National Endowment for the Arts; (20) National Endowment for the Humanities; (21) National Labor Relations Board; (22) National Science Foundation; (23) Peace Corps; (24) Pension Benefit Guaranty Corporation; (25) Securities and Exchange Commission; (26) Smithsonian Institution; (27) United States International Trade Commission; (28) Postal Regulatory Commission; and (29) United States Postal Service.[10]

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[8] 5 U.S.C. App. § 4(d).

[9] Section 12(2) of Title 5 Appendix, United States Code, lists 32 IGs, including the IGs in numbers 1-29 in the above text. However, the IGs for the Federal Emergency Management Agency, the Community Development Financial Institutions Fund, and the Resolution Trust Corporation are no longer in existence. The functions of those agencies were either transferred or abolished. Also, 5 U.S.C. App. § 2 specifically lists the Office of Treasury IG for Tax Administration; the Treasury is defined as an establishment under 5 U.S.C. App. § 12(2).

[10] Section 8G(a)(2) of Title 5 Appendix, United States Code, lists several DFE IGs that are no longer in existence, have had their functions transferred, or are now presidentially appointed IGs. For example, the FDIC IG is still listed in 5 U.S.C. § 8G(a)(2) as a DFE IG; however, he was made a presidentially appointed IG. The Federal Housing Finance Board (FHFB) was merged into the Federal Housing Finance Agency (FHFA); the FHFA IG was added as an (continued...)

There are several additional types of IGs that draw their authorities in part from the IG Act. The five legislative branch IGs are located in the following entities: (1) Government Accountability Office; (2) Architect of the Capitol; (3) Government Printing Office; (4) Library of Congress; and (5) Capitol Police. There are three Special IGs: (1) SIGIR, (2) SIGAR, and (3) SIGTARP. Finally, there is an IG for the Central Intelligence Agency (CIA) and an IG for the Office of the Director of National Intelligence (ODNI).

Differences Between Establishment and DFE IGs

The IG Act of 1978 created IGs in a small number of executive branch agencies known as establishments.[11] The IG Act Amendments of 1988 expanded the number of presidentially appointed establishment IGs and also created DFE IGs.[12] The House Report on an earlier version of the 1988 amendments stated that although most of the DFEs at the time had “audit units and some also have investigative units ... the extension of the 1978 act is necessary, because many of these entities have failed to comply with longstanding requirements regarding independence” of such units.[13]

The most notable difference between establishment IGs and DFE IGs is the individual who appoints and who may remove or transfer the IG—for establishment IGs, this individual is the President and for DFE IGs, this person is the agency head. Another key difference between establishment and DFE IGs is that establishment IGs receive a separate appropriations account or a line item in the establishment’s appropriations.[14] In contrast, each DFE IG’s budget is part of the parent entity’s budget process.[15] A 1992 guidance memorandum from the Office of Management

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establishment IG on July 30, 2008, in P.L. 110-289, and does not presently have a presidentially appointed IG. The IG for the FHFB is serving as the Associate Director for Internal Audit, and he reports to the Office of the Director. The FHFA website states: “Until FHFA has an [OIG], employees or others who wish to report a violation of any law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public safety or complaints regarding the programs and operations of the agency may make a report or complaint to FHFA’s Office of Internal Audit.” FHFA, Office of Inspector General, http://www.fhfa.gov/Default.aspx?Page=122. The Panama Canal Commission ended with the transfer of the canal to Panama (22 U.S.C. § 3611). In P.L. 103-236, the Board for International Broadcasting was abolished and its functions were transferred to the U.S. Information Agency, of which the newly created Broadcasting Board of Governors (BBG) was a part. Currently, the Department of State IG is also the IG for the BBG. *See* 22 U.S.C. § 6203; Department of State, Office of Inspector General, http://oig.state.gov/. However, a January 2009 *Federal Register* notice listed the BBG IG as a separate DFE. 74 Fed. Reg. 3656 (Jan. 21, 2009).

[11] The initial establishments listed in P.L. 95-452 were the Departments of Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation, as well as the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans’ Administration. The IGs in these agencies followed the establishment of predecessors in 1976, in what is now the Department of Health and Human Services, and in 1977 in the Department of Energy.

[12] Initially, the DFEs in which the 1988 amendments created IGs were entities that were “(1) regulatory agencies of the Federal Government or (2) were established by the Federal Government and receive[d] over $100 million annually in Federal funds.” H.R. Rep. No. 100-771, Inspector General Act Amendments of 1988, at 2 (July 13, 1988).

[13] *Id.* at 13.

[14] 31 U.S.C. § 1105(a)(25).

[15] This appropriations information for designated federal entity OIG appropriations is derived from a May 27, 2008 memorandum by (name redacted), Specialist in National Government, CRS. For coverage of this and other matters, see also GAO, *Designated Federal Entities: Survey of Governance Practices and the Inspector General Role*, (continued...)

and Budget (OMB) stated that "because of the reporting relationship established by the IG Act, entity heads must make entity budget formulation and budget execution decisions affecting the IG."[16] OMB stated that it was "expected that entity heads will apply agency budget reductions, redistributions, sequestrations, or pay raise absorptions to the Office of the IG with due consideration to the effect that such application would have on the Office's ability to carry out its statutory responsibilities."[17] OMB's guidance added that the IG was to "have an ongoing dialogue with the OMB budget examiner" regarding the IG's "operational plans, activities, and accomplishments."[18] The Reform Act created additional safeguards for IG budgets. Section 8 of the Reform Act addressed the reporting of the IG's initial budget estimate to the head of the establishment or DFE. The budget estimate includes the budget request, a request for funds for training, and amounts necessary to support the newly created Council of the Inspectors General on Integrity and Efficiency (CIGIE). The establishment or DFE head must then include this information, as well as comments of the IG, when transmitting the request to the President. The President, in turn, must then include in his budget submission: the IG's budget estimate; the President's requested amounts for the IG, IG training, and support of the CIGIE; and comments of the affected IG, if the IG determines that the President's budget would "substantially inhibit" the IG from performing his or her duties.

Other less apparent differences also exist between establishment IGs and DFE IGs, such as how the two types of IGs may be selected and how they may select their own employees. The DFE IGs are exempt from the sections of the IG Act (§§ 6(a)(7) and (a)(8)) that mandate the selection, appointment, and employment of officers and employees in establishment IG offices according to civil service employment laws. The House Report on a version of the 1988 IG Act amendments stated that "the committee recognizes that not all Federal entities operate under the Civil Service personnel system," and therefore Congress did not extend such provisions regarding employee hiring to DFE IGs.[19] DFEs have been exempt from these requirements for establishment OIGs since DFEs were created. DFE IGs must be appointed by the head of the agency "in accordance with the applicable laws and regulations governing appointments within" the agency.[20] The DFE IGs, in turn, must hire employees for their offices "subject to the applicable laws and regulation that govern such selections, appointments, and employment, and the obtaining of such services, within the [DFE]."[21]

Another difference relates to the use of legal counsel by IGs. The different relationships between establishment and DFE IGs and their attorneys were delineated in the Reform Act. The act specified that an establishment IG must receive legal advice from an attorney who is hired under civil service laws and reports directly to the IG or to another IG. The Reform Act also provided three ways for a DFE to obtain counsel. First, a DFE IG could obtain counsel from an attorney appointed by the IG (according to the DFE-specific laws and regulations governing appointments within the DFE) who reports directly to the IG. Second, DFE IGs, on a reimbursable basis, could

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GAO009-270 (April 2009), http://www.gao.gov/new.items/d09270.pdf.

[16] Memorandum from Frank Hodsoll, Office of Management and Budget, *Inspectors General in Designated Federal Entities: Key Statutory Provisions and Implementing Guidance* (Nov. 13, 1992), at 6.

[17] *Id.* at 7.

[18] *Id.*

[19] H.R. Rep. No. 100-771, Inspector General Act Amendments of 1988, at 16 (July 13, 1988).

[20] 5 U.S.C. App. § 8G(c).

[21] 5 U.S.C. App. § 8G(g)(2).

obtain services from a counsel who is appointed by and who reports to another IG. Third, the DFE IG may obtain the legal services of an appropriate person on the CIGIE.[22]

The Reform Act continued preexisting differences between the two types of IGs addressed in the IG Act. For example, the Reform Act increased the pay of establishment IGs, the CIA IG, SIGIR, and SIGAR to the rate of level III of the Executive Schedule, plus 3%.[23] The Reform Act increased the pay of DFE IGs as well, but did not link them to the Executive Schedule. The Reform Act provided that DFE IGs should be classified for pay purposes at a level at or above a majority of the senior level executives of the DFE (such as a General Counsel or Chief Acquisition Officer), but that the pay could not be less than the average total compensation, including bonuses, of those senior level executives.[24] The Reform Act also provided that a DFE IG's pay could not increase by more than 25% of the DFE IG's average total pay for the previous three fiscal years.[25]

Prior to the Reform Act, additional disparities existed between establishment and DFE IGs. That act required DFE IGs, like their establishment IG counterparts, to be appointed based only on the individual's skills in auditing or other relevant areas.[26] In the conference report for the Inspector General Act Amendments of 1988, the conferees indicated that they "intend that the head of the designated Federal entity appoint the Inspector General without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[27] However, this sentiment was not added to the law until the Reform Act was enacted. Additionally, the Reform Act provided that the CIGIE must submit recommendations for nominees to establishment, DFE, CIA, and ODNI IG positions.[28]

The Reform Act also granted law enforcement authority to DFE IGs, which was previously only available to establishment IGs, including the authority to carry firearms, make arrests without warrants, and seek and execute arrest warrants.[29]

Additionally, the Reform Act addressed a protection that DFE IGs enjoyed that was not previously available for establishment IGs—the Reform Act added a provision regarding transfers of establishment IGs to the clause regarding how the establishment IGs may be removed by the President. The removal clause for DFE IGs previously mentioned transfers of DFE IGs, but did not provide the notification requirement added by the Reform Act. As mentioned previously, the Reform Act provided that the President and the agency head must notify Congress of the reasons for a removal or transfer of an IG in writing at least 30 days before removing or transferring the IG.[30] Previously, the DFE heads had to notify Congress in writing when removing an IG, while the President was not required to communicate the reasons for removal to Congress in writing.

[22] P.L. 110-409, § 6; 5 U.S.C. App. § 8G(g)(4).

[23] 5 U.S.C. § 5314.

[24] P.L. 110-409, § 4(b). As a result, some DFE IGs may make more than their establishment IG counterparts.

[25] Additionally, federal employees appointed to serve as IGs could not have their pay reduced as a result of being appointed to the IG position, nor could IGs currently serving have their pay reduced as a result of the law's enactment.

[26] P.L. 110-409, § 2.

[27] H.R. Rep. No. 100-1020, at 27 (Sept. 30, 1988) (Conf. Rept.).

[28] P.L. 110-409, § 7(c)(1)(F).

[29] P.L. 110-409, § 11.

[30] P.L. 110-409, § 3.

Legislation

This section will discuss proposed changes affecting offices of inspectors general (OIGs) or establishing new OIGs in select bills in the 111th Congress: H.R. 885/S. 1354, the Improved Financial Commodity Markets Oversight and Accountability Act; H.R. 3126, the Consumer Financial Protection Agency Act of 2009; and H.R. 3962, the Affordable Health Care for America Act.

H.R. 885/S. 1354: Improved Financial Commodity Markets Oversight and Accountability Act

On June 6, 2009, the House passed H.R. 885, which would elevate five DFE IGs in entities that address financial issues—the IGs for the Board of Governors of the Federal Reserve System; the Commodity Futures Trading Commission (CFTC); the National Credit Union Administration (NCUA); the Pension Benefit Guaranty Corporation (PBGC); and the Securities and Exchange Commission (SEC)—to the status of presidentially appointed, Senate-confirmed IGs. The changes would take effect 30 days after the law is enacted. The IGs that currently serve as the head of the OIG offices in those DFEs could continue serving as the IGs until the President makes an appointment under the IG Act procedures. Nothing in H.R. 885 would prohibit the President from appointing the individuals currently serving as the DFE IGs to the new presidentially appointed IG positions.

Initially, H.R. 885 provided that IGs acting in that capacity would remain subject to current DFE limitations, such as those on authorities and pay. However, as amended, H.R. 885 "ensures that the changes made by the legislation do not interfere with existing pay structures ... as they relate to the position of inspector general and other employees."[31]

Other amendments to H.R. 885, as passed by the House, included provisions relating to the continuation of personnel. As mentioned above, these five DFE IGs are exempt from the sections of the IG Act (§§ 6(a)(7) and (a)(8)) that mandate the selection, appointment, and employment of officers and employees in establishment IG offices according to civil service employment laws. H.R. 885 would preserve that distinction for these five IGs, though they would be elevated to presidentially appointed IGs.[32]

H.R. 885 would change the authorities of the five DFE IGs in the bill in a significant way with respect to other establishment and DFE IGs, as H.R. 885 would grant these IGs the ability to subpoena testimony as well as documents.[33] Under H.R. 885, the five DFE IGs would be able to subpoena testimony not just of agency employees, but also of contractors, grantees, and persons or entities regulated by the establishment.[34] Presently, § 6(a)(4) of the IG Act provides IGs with

[31] H.R. Rep. No. 111-114, at 3-4 (May 18, 2009).

[32] H.R. 885, § 3 (adding § 8M to the IG Act).

[33] In *National Aeronautics and Space Administration* (NASA) *v. FLRA*, the United States Supreme Court remarked on this limitation of the IG Act: it "grants Inspectors General the authority to subpoena documents and information, but not witnesses." 527 U.S. 229, 242 (1999); *see also* United States v. Iannone, 610 F.2d 943, 945 (D.C. Cir. 1979).

[34] H.R. 885, § 4. IGs would have the ability "to require, by subpoena, from any officer or employee of a contractor or grantee of the establishment, any officer or employee of a subcontractor or subgrantee of such a contractor or grantee, or any person or entity regulated by the establishment, any records and testimony necessary in the performance of (continued...)

the authority to subpoena "documentary evidence necessary in the performance of the functions assigned by this Act." Subpoena authority under the IG Act is delegable,[35] and subpoenas issued under the act are judicially enforceable.[36] The IG Act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under this authority.

Finally, H.R. 885 would create a new provision regarding the responses of establishment agency heads to reports by these five IGs. A similar provision was included with respect to reports issued by the SIGTARP in § 4 of P.L. 111-15, the Special Inspector General for the Troubled Asset Relief Program Act of 2009, which was passed by Congress earlier this year. Under H.R. 885, the heads of these five establishments must either "take action to address deficiencies identified by a report or investigation" of the establishment's IG or "certify to both Houses of Congress that no action is necessary or appropriate in connection with" such a deficiency.[37]

H.R. 3126: Consumer Financial Protection Agency Act of 2009

Sections 115(a)(3) and 181 of the discussion draft of H.R. 3126 appear to create a DFE IG for the proposed Consumer Financial Protection Agency (CFPA).[38] Section 115(a) of the discussion draft states that the Director of the CFPA shall appoint the CFPA IG, who shall have the authority and functions of a DFE IG .[39] Section 181 of the discussion draft would amend the IG Act to add the CFPA to the list of DFEs.[40]

H.R. 3962: Affordable Health Care for America Act

Section 1647 of H.R. 3962 would create a presidentially appointed, Senate-confirmed establishment IG for the Health Choices Administration (HCA).[41] In addition to the authorities

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functions assigned" to the IG. *Id.*

[35] *United States v. Custodian of Records*, 743 F. Supp. 783, 786 (W.D. Okla. 1990); *Doyle v. U.S. Postal Service*, 771 F. Supp. 138, 140 (E.D. Va. 1991).

[36] 5 U.S.C. App. § 6(a)(4)("... which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States District Court ..."); *Inspector General v. Banner Plumbing Supply Co., Inc.*, 34 F. Supp. 682, 686 (N.D. Ill. 1998); *University of Medicine and Dentistry v. Corrigan*, 347 F.3d 57, 63 (3d Cir. 2003).

[37] H.R. 885, § 5.

[38] This section examines the powers of the CFPA as set forth in Rep. Barney Frank's September 25th discussion draft of the Consumer Financial Protection Agency Act of 2009, http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/FinancialRegulatoryReform/Discussion_Drafts/Discussion_Draft_of_CFPA_Bill_092509.pdf [hereinafter Discussion Draft]. The House Committee on Financial Services approved the draft (which was ordered to be reported, as amended, as H.R. 3126) with several amendments on Oct. 22, 2009, but a version of the discussion draft with the amendments is not publicly available as of the date of this report. The House Committee on Energy and Commerce approved the bill, which was ordered to be reported, as amended, on Oct. 29, 2009.

[39] Section 115(a) of the discussion draft refers to the IG having the "authority and functions of an inspector general of a designated federal entity under the Inspector General Act of 1978 (*5 U.S.C. App. 3*)." (emphasis added) It appears that the reference to 5 U.S.C. App. 3, which concerns the appointment and removal of presidentially appointed establishment IGs, may be intended to serve as the reference for all of the IG Act (5 U.S.C. App.), not just § 3 of the IG Act, as set forth in 5 U.S.C. Appendix. However, if the CFPA IG is intended to be an establishment IG, or a DFE IG appointed by the CFPA Director but with the authority and functions of an IG under 5 U.S.C. App. 3, the language in §§ 115 and 181 of the discussion draft would likely need to be reworked.

[40] Section 181 of the discussion draft again refers to 5 U.S.C. App. 3, which is the establishment IG section.

[41] This section would add the HCA to the list of establishments in the IG Act, and would also add the Commissioner of (continued...)

provided to establishment IGs in the IG Act, H.R. 3962 would grant the HCA IG the authority to conduct, supervise, and coordinate audits, evaluations, and investigations of the programs and operations of the HCA, including matters relating to fraud, abuse, and misconduct in connection with the admission and continued participation of any health benefits plan participating in the Health Insurance Exchange.[42] The IG also would have the authority to conduct audits, evaluations, and investigations relating to any private Health Insurance Exchange-participating health benefits plan. In consultation with the HHS IG, the IG for the HCA would have the authority to conduct audits, evaluations, and investigations relating to the public health insurance option. The IG would also have access to all relevant records, including records relating to claims paid by the health benefits plans that participate in the Health Insurance Exchange.

The authorities that would be granted to the HCA and the IG would not limit the duties, authorities, and responsibilities of the HHS IG, as in existence as of the date of enactment of the act, to oversee HHS programs and operations. The HHS IG would retain primary jurisdiction over fraud and abuse in connection with payments made under the public health insurance option.

Potential Considerations for Converting Certain DFE IGs to Presidentially Appointed IGs

Elevating DFE IGs, such as the five identified in H.R. 885, to presidentially appointed, Senate-confirmed (PAS) positions would be within Congress's discretion, as provided for in the Constitution. Article II, section 2, clause 2 states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[43] Many PAS positions other than high-level policy positions have been created because Congress saw a need to establish such position as one requiring advice and consent. This section discusses several potential considerations, which could be construed as advantages or disadvantages of establishing these five DFE IGs as PAS positions.[44] There are several approaches that Congress could pursue—(1) taking no action; (2) converting some DFE IGs into PAS positions; (3) converting all DFE IGs into PAS positions; or (4) converting some or all DFE IGs into PAS positions but including a sunset provision.[45] If a sunset provision were added to a statute converting some or all of the DFE IGs, Congress could then evaluate the benefits and drawbacks of granting PAS status to some or all of these IGs. The PAS positions could automatically revert to agency appointments after a period of time unless Congress made such changes permanent. CRS takes no position as to which of these options would be most desirable.

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the HCA to the list of establishment heads in that act. H.R. 3962, § 1647(b)(1).

[42] H.R. 3962, § 1647(b)(2).

[43] It should be noted that the President could be vested with authority to appoint IGs alone. For example, SIGAR is a presidentially appointed, but not Senate-confirmed, IG. 5 U.S.C. App. § 8G note.

[44] This section summarizes some concerns outlined in CRS Report RL32212, *The Appropriate Number of Advice and Consent Positions: An Analysis of the Issue and Proposals for Change*, by (name redacted) (Mar. 14, 2005; out of print but available from author).

[45] As a separate approach, legislation could also consolidate an IG office in a DFE under the office of an IG in an establishment, as Congress accomplished with the oversight of the Broadcasting Board of Governors by the Department of State IG.

A conversion of some or all of these positions to PAS positions could have both positive and negative effects. Some of the advantages may be that the PAS process ensures that potential appointees are subject to more extensive ethical and political scrutiny, and IGs appointed under the PAS process may have greater credibility than their agency head appointed counterparts. Congress, specifically the Senate, may indirectly exert greater influence over the selection process and prevent unqualified individuals from being appointed. The prestige of a presidential appointment may also attract additional candidates. Some of the disadvantages of the PAS process may be that the politicization of the process could deter well-qualified candidates (although politicization may be less likely with IGs, due to their statutory qualifications regarding appointment without regard to political affiliation). Potential nominees may be required to submit a large quantity of paperwork as the President, and later the Senate, considers the individual's merits. As a result, the establishment of additional PAS positions may increase the workload of Senate committees and consume time and resources that could be used for other pending issues.

If an appointee is confirmed by the Senate, that IG may be seen as more credible and accountable to Congress than an appointee who does not require Senate confirmation. During the confirmation hearing, the Senate may obtain commitments from the IG appointee to respond to future requests for testimony. Such specific commitments with regard to future testimony may not be necessary, as the IG Act provides that the IGs have a duty to keep Congress "fully and currently informed."[46] However, such commitments may ease the process for obtaining IG testimony in the future. The Senate may also seek additional commitments during the confirmation process and explain its vision for the position or for the agency. At the same time, the PAS process may increase congressional involvement in the organization and activities of the DFE. Confirmation hearings for the IG could be used as a vehicle to conduct oversight of the DFE and its programs and operations. Additionally, the IG appointee may have developed relationships with Senators and congressional staff throughout the appointment process. However, the practical effect of these considerations may be limited as the IG Act indicates that DFE and establishment IGs are accountable to Congress, due, in part, to their reporting requirements.

Alternatively, it could be argued that maintaining the status quo for these IGs provides the President with greater flexibility in terms of managing staff, in that a typical conversion of a non-PAS position into a PAS position might make such IGs more amenable to indirect congressional control. Such amenability could undermine presidential control as compared to the status quo. The President could stand to lose, as IGs appointed by the agency heads alone may be more responsive and accountable to the President and more likely to implement his priorities, if any, for the IG office. Allegiance from DFE IGs under the current system arguably may assist the President's ability to address problems quickly. However, unlike other positions being considered for conversion to the level of a presidential appointment, IGs are perhaps unique because they are already accountable to Congress in terms of their statutory responsibilities, and they also have specified qualifications required for appointment. As a result, the potential loss of presidential power may not be as great with the conversion to a PAS position as it would otherwise seem to be due to a potential increase in indirect congressional control with the change to a PAS appointment, because Congress already retains and exerts control with regard to DFE IGs.

Because of the nature of the agencies being considered in H.R. 885, the President would only appear to retain more control over the appointment of the five DFE IGs under the status quo if he also gained more control over the agency boards. The Federal Reserve, CFTC, NCUA, and the

[46] 5 U.S.C. App. §§ 2, 4(a)(5).

SEC are independent agencies.[47] These independent agencies are insulated from complete Executive Branch control as they are headed by multi-member boards. For example, the boards of the CFTC, SEC, and NCUA are comprised of members of both political parties, but may have no more than a simple majority from one political party. In addition, the board membership at these agencies is determined according to staggered terms, so that not all of the members may be replaced at once. The Federal Reserve Board of Governors and the SEC Commissioners have for cause removal protection.[48] Therefore, arguably, the President may have more control over the five IGs if they are converted to PAS positions and the President is able to appoint those IGs himself. This would appear to be true even though the nominee would be approved through the advice and consent process.

Furthermore, DFE heads, who are politically aligned with the President, would likely prefer to maintain their influence on the selection process of the DFE's IG. Such appointment power may enable the DFE head to exercise greater control over the agency, posing questions of intrusion on the IG's independence. A DFE head's appointment power may help curry favor with the IG, as the DFE head is responsible for hiring and firing the IG. If the DFE IGs were converted to PAS positions, the agency head may still have some level of influence as the President may consult with the agency head when making an appointment to the IG position or when removing an IG.

Presidential appointees may also encounter procedural or political complications during the Senate confirmation process, such as a hold placed on a nomination. The confirmation process arguably provides the Senate with greater leverage during its negotiations with the Executive Branch over matters that may or may not be related to the appointment. Holds may be placed on nominations for various reasons. Whether as a result of a hold or other factors, the appointment process may be lengthy, thus potentially leading to longer vacancies.

The Government Accountability Office (GAO) has issued several reports dealing with IG structural and organizational changes. The reports considered the conversion of DFE IGs from agency head appointments and removals to presidential appointments and removals, which would affect the status and control of the current DFE IG offices. GAO concluded that such an arrangement would strengthen the independence, efficiency, and effectiveness of the DFE IG offices. In its 2002 report, GAO found no consensus among DFE and establishment IGs regarding the perceived impact of conversion.[49] The report noted that the presidentially appointed IGs "generally indicated that DFE IG independence, quality, and use of resources could be strengthened by conversion," while the DFE IGs "indicated that there would be either no impact or that these elements could be weakened."[50] GAO called for dialogue among Congress, the IG community, and the affected agencies regarding specific conversions of DFE IGs.[51] In 2003, the Comptroller General similarly testified regarding GAO's determination that "if properly implemented, conversion ... and consolidation of IG offices could increase the overall independence, economy, efficiency, and effectiveness of IGs."[52] GAO testimony on March 25,

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[47] The PBGC is a federal corporation.

[48] 12 U.S.C. § 242; *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988).

[49] GAO, *Inspectors General: Office Consolidation and Related Issues*, GAO-02-575 (2002).

[50] *Id.* at 3.

[51] *Id.* at 4.

[52] Statement of David M. Walker, Comptroller General, GAO, *Inspectors General: Enhancing Federal Accountability*, GAO-04-117T (2003), at 1.

2009, similarly indicated that a change in the appointment of the IGs would result in a different level of independence.[53]

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[53] H.Rept. 111-114, at 4 (May 18, 2009).

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