Description of document:	Report on Matters Impairing the Effectiveness and Independence of the of the AMTRAK Inspector General, and AMTRAK Management response, 2009
Requested date:	19-August-2012
Released date:	20-December-2012
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Source of document:	Amtrak FOIA Office 60 Massachusetts Avenue, NE Washington, D.C. 20002 Fax: 202-906-3285 Email: foiarequests@amtrak.com

NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE, Washington, DC 20002

VIA E-MAIL

December 20, 2012

Re: Freedom of Information Act Request
Tracking Number: 12-FOI-00181

We are further responding to your August 19, 2012 request for information made under the Freedom of Information Act (FOIA), which was received via e-mail by Amtrak's FOIA Office on August 20, 2012.

Your request seeks the records described below:

1. Report of Matters Impairing the Effectiveness and Independence of the Office of the Inspector General of the National Railroad Passenger Corporation by Robert J. Meyer, Willkie Farr & Gallagher LLP, dated June 18, 2009, 64 pages.

2. The 32 page AMTRAK Management Response to the abovementioned report, prepared in July 2009.

In response to item #1, please find attached a copy of the above-referenced report. Please note this report has also been posted on the internet.

In response to item #2, we are releasing in part, Amtrak's Management Response (32 pages). The names and personal information of Amtrak Management and Office of Inspector General employees as well as private individuals have been redacted from the enclosed records pursuant to exemption 6 of the FOIA on the basis that disclosure could constitute a clearly unwarranted invasion of the personal privacy of these individuals. Records considered to be commercially sensitive have been redacted based on the commercial privilege of exemption 5. Information determined to be Attorney-Client Privileged and/or Attorney-Work Product has also been redacted based on exemption 5.

Pursuant to Amtrak's FOIA regulations (49 CFR 701.10), if you wish to appeal Amtrak's decision to withhold the above-mentioned information, you may file an appeal with Eleanor D. Acheson, Vice President, General Counsel and Corporate Secretary, within thirty days (30) of the date of this letter, specifying the relevant facts and the basis for your appeal. Your appeal may be sent to Ms. Acheson at the above address. The President and CEO of Amtrak have delegated authority to the General Counsel and Corporate Secretary for the rules and compliance to the FOIA.

If you have any questions regarding the processing of your request, please feel free to contact me at (202) 906-3741 or via e-mail at Hawkins@amtrak.com.

Sincerely,

Sharron Hawkins
FOIA Officer

Attachment

IM-134653

WILLKIE FARR & GALLAGHER LLP

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June 18, 2009

VIA HAND DELIVERY AND E-MAIL

The Honorable Fred E. Weiderhold, Jr.
Inspector General
National Railroad Passenger Corporation
10 G Street, N.E., Suite 3E-400
Washington, DC 20002

Re: Report on Matters Impairing the Effectiveness and Independence of the Office of Inspector General of the National Railroad Passenger Corporation (Amtrak)

Dear Inspector General Weiderhold:

On February 11, 2009, you retained Willkie Farr & Gallagher LLP ("Willkie Farr") to, among other things, review and analyze several Amtrak policies and practices relating to oversight of OIG audits, investigations, and operations. Specifically, you requested Willkie Farr to examine (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations, (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters, and (3) Amtrak's internal procedures governing OIG funding under the American Recovery and Reinvestment Act of 2009 ("ARRA"), for potential impairments to the OIG's statutory independence under the Inspector General Act. Transmitted herewith is my report on these matters.

I am available to discuss these matters further at your convenience.

Sincerely yours,

Robert J. Meyer

cc: Colin C. Carriere, Esq., Deputy Inspector General Investigations and Legal Counsel
D. Hamilton Peterson Esq., Deputy Counsel/Director Special Investigations
Joseph E. diGenova, Esq., diGenova & Toensing, LLP

Privileged & Confidential
Attorney-Client Communication
Attorney Work Product

Report on Matters Impairing the Effectiveness and Independence of the Office of Inspector General of the National Railroad Passenger Corporation (Amtrak)

Robert J. Meyer
Willkie Farr & Gallagher LLP

June 18, 2009

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I. INTRODUCTION

On February 11, 2009, the Office of Inspector General ("OIG") of the National Railroad Passenger Corporation ("Amtrak" and, together, "Amtrak OIG") retained Willkie Farr & Gallagher LLP ("Willkie Farr") to review and analyze several Amtrak policies and practices relating to oversight of OIG audits, investigations, and operations. Specifically, the Amtrak OIG requested Willkie Farr to examine (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations, (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters, and (3) Amtrak's internal procedures governing OIG funding under the American Recovery and Reinvestment Act of 2009 ("ARRA"), for potential impairments to the OIG's statutory independence under the Inspector General Act.[1] Prior to engaging Willkie Farr, the Inspector General had suggested that the policies and practices in question were "inconsonant with the Inspector General [Act] and the standards of the IG community" and resulted in "serious and unreasonable interference with OIG activities." The OIG thereafter requested that Willkie Farr examine these issues and make recommendations for how to address them within Amtrak or otherwise.

As described in more detail below, we have concluded that the Amtrak OIG's independence and effectiveness are being substantially impaired by a number of policies and practices at the corporation relating to Law Department oversight of OIG investigations, OIG personnel matters, and OIG funding. For example:

- The Law Department at Amtrak pre-screens all Amtrak documents before production to the OIG, in some cases redacting information from documents to be produced to the OIG and making determinations regarding what is responsive to the OIG's requests.

- Law Department personnel or outside counsel retained by the Law Department attend OIG interviews of Amtrak personnel and in some cases third parties, including OIG interviews of employees of Amtrak vendors and contractors.

- Amtrak policy prohibits the OIG from disclosing "Amtrak information" to Congress and any other "third party," unless the information is first reviewed by the Law Department to enable the Law Department to take appropriate action "to restrict or limit disclosure of such information."

- The OIG's personnel decisions are subject to Law Department oversight, with respect to which the General Counsel has asserted that she is the ultimate

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[1] The Inspector General Act of 1978, 5 U.S.C. app. 3.

authority within Amtrak regarding interpretation of the Inspector General Act and the OIG's personnel authority.

- And, OIG funding under the ARRA is subject to review by the Law Department and approval by several other senior members of Amtrak management, including the Chief Financial Officer and Chief Operating Officer.

These policies and practices constitute significant impairments to the Amtrak OIG's effectiveness and its actual and perceived independence under the standards of the Inspector General Act, 5 U.S.C. app. 3 ("IG Act"), as well as published guidance of the Office of Management and Budget ("OMB") and the Government Accountability Office ("GAO"). In enacting the IG Act, Congress intentionally gave Inspectors General ("IGs") an extraordinary degree of authority, discretion, and independence in carrying out their duties and responsibilities. This included, among others, the power to initiate and carry out audits, investigations, and inspections "as necessary" within each IG's judgment; direct access to documents and information within their agencies, departments, and entities; a direct reporting relationship with Congress; and independent authority over OIG personnel and resources. Published guidance by OMB and the GAO reflects these same standards of independence.

In the report that follows we summarize these standards and how Amtrak's current policies and practices are impairing the OIG's independence and effectiveness. We also make several recommendations for addressing these matters. In sum, we advise that the OIG address these issues and this report's recommendations with Amtrak's Chairman. Further, in light of our conclusion that the OIG's ability to carry out its statutory functions has been compromised, and in keeping with the OIG's obligation to keep the Congress "fully and currently informed," we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

We are available at your convenience to discuss these matters further.

II. EXECUTIVE SUMMARY

The Amtrak OIG is one of many OIGs created by Act of Congress to promote integrity and efficiency at departments and agencies of the federal government, as well as at certain other designated federal entities ("DFEs") such as Amtrak. Since 1978, Congress has consistently looked to OIGs for unbiased assessments of the management of federal funds and programs. As one congressional advocate of OIGs recently stated:

> Over the years, I have seen a number of Inspectors General come and go. It is a tough job to be an Inspector General. You can not go along to get along. You must buck the system, dig deep into the books of the agency, find where the secrets are hidden, and then report the truth to Congress, the President, and the American people. Unfortunately, Inspectors General must do all this with the agencies that often fight their every move. These entrenched bureaucracies have an interest in not seeing Inspectors General succeed—they do not want egg on their face. That is why we in

> Congress must make sure they have all the tools they need to get the job done and ensure that there is accountability for the billions in taxpayer dollars that are spent annually on the operation of the Executive Branch.[2]

The critical function played by the federal government's OIGs is illustrated by statistics for fiscal year 2007 (the most recent year for which data is available) showing that the combined efforts of the U.S. government's IGs that year resulted in $11.4 billion in potential savings from audit recommendations, $5.1 billion in investigative recoveries and receivables, 8,900 successful prosecutions, and 4,300 suspensions or debarments.

Amtrak's OIG was established in 1989 and is tasked by federal statute with preventing and detecting fraud and abuse in Amtrak programs and operations, conducting and supervising audits and investigations, and recommending policies to promote economy, efficiency, and effectiveness within Amtrak's operations. Although Amtrak is not a federal agency, it is a recipient of significant federal funding, and Congress accordingly created the Amtrak OIG to act as a watchdog over Amtrak's integrity and effectiveness just as the other statutory IGs watch over the U.S. government's departments and agencies. In creating Amtrak's OIG, Congress gave it the same mission, functions, and independence as the U.S. government's other statutory OIGs.

The successful accomplishment of an OIG's mission requires objectivity and independence. An OIG's audits, investigations, and policy recommendations must be impartial and must be seen as impartial by the OIG's two critical audiences—its own agency or DFE head, and Congress. Both the entity and Congress must be able to rely on an OIG's unbiased work as a basis for improving the stewardship of taxpayers' money and for making important legislative and other policy decisions. As the GAO has observed, "the concepts of objectivity and independence are very closely related."[3] Indeed, it is axiomatic that "[p]roblems with independence or conflicts of interest may impair objectivity."[4] Thus, to objectively perform its mission, an OIG must have direct access to its entity's information and be free of supervision from and entanglements with the management and operations of the entity that it oversees. Having an OIG that is dependent upon, reports to, or is otherwise under the supervision of, the officials whose programs it is auditing and investigating would be, as Congress noted in 1978, "an exercise in futility."[5]

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[2] 155 Cong. Rec. S5132 (daily ed. May 8, 2009) (statement of Sen. Grassley).

[3] GAO Report, *Gov't Auditing Standards*, GAO-07-731G, at 27 n.19 (July 2007).

[4] *Id.*

[5] S. Rep. No. 95-1071, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2681.

For these reasons, Congress has repeatedly recognized that the successful accomplishment of an OIG's mission requires independence within an agency or DFE. On its most basic level, an OIG's mission entails investigating and reporting on waste, fraud, and abuse in federal programs. On a broader public policy level, however, an OIG plays "a critical role in maintaining checks and balances in the federal government."[6] On either level, an OIG's independence is critical to the successful performance of its mission and the perception of its objectivity.

In the case of a DFE, such as Amtrak, this means, among other things, that the head of the entity (in Amtrak's case, the Chairman of the Board of Directors) may only exercise general supervision over the Inspector General's Office. The OIG may not report to or otherwise be supervised by any other entity officer or employee. Independence also requires that the Office of Inspector General have unfettered access to entity documents and information, without the involvement, oversight, or supervision of other officers or personnel within the entity. Finally, independence requires that the OIG have functional budgetary and personnel independence. Absent independence in expending funds and in hiring and promoting personnel, an OIG would lack meaningful independence from the management it was expected to oversee. As discussed in more detail in this report, each of these attributes of independence is firmly grounded in the Inspector General Act, as amended, and guidance from OMB and the GAO.

Against this background, the Amtrak OIG has retained Willkie Farr to assess and make recommendations regarding several issues concerning the independence of the Amtrak OIG—issues related to internal reporting, access to documents, and budgetary and personnel independence. Although these issues have been discussed within Amtrak, up to and including discussions with the entity head and the Board of Directors, the issues persist in ways that the IG believes significantly impair his independence and are inconsistent with the IG Act.

Specifically, the Amtrak OIG has asked Willkie Farr to examine the following Amtrak policies and practices for potential impairments to the OIG's statutory independence: (1) Amtrak's policies and practices regarding the role of the Amtrak Law Department in OIG audits and investigations; (2) Amtrak's policies regarding Law and Human Resources oversight of OIG personnel matters; and (3) Amtrak's internal procedures governing ARRA funding. The Amtrak OIG has further requested, insofar as we conclude that these policies or practices are inconsistent with the standards of the IG Act or OMB or GAO guidance, that Willkie Farr make recommendations for corrective action by the Chairman of the Board of Directors to ensure any such policies and practices are consonant with the requirements of objectivity and independence under the Act.[7]

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[6] H.R. Rep. No. 110-354, at 9 (2007).

[7] In connection with this report we principally reviewed the following documents supplied by the OIG (in no particular order): (1) the October 10, 2007 Agreed Protocol of the Amtrak Office of Inspector General and Law Department Regarding Disclosure of Privileged, Classified, Proprietary or Other Confidential Information (the "Protocol") (and drafts of the Protocol); (2) correspondence between the OIG and the Law Department (and the Law

The policies and practices at issue first arose in approximately 2007, after an alleged leak of attorney-client privileged information in connection with an OIG investigation of the Law Department's use and supervision of outside counsel. Since then, the Law Department has sought to exercise increasingly significant oversight of OIG investigations, document requests, and interviews of Amtrak personnel. For example, in connection with various OIG investigations:

- In February 2007, the OIG issued a subpoena to one of Amtrak's principal outside law firms. The law firm refused to produce documents without direction from the Law Department, and the Law Department failed to instruct the law firm to comply immediately with the OIG's requests. Rather, the Law Department required the OIG to enter into a written protocol limiting the OIG's use of certain

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(continued)

Department's outside counsel) related to the Protocol; (3) correspondence between the OIG and the Board of Directors related to the Protocol; (4) the November 5, 2007 Administrative Directive ("2007 EXEC-1") (and drafts of the EXEC-1); (5) correspondence between the OIG (and its outside counsel) and the Board of Directors regarding the 2007 EXEC-1 (and draft correspondence); (6) the July 28, 2005 Amtrak policy regarding indemnification of Amtrak employees; (7) draft memoranda from the Board of Directors to all Amtrak departments and employees regarding cooperation with the OIG; (8) Review of Amtrak's Management of Outside Legal Services by the OIG and Department of Transportation Inspector General (and drafts of the review); (9) May 31, 2006 Report by John W. Toothman ("Toothman") entitled "Amtrak Law Department Performance"; (10) the Toothman retention agreement and other correspondence between the OIG and Toothman; (11) correspondence among the Law Department, OIG, and Board of Directors regarding the OIG investigation into Amtrak's use of outside counsel; (12) correspondence between the OIG and members of Congress regarding the OIG investigation into Amtrak's use of outside counsel (and draft correspondence); (13) correspondence between the OIG and attorneys for Amtrak employees from whom the OIG sought documents and interviews; (14) OIG subpoenas to Amtrak vendors; (15) correspondence between the OIG and attorneys for Amtrak vendors subpoenaed by the OIG; (16) correspondence between the Law Department and attorneys for Amtrak vendors subpoenaed by the OIG; (17) correspondence between the OIG and the Law Department regarding various OIG document requests and interview requests to Law Department employees, other Amtrak employees, and Amtrak vendors; and (18) correspondence and memoranda among OIG personnel regarding pending investigations and outstanding requests for documents and information. Many of the foregoing documents are subject to applicable privileges and nothing contained herein is intended to waive any privilege or other confidentiality.

In addition to the foregoing documents provided by the OIG, we also considered, as cited throughout the report, (1) the Inspector General Act, its amendments, and the legislative history of the statute and its amendments; (2) published reports regarding inspectors general and their conduct of audits and investigations from the United States Government Accountability Office, the Project on Government Oversight, the President's Council on Integrity and Efficiency, and the Executive Council on Integrity and Efficiency; (3) law review articles and media reports on the purpose and legislative history of the Inspector General Act; and (4) media reports regarding Amtrak's use of outside counsel.

We have also reviewed an analysis of some of these issues prepared by Joseph E. diGenova of diGenova & Toensing LLP. *See* Oct. 17, 2008 Letter from Joseph E. diGenova to Donna McLean. In this letter, diGenova concluded that certain Amtrak policies hindered the function and operation of OIG and were inconsistent with the IG Act. We have not sought or received documents or information from the Board of Directors, Law Department, or any other Amtrak personnel, and we have not conducted any interviews of Amtrak directors, officers, or other personnel in connection with this report.

documents without prior Law Department review and approval. In May 2007, the law firm produced its first set of documents responsive to the subpoena. The law firm's production continued in installments through February 2008, and remains incomplete insofar as it has not yet provided a certificate of compliance.

- As part of the same investigation, in 2007 and 2008, the OIG sought documents and interviews with Law Department employees. The Law Department required that the General Counsel be notified of, and approve, all document requests by the OIG to Law Department employees. The Law Department also required that separate counsel be appointed, at Amtrak's expense, to represent all Law Department employees to be interviewed.

- In connection with an OIG investigation of Amtrak's retention of a financial adviser, in December 2008 the OIG issued a subpoena to the adviser and additionally sought documents and information from two Amtrak employees. The adviser and the employees declined to provide complete document productions to the OIG without first sending documents to the Law Department for its review. In the case of the adviser, the OIG sent a letter on February 13, 2009 to the adviser's attorneys with instructions for complying with the subpoena. The Law Department issued a letter the same day purporting to repudiate the OIG's instructions and giving different ones.

- In response to a whistleblower complaint, in December 2007 the OIG initiated an investigation of an Amtrak consultant suspected of inflating its fees. The consultant resisted making its time records database available for inspection on the grounds that doing so would purportedly breach confidences of its other clients. During negotiations between the OIG and the consultant's attorneys, the Law Department on March 31, 2008 sent a letter to the consultant's attorneys requesting that the consultant provide responsive documents first to the Law Department for review prior to production to the OIG. The consultant subsequently used the March 31, 2008 letter from the Law Department in support of its contention that it could not, for client confidentiality reasons, provide the time records database to the OIG. The consultant also noted that it would not produce documents to the OIG without Law Department permission and it requested that Amtrak's General Counsel attend any questioning of its employees.

- In January 2008, the OIG began an investigation of an Amtrak supplier suspected of delivering defective products. The OIG sought certain inspection reports and related documents from Amtrak's Engineering Department to determine who should bear the cost of replacing the defective product. The Engineering Department referred the OIG to the Law Department for the documents. On February 28, 2008, Amtrak disclosed publicly that the vendor had installed defective products and that it would cost tens of millions of dollars to remediate the issue. The OIG then made several follow-up requests to the Law Department for the requested documents. In June 2008, the Law Department made a partial production of documents responsive to the OIG's request of the Engineering

Department. Some of the requested documents were missing or redacted, while others were designated with a label that indicated they should not be shared with third parties.

Each of the foregoing examples is discussed in more detail in this report, as well as our conclusion that such Law Department oversight of OIG activities is inconsistent with the letter and spirit of the Inspector General Act and the Amtrak OIG's statutory independence. In that regard, it is important to note that even if motivated by an interest in protecting legal privilege or other interests of Amtrak, the Law Department may not interfere with the OIG's investigations so as to impair the OIG's independence or undermine the credibility of its investigations. Such interference would be inconsistent with the IG Act and the published guidance of OMB and GAO.

We have also examined other issues that potentially impair the OIG's independence at Amtrak—issues involving the Inspector General's independent personnel authority and budget oversight—and have concluded that, in those areas as well, Amtrak's policies and practices are inconsistent with the letter and spirit of the Inspector General Act and published OMB and GAO guidance:

- Regarding the OIG's independent personnel authority, we reviewed correspondence between Amtrak's General Counsel and the Deputy IG for Management and Policy in which the General Counsel objected to, among other things, the IG's decision to increase the salaries of certain OIG staff. In attempting to reject the salary increases, the General Counsel took the position that she is the ultimate legal authority within Amtrak regarding interpretations of the Inspector General Act and the OIG's personnel authority.

- We also reviewed an issue of budget oversight involving the OIG's access to ARRA funds that Congress appropriated expressly for the OIG. Amtrak received an appropriation of $1.3 billion, $5 million of which was expressly allocated to the Amtrak OIG. In March 2009, Amtrak applied for ARRA funding without input from the OIG and has since directed that OIG's use of ARRA funding would require review by the Law Department and approval by several senior members of Amtrak management, including the Chief Financial Officer and Chief Operating Officer.

In the report that follows, we examine each of the foregoing issues in more detail. In Section III, we provide a detailed discussion of the IG Act and its application to Amtrak. This section begins with a brief history of the origins of the IG function, describing how Congress determined that internal audits, standing alone, could not sufficiently protect against waste, fraud, and abuse within the federal government. The section discusses the adoption of the IG Act in 1978 and the circumstances surrounding its subsequent amendments, including, in particular, the 1988 amendments that established an IG at Amtrak, among other DFEs. In this portion of the report, we discuss the statutory duties and responsibilities of inspectors general, along with the IG Act provisions and legislative history relating to the establishment and protection of OIG independence.

In Section IV, the report describes in more detail the recent developments at Amtrak, highlighted above, implicating the perceived and actual independence of the Amtrak OIG. This section discusses the background of current Amtrak policies and practices governing the relationship between the Amtrak OIG and the Law Department in OIG investigations and audits. These include a written 2007 Protocol between the OIG and the Law Department and changes approved in 2007 to Amtrak's EXEC-1 (Amtrak's internal procedures relating to the OIG). This section includes a discussion of how the Protocol and EXEC-1 have been applied in practice at Amtrak in the context of several investigations and audits currently underway. This section also includes a discussion of other issues potentially affecting the OIG's statutory independence relating to its budgetary and personnel issues.

In Section V, the report analyzes these Amtrak procedures under the Inspector General Act and other authorities. We conclude that many of the policies and practices discussed in this report have (1) impaired the OIG's independence, (2) unlawfully restricted the OIG's access to information and documents, (3) improperly subjected the OIG to the supervision of the Law Department contrary to the statutory requirement that the OIG be subject only to the general supervision of Amtrak's Chairman, and (4) undermined the objectivity of the OIG's work product because of the appearance and reality of improper external political pressures on the OIG.

Finally, in Section VI, the report concludes with recommendations to address the concerns noted above and to improve the integrity and effectiveness of OIG activities at Amtrak. These recommendations include:

- Empowering the OIG to gather documents and information in support of its audits and investigations from Amtrak employees or vendors without any involvement of, or notification to, the Law Department or other departments, specifically amending EXEC-1 to that effect;

- Precluding the Law Department from attending OIG interviews with Amtrak employees or employees of vendors, unless at the request of the OIG;

- Entrusting the OIG's own attorneys—rather than the Law Department—to advise on the collection and use of Amtrak's potentially privileged and proprietary information during OIG investigations; and

- Permitting the OIG to utilize ARRA funds allocated by Congress, and to set compensation for its staff, without involvement of other Amtrak departments.

We further recommend that the OIG address these issues and this report's recommendations with Amtrak's Chairman. Additionally, in light of our conclusion that the OIG's ability to carry out its statutory functions has been compromised, and in keeping with the OIG's obligation to keep the Congress "fully and currently informed," we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

III. STANDARDS OF INDEPENDENCE UNDER THE INSPECTOR GENERAL ACT

A. Introduction

In the early 20th century, Congress created a basic legislative framework for financial controls and audits of government agencies by which it sought to ensure that public funds were legally expended and that the government's operations were conducted in an economical and efficient manner on behalf of the taxpaying public. It enacted the Budget and Accounting Act of 1921 and established what is now the Government Accountability Office ("GAO") (formerly the General Accounting Office) as an entity that could "independently settle the accounts of the agencies of government."[8]

By the end of World War II, Congress found that the enormous growth of the federal government had significantly outpaced GAO's capacity to audit the wide range of federal agencies and programs then in existence. Consequently, in the Accounting and Auditing Act of 1950, Congress directed each covered federal agency to establish and maintain its own accounting and related systems so that it could keep "effective control over and accountability for all funds, property, and other assets for which the agency is responsible, including appropriate internal audit."[9]

By the late 1970s, although the federal government had expanded greatly, the GAO found that some agencies had not yet complied with the 1950 Act, while others had minimally complied or maintained audit and investigative functions that were poorly staffed or so decentralized as to be ineffective.[10] Following several multi-million dollar scandals involving the fraudulent misuse of federal program funds, OIGs were established administratively in at least one cabinet department and by statute at several others. However, most of the agencies responsible for administering the bulk of federal spending did not yet have strong, organized, or centralized audit or investigative functions.

Convinced that the existing patchwork system offered little assurance that serious issues of waste and fraud would ever come to light and that piecemeal efforts by federal agencies would not work, committees in both houses of Congress held extensive hearings and conducted a number of their own investigations. These revealed that auditors and investigators throughout the federal government were "severely handicapped" by several serious conditions, including: [11]

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[8] S. Rep. No. 100-150, at 2 (1987).

[9] *Id.* (citing Pub. L. No. 784, 81st Cong.).

[10] *Id.* at 3.

[11] H.R. Rep. No. 100-1027, *The Inspector General Act of 1978: A Ten-Year Review*, at 4 (1988).

- Lack of independence—agency audit and investigative staff were supervised by the same officials responsible for the programs or funds being audited or investigated, and the staff could not initiate audits or investigations without the approval of their supervisors. In some cases, investigators had been "kept from looking into suspected irregularities, or even ordered to discontinue an ongoing investigation."[12]

- Lack of effective organization and leadership—congressional hearings confirmed GAO's findings that some agencies had several audit or investigative units "organized in fragmented fashion with no strong central leadership."[13]

- Lack of coordination between audit and investigative staffs within the same agency.

- Lack of resources, resulting in infrequent audits or none at all.

Based on these findings, Congress concluded, "[t]here is now unanimous agreement that the Federal Government has failed to make sufficient and effective efforts to prevent and detect fraud, abuse, waste, and mismanagement in our programs and expenditures."[14]

Accordingly, Congress enacted the Inspector General Act of 1978, with considerable bipartisan support in both the House and the Senate. The Act created OIGs in 12 executive departments and agencies, each to be led by an IG appointed by the President and confirmed by the Senate. The existing auditing and investigative resources of these agencies were consolidated under the leadership of the IG, whom Congress determined should act as "an individual with high visibility" in the agency as well as "the single focal point . . . for the effort to deal with waste, fraud, and abuse in agency operations and programs."[15] As one Representative noted during debate on this legislation in the House of Representatives:

> The Inspector General, responsible for investigations of fraud and abuse, is a symbol to the Congress and the public, that any department or agency desires efficiency and honesty within its ranks, and is symbolic of an agency's willingness to tighten up on fraud in any of its programs.[16]

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[12] 124 Cong. Rec. H10922 (daily ed. Sept. 27, 1978) (statement of Rep. Fountain).

[13] H.R. Rep. No. 100-1027, *supra* note 11, at 4.

[14] 124 Cong. Rec. S15870 (daily ed. Sept. 22, 1978) (statement of Sen. Eagleton).

[15] *Id.*

[16] 124 Cong. Rec. H2948 (daily ed. Apr. 18, 1978) (statement of Rep. Gilman).

Congress intended these IGs to conduct audits and investigations "without hindrance" in their agencies and gave them "broad authority to obtain information in aid of such audits and investigations, including subpoena power."[17] An IG's independence from both internal and external political pressures was regarded as "fundamental" and is protected by several key provisions of the Act, as discussed in more detail in subsection B, below.

Since 1978, the Act has been amended several times to create OIGs at additional federal agencies and DFEs (including Amtrak) and, as of 2008, there were 58 statutory OIGs in the federal government.[18] The basic OIG model embodied in the 1978 Act is regarded as highly successful and Congress has enacted only a few substantive modifications to it.[19] Such revisions have primarily been designed to further strengthen the IGs' independence, after Congress heard evidence of "[i]nterference by agency management, the absence of input or control by [IGs] into their office budgets, and campaigns by management to remove [IGs] who are aggressive in their investigations . . . ."[20]

It is clear that, after more than 30 years' experience with the IG Act, Congress still places a high value on the work of the IGs, continues to safeguard their independence, and, on a bipartisan basis, regards the IGs as "vital partners" in the effort to give Americans "better value for their tax dollar."[21]

B. The Text and Legislative History of the IG Act

The legislative history of the IG Act shows that, of all of the key attributes of an Inspector General, Congress placed the highest priority on independence. Congress also clearly understood that the degree of independence it had in mind for the IGs was exceptional. Testifying before the Senate Governmental Affairs Committee in 1978, Representative Fountain—then Chairman of the subcommittee of the House Government Operations Committee that had drafted the House version of the IG Act—reflected on the breadth of federal program fraud that for too long had gone undetected and ultimately compelled Congress to act:

> I think the facts which have been disclosed are so fantastic and the abuses and frauds are so great that we are forced to take

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[17] H.R. Rep. No. 100-1027, *supra* note 11, at 5.

[18] H.R. Rep. No. 110-354, at 9.

[19] *See generally* H.R. Rep. No. 100-1027, *supra* note 11.

[20] H.R. Rep. No. 110-354, *supra* note 18, at 9.

[21] Press Release, Sen. Comm. on Homeland Security & Governmental Affairs, Sen. Collins' Bipartisan IG Reform Bill Signed Into Law (Oct. 15, 2008) *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=9d1a6af2-ff91-48fa-8af5-988a9e05700e&Month=10&Year=2008.

> extraordinary measures to establish the kind of independence within the agency which this legislation establishes.[22]

In the hearings held by Representative Fountain's subcommittee, one congressman responded to criticism of the proposed extent of IG independence, saying:

> [M]y concern is not that [the IG] will be too independent *but [that] . . . the IG will not be independent enough* in order to really blow the whistle . . . . I think that unless you have an independent and tough-minded person who is going to get that information, knows that he is not going to be cut off at the pass, and knows it is going to get into the hands of people who can really take action [i.e., Congress], then I do not think it will work.[23]

Speaking later during the House debate, Representative Wydler observed:

> The new IGs are to be totally independent and free from political pressure. If I have any reservations at all, they are concerned with that independence. I would merely suggest that we keep an eye on these IGs and see to it that they have the freedom to operate independently.[24]

As each of the foregoing statements suggests, Congress carefully considered the necessity of incorporating into the Act a mandate of independence for the IGs, and it deliberated over a number of specific safeguards that ultimately were enacted with the hope that they would guarantee such independence to the greatest extent possible. These include appointment of the IGs by either the President of the United States or the DFE head and an administrative structure shielding the IG from supervision by anyone other than the DFE head who, even then, was given only limited authority over IG functions.

The safeguards also include: a direct reporting relationship between the IG and Congress; dedicated staff and office resources; unrestricted access to agency records; subpoena power; special protections for agency employees who cooperate with the IG; and the ability to refer criminal matters to the Department of Justice ("DOJ") without clearing such referrals through the agency's or entity's Office of General Counsel ("OGC").[25] Anticipating the

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[22] *Legislation to Establish Offices of Inspector General—H.R. 8588: Hearings before the Sen. Comm. on Govt'l Affs.*, 95th Cong. 15 (1978).

[23] *Establishment of Offices of Inspector General: Hearings before a Subcomm. of the House Comm. on Gov't Ops.*, 95th Cong. 29 (1977) (statement of Rep. Levitas) (emphasis added).

[24] 124 Cong. Rec. H2949 (daily ed. Apr. 18, 1978).

[25] *See generally* 5 U.S.C. app. 3 §§ 4-7, 8G.

possibility of personal risk to an independent OIG pursuing its mission, Congress even authorized certain IGs to "carry a firearm" and to "make an arrest without a warrant" when authorized to do so by the Attorney General.[26]

The basic safeguards initially enacted for the 12 presidentially appointed IGs created in 1978 have been extended to all of the additional IGs created since then. These safeguards were reaffirmed and expanded by Congress in October 2008, when Congress passed the Inspector General Reform Act of 2008 ("IG Reform Act"). We discuss each of these safeguards of IG independence in more detail below.

Appointment/Removal by the President or DFE Head. The 1978 Act provided for the appointment of each of the 12 new IGs by the President with the advice and consent of the Senate "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] The 1988 Amendments, establishing OIGs at more than 30 DFEs, including Amtrak, provided for these IGs to be appointed by the head of the DFE, which, for Amtrak, means the Chairman.[28] The relatively smaller size of the DFEs apparently led Congress to conclude that presidentially appointed IGs were not needed there.

Originally, the standards of integrity and ability for DFE IGs were implied, rather than stated. Nevertheless, the conferees made clear their intent 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 . . . ."[29] The IG Reform Act made this standard explicit.[30]

Whether appointed by the President or the DFE head, IGs were not limited to a fixed term of office.[31] Although the Act allows the President or DFE head (whichever is applicable) to remove an IG from office, the reasons for such removal must be communicated in writing to Congress at least 30 days in advance. Implicit in this required communication is

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[26] *Id.* § 6(e)(1)(A), (B). These privileges, originally reserved for presidentially appointed IGs, were extended to DFE IGs, including Amtrak's IG, by section 11 of the Inspector General Reform Act of 2008.

[27] *Id.* § 3(a). The standards of integrity and ability for DFE IGs were implied, rather than stated, in the 1988 Act. Congress remedied this in section 2 of the 2008 Act by expressly adopting the same standards for DFE IGs.

[28] *Id.* § 8G(a)(3); Office of Management & Budget, 2008 & 2009 List of Designated Federal Entities and Federal Entities, 74 Fed. Reg. 3656 (Jan. 21, 2009).

[29] H. Rep. No. 100-1020, at 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3179, 3186.

[30] The Inspector General Reform Act, Pub. L. No. 110-409, § 2, 122 Stat. 4305 (2008).

[31] The 2008 Act provides for a seven-year term for IGs appointed after the date of enactment, but does not limit the number of terms an IG can serve.

Congress's intent to scrutinize and potentially investigate removals which appear to be unjustified in order to protect the IG's independence.

Supervisory and Reporting Structure. Congress also sought to safeguard an IG's independence by limiting the supervising and reporting structure to which a DFE IG is subject. Accordingly, section 8G(d) of the Act provides that a DFE's IG "shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity."[32] In addition, an IG is assured of "direct and prompt access" to the agency or DFE head "when necessary for any purpose pertaining to the performance of functions and responsibilities" under the Act.[33]

Section 8G(d) also makes clear that an agency or DFE head's *general* supervisory relationship does not encompass the *specific* authority to direct or supervise any of an IG's audit or investigative responsibilities: "The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation."[34]

Direct Reporting to Congress. In addition to assuring that an IG would be under only the general supervision of an agency or DFE head, Congress also created a direct reporting relationship between the IGs and Congress. Section 5 of the Act directs each IG to report to Congress twice a year. An IG must furnish a copy of these semiannual reports to the agency or DFE head, who has 30 days to review and comment before the report is transmitted to Congress.[35] However, the entity head has no authority to intercept, change, or reject the IG's report. Rather, at the end of the 30-day period, the report must be transmitted to Congress along with any comments the agency or DFE head deems appropriate.[36]

An IG is required to report "immediately" to the DFE head whenever the IG "becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations" and the report must be transmitted to the appropriate committees or subcommittees of Congress within seven calendar days.[37] Again, an IG's independence is maintained in this process because the agency or DFE head is not authorized to intercept, change, or reject such reports, but must transmit the report to the

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[32] 5 U.S.C. app. 3 § 8G(d).

[33] *Id.* § 6(a)(6).

[34] *Id.* § 8G(d).

[35] *Id.* § 5(b).

[36] *Id.* § 5(b)(1)

[37] *Id.* § 5(d).

appropriate congressional committees within one week. Such communications are generally referred to as "seven-day letters."

The Act neither authorizes nor prohibits other forms of communication between the IGs and Congress but, in practice, other forms of communication have developed. The legislative history of the 1988 amendments to the IG Act indicates that Congress expected *informal* channels of communication between itself and the IGs to supplement the formal reporting set forth in the IG Act.[38] By that time, additional *formal* means of communication had also developed, including correspondence between congressional committees and IGs, and testimony by IGs at congressional hearings.

In its ten-year review of the IG Act in 1988, the House Committee on Government Operations reported the following with respect to IGs:

> They also provide the Congress information both formally and informally . . . . In addition to [the] formal mechanisms, inspectors general provide testimony and copies of audit and investigative reports to the Congress at the request of specific committees, subcommittees, and Members. They also provide responses to specific inquiries from committees, subcommittees, and Members.[39]

The committee also noted with approval that "inspectors general report extensive informal contact and reporting to the Congress during day-to-day operations."[40] The committee further noted that "[t]here are also indications that some inspectors general have relied solely on their semiannual reports to provide information to appropriate committees and have failed to establish any other contact with them."[41] To such IGs, the committee recommended that they "should take care to assure that relationships have been established with all appropriate committees and subcommittees," and noted that "[w]hile keeping the head of the establishment informed is in the inspectors general's best interest, the public interest as well as the inspectors general's interest will be best served if the inspectors general also keep the Congress adequately informed."[42]

No Other Management Supervisory Authority over the IG. The Act empowers the IG to "make such investigations and reports relating to the administration of the

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[38] H.R. Rep. No. 100-1027, *supra* note 11, at 21-22.

[39] *Id.*

[40] *Id.* at 23 (citing staff interviews with inspectors general).

[41] *Id.*

[42] *Id.*

programs and operations of the [agency or DFE] as are, in the judgment of the Inspector General, necessary or desirable."[43] In support of this and the other authorities of the IG, section 8G of the Act stipulates that the IG "shall *not* report to, or be subject to supervision by, any other officer or employee of such designated Federal entity." (Emphasis added.) As the GAO observed:

> An IG supervised by a lower level official will inevitably be called upon at times to report audit or investigative findings in areas falling under the direct responsibility of his/her own superior. This can impair the independence of the IG in both fact and appearance, rather than giving the IG the more dependable insulation offered by the organizational independence required under the IG Act.[44]

During the course of the House Government Operations Committee's subcommittee hearings on the 1978 Act, the subcommittee received testimony from witnesses representing several federal departments that had already had some experience with OIGs established either administratively or by statute. Not surprisingly, discussion occurred with respect to the relationship between an OIG and an agency's General Counsel, who might reasonably be expected to take a professional interest in instances of fraud or other illegal activity that might be taking place in the agency and discovered by the agency's OIG.

In one example, the subcommittee discussed an incident in which the then Office of Investigation at the U.S. Department of Agriculture ("USDA") had discovered a case of alleged bribery of USDA officials by a rice exporter and sought to turn the information over to DOJ. The pertinent testimony indicated that the USDA General Counsel never referred the matter to DOJ, in effect putting a stop to the investigation.[45] Ultimately, the hearings revealed 24 instances over a two-year period in which cases referred by the Office of Investigation were held for more than six months by USDA's General Counsel before they were sent to DOJ, and one case was held for more than two years.[46] The subcommittee's review of procedures at other federal agencies showed that some agencies required all referrals to go through the OGC, while others did not.[47]

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[43] 5 U.S.C. app. 3 § 6(a)(2).

[44] GAO Report, *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, GAO-AIMD-94-39, at 4 (Nov. 1993).

[45] *Establishment of Offices of Inspector General: Hearings before a Subcomm. of the House Comm. on Gov't Ops.*, *supra* note 23, at 413, 425, 432-33 (statement of James R. Naughton, Counsel to the Subcomm. on Intergovt'l Rel. & Human Res.).

[46] H.R. Rep. No. 95-584, at 6 (1977).

[47] *Id.*

Based on the forgoing evidence, it is not surprising that the Act does not give any authority over an OIG to any entity's OGC—or to any other official apart from the entity head. In fact, neither OGCs nor any other senior agency or DFE officials (with a few exceptions not pertinent to this discussion) are even mentioned in the Act. As GAO later remarked, "with few exceptions, neither the agency heads nor subordinates are to prevent or prohibit IGs from initiating, carrying out, or completing any audit or investigation. Thus, IGs are to be insulated from the interference of senior officials, such as General Counsels."[48]

OIG Must Have Its Own Resources and Staff. Section 6 of the Act requires the head of the agency or DFE to provide the OIG with "appropriate and adequate office space at central and field office locations, together with such equipment, office supplies, and communication facilities and services as may be necessary for the operation of such offices." In later analyzing the experience of DFE IGs, GAO emphasized that it is "important that [DFE] entity heads receive the IG's unmodified budget requests and that IGs actively participate in all decisions allocating entity resources to the OIGs."[49]

In addition, an IG is authorized to select and manage its own separate OIG staff. Specifically, the Act provides:

> In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers 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 . . . subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.[50]

By including this provision in the 1988 Act, Congress reinforced the position it took with respect to the IGs created in the 1978 Act and responded to concerns over the possibility that agencies might deny IGs the authority to hire and manage needed staff in an effort to hamper the IG's operations. As a result of the 2008 amendments to the Act, each IG is also to have its own counsel.[51] Congress enacted this provision in response to recommendations by GAO and others

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[48] GAO Report, *Inspectors General: Independence of Legal Services Provided to IGs*, GAO/OGC-95-15 at 1 (Mar. 1995).

[49] *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 5.

[50] 5 U.S.C. app. 3 § 8G(g)(2).

[51] Pub. L. No. 110-409, *supra* note 30, § 6.

who expressed doubt that attorneys located in an agency's OGC could provide the independent legal services necessary to an OIG.[52]

Through such provisions, Congress recognized that an OIG's independence could be compromised by having to rely on any other officials or personnel of its agency or DFE for its basic operating tools and took steps that were unambiguously designed to prevent that.

Access to Information. Section 6 of the Act authorizes an OIG to have access, without limitation, to the internal information and records necessary to carrying out the IG's responsibilities. Specifically, the Act states:

> [E]ach Inspector General, in carrying out the provisions of this Act is authorized . . . to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act . . . .[53]

The Act provides that when, in an IG's judgment, the information requested is "unreasonably refused or not provided," the IG is required to report the circumstances to the agency or DFE head.[54] An IG is further authorized to "require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data. . . and documentary evidence necessary" to the performance of the IG's duties[55] and to administer an oath or take an affidavit from "any person" whenever necessary in the performance of the IG's statutory functions.

These provisions are described in the Act's legislative history as among the several authorities that collectively serve as the foundation of IG independence.[56] Congress made clear its intent that IGs have unfettered access to all information within the possession or control of the agency or DFE that is necessary to an IG audit or investigation. Congress did *not* qualify the provision in any way, *i.e.*, Congress did not restrict the IG to reasonable access or access obtained upon consultation with the custodian of the records, or impose any other

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[52] *Inspectors General: Independence of Legal Services Provided to IGs*, *supra* note 48, at 1.

[53] 5 U.S.C. app. 3 § 6(a)(1).

[54] *Id.* § 6(b)(2).

[55] *Id.* § 6(a)(4). An IG's subpoena power is reserved for obtaining documents and information outside the agency or DFE, *e.g.*, from contractors or other third parties. *See id.*

[56] 124 Cong. Rec. S15871 (daily ed. Sept. 22, 1978) (statement of Sen. Eagleton) (describing the IG appointment process, direct reporting relationships, discretionary authority, subpoena power, and "access to all records, reports, documents, or materials available to the agency . . ." as "fundamental" to IG independence).

restriction or limitation.[57] Reflecting on the Act ten years later, the Senate Governmental Affairs Committee confirmed that the Act authorized each IG to "conduct audits and investigations *without hindrance* . . . [and] with *broad authority* to obtain information in aid of such audits and investigations."[58]

This provision has consistently been interpreted to mean that the IG has *direct* access to information the IG is seeking.[59] In addition, GAO has affirmed that it regards restrictions on an IG's access to "records, government officials, or other individuals needed to conduct the audit" as examples of "impairments" to IG independence.[60]

No Reprisals against Cooperating Employees. Section 7 of the Act provides that:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not . . . take or threaten to take any [such] action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

This provision protects the IG's access to necessary information and materials by protecting, from the threat of reprisal for their cooperation, those within the agency or DFE who are in a position to assist the IG.

Direct Referral of Criminal Matters to the Attorney General. Based in part on information obtained in congressional hearings regarding the interference of some OGCs in OIG investigations leading to criminal referrals, as described above, Congress did not give agency or DFE OGCs any role in reviewing, commenting on, or clearing referrals of criminal activity by the OIGs to DOJ. In large part, it appears that Congress deferred to DOJ's position in this matter. The House Government Operations Committee's 1977 report on the IG legislation expressly stated that DOJ witnesses had endorsed direct referral of criminal matters by the IGs to

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[57] *See, e.g.*, H.R. Rep. No. 95-584, *supra* note 46, at 14 (stating that the legislation "makes clear that each Inspector General is to have access to all records, documents, et cetera, available to his or her agency which relate to programs and operations with respect to which the office has responsibilities").

[58] S. Rep. No. 100-150, *supra* note 8, at 5 (emphasis added).

[59] *See, e.g.*, GAO Report, *Highlights of the Comptroller General's Panel on Federal Oversight and the Inspectors General*, GAO-06-931SP, at 1 (Sept. 2006).

[60] GAO Report, *Inspectors General: Proposals to Strengthen Independence and Accountability*, GAO-07-1021T, at 2 (June 20, 2007).

the Department.[61] Therefore, the Act provides that "in carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law."[62]

Compliance with Comptroller General Standards for Auditor Independence. The Act requires each IG to "comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions."[63] The current *Government Auditing Standards* ("*Auditing Standards*") clearly reaffirm for all government-related auditing functions certain principles of independence that are similar or identical to the independence safeguards adopted by Congress in the Act.[64] The *Auditing Standards* also set forth in detail the specific elements that characterize such independence, among them the following:[65]

> 3.02 In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments of independence.
>
> 3.03 Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information. Auditors should avoid situations that could lead objective third parties with knowledge of the relevant information to conclude that the auditors are not able to maintain independence and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the audit and reporting on the work.

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[61] H. Rep. No. 95-584, *supra* note 46, at 6.

[62] 5 U.S.C. app. 3 § 4(d).

[63] *Id.* § 4(b)(1)(A).

[64] *Gov't Auditing Standards*, *supra* note 3, at Ch. 3.

[65] *Id.* at 29.

The *Auditing Standards* also advise government auditors who perceive that their independence has been impaired to disclose such impairments in their audit reports.[66] By building GAO audit standards into the Act, Congress emphasized and clarified the necessity of IG independence.

Other Authorities of the IG. In addition to the above-mentioned authorities available to the IG to carry out investigations and audits as necessary in the IG's judgment, the IG may receive and investigate complaints from agency or DFE employees concerning any possible "violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."[67] The IG is also authorized to enter into "contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act."[68] The IG may also request information or assistance from any federal, state, or local government agency as necessary to carry out the IG's responsibilities.[69] Each of these reaffirms Congress's intention to give IGs the information and resources necessary to maintain absolute objectivity and independence in the performance of their duties.

C. Extending the Act to Amtrak and its Safeguards to the Amtrak OIG

1. Congress Wanted to Expand a Successful Model

In 1988, Congress amended the IG Act to create OIGs at additional departments and agencies. The 1988 Act also defined a new class of federal entity in which the federal government had an interest—the DFEs. Although most of the individual DFEs were smaller federal agencies (*e.g.*, the Federal Election Commission and the Securities and Exchange Commission), collectively they represented a significant amount of federal spending. Pursuant to the 1988 amendments, an OIG was established at Amtrak in 1989.

The legislative history of the 1988 amendments does not include any substantive debate over the creation of an OIG at Amtrak. It appears the amendments included Amtrak because Amtrak was one of many entities that received annual federal funding in excess of $100 million.[70] Nevetheless, the Senate report also noted that GAO had found that the existing

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[66] *Id.* at 30 (Sec. 3.04).

[67] 5 U.S.C. app. 3 § 7.

[68] *Id.* § 6(a)(9).

[69] *Id.* § 6(a)(3).

[70] In fiscal year 1988, Amtrak's appropriated funds totaled around $600 million. GAO Report, *Amtrak: Deteriorated Financial and Operating Conditions Threaten Long-Term Viability,* GAO/T-RCED-95-142, at 4 (Mar. 23, 1995). A separate statute provides that Amtrak will no longer be subject to the statutory OIG requirement following the first fiscal year in which it no longer receives a federal subsidy. Pub. L. No. 105-134 § 409(a)(2) (1997).

auditing and investigative functions of several agencies and other entities (including Amtrak) had several problems that the 1988 amendments were intended to remedy. Specifically, GAO reported that Amtrak had "multiple audit or investigative units" but "no written procedures for coordinating the audit or investigative efforts."[71] In another report, GAO listed Amtrak among the "agencies" not meeting government audit standards because of the organizational placement of its audit staff.[72] A table in the report shows that Amtrak's Internal Audit Department reported to the Vice President for Law, while the Contract Audit Department reported to the Controller.[73] As a result, Amtrak was identified as one of several entities having "external or organizational impairments to audit independence" because the heads of Amtrak's audit units did not report to Amtrak's Chairman.[74]

2. *DFE IGs Given the Same Powers and Duties as Presidentially Appointed IGs*

Although IGs at the DFEs (including Amtrak) are appointed by the heads of the respective entities, rather than the President, they "have essentially the same powers and duties as the presidentially-appointed IGs."[75] Accordingly, Amtrak's IG has the same duties and responsibilities as all other IGs (as more fully described above in subsection B). The comparison in **Table 1** of the statutory differences between the presidentially appointed IGs and those appointed by their entity heads demonstrates that the only differences are primarily administrative in nature and generally reflect that presidentially appointed IGs were created at federal departments and agencies that are significantly larger than DFEs and that employ personnel drawn from the civil service or Senior Executive Service; substantively, the Amtrak and other DFE IGs have the same audit and investigative authorities as the presidentially appointed IGs.

See **Table 1**, next page.

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[71] GAO Report, *Status of Internal Audit Capabilities of Federal Agencies without Statutory Inspectors General*, GAO/AFMD 84-45, App. VIII at 16 (May 4, 1984).

[72] GAO Report, *Internal Audit: Non-Statutory Audit and Investigative Groups Need to Be Strengthened*, GAO/AFMD 86-11, at 18 (June 3, 1986).

[73] *Id.*

[74] *Id.* at 30.

[75] GAO Report, *Federal Inspectors General: An Historical Perspective*, GAO/T-AIMD-98-146, at 2 (Apr. 21, 1998).

Table 1 – Comparison of Presidentially Appointed and DFE Inspectors General

PRESIDENTIALLY APPOINTED IGS	DFE IGS
Appointed by the President with the advice and consent of the Senate 5 U.S.C. app. 3 § 3(a)	Appointed by the DFE head [Chairman of Amtrak] in accordance with the applicable laws and regulations governing appointments within the DFE 5 U.S.C. app. 3 § 8G(c)
Under the general supervision of the agency head or deputy 5 U.S.C. app. 3 § 3(a)	Under the general supervision of the DFE head 5 U.S.C. app. 3 § 8G(d)
Removal or transfer by the President who shall communicate the reasons in writing to both Houses of Congress not later than 30 days before the removal or transfer Pub. L. No. 110-409 § 3(a)	Removal or transfer by the DFE head who shall communicate the reasons in writing to both Houses of Congress not later than 30 days before the removal or transfer Pub. L. No. 110-409 § 3(a)
IGs shall appoint separate Assistant IGs for Auditing and Investigations 5 U.S.C. app. 3 § 3(d) IG authority to select, appoint, and employ such officers and employees as may be necessary, subject to certain provisions of Title 5, U.S. Code (provisions regarding the competitive service and general schedules—in general, the civil service) 5 U.S.C. app. 3 § 6(a)(7)-(8)	IG authority to select, appoint, and employ such officers and employees as may be necessary, subject to the laws and regulations governing the DFE 5 U.S.C. app. 3 § 8G(g)(2)
OIGs have separate appropriations accounts 31 U.S.C. § 1105(a)(25)	Not applicable to DFEs—in practice, Congress has earmarked funds for Amtrak's OIG in recent appropriations bills
IGs to be paid at Executive Level III, plus 3 percent Pub. L. No. 110-409 § 4(a)	IGs to be paid and classified at a "grade, level, or rank designation" (as appropriate to the DFE) at or above those of a majority of the senior level executives at the DFE (such as General Counsel, Chief Financial Officer, etc.). For an IG whose pay is adjusted under this provision [which was enacted in 2008], the adjustment cannot be more than 25% of the IG's average total compensation for the prior 3 fiscal years. The pay of a DFE IG to be not less than the average total compensation (including bonuses) of the senior level executives of the DFE calculated on an annual basis Pub. L. No. 110-409 § 4(b)(1)

D. Other Standards of IG Independence

As discussed in detail above, Congress has created numerous IGs for cabinet departments, executive branch agencies, and DFEs, including Amtrak, to act as "watchdogs" over federal programs and expenditures. To maintain the objectivity that is essential to the effective performance of an IG's mission, Congress incorporated into the Act a number of safeguards intended to protect and enhance IG independence.

The IGs' direct reporting relationship with Congress and the obligation of a DFE agency head to inform Congress in advance of an IG's removal are regarded as establishing a special relationship between Congress and the IGs that undergirds IG independence. However, Congress did not include in the Act a centralized federal entity (other than itself) with general responsibility for assuring IG independence or to provide other guidance to IGs in the performance of their statutory missions. Over time, however, other governmental and non-governmental organizations have at least partially filled that role.

The President's Council on Integrity and Efficiency ("PCIE") (for presidentially appointed IGs) and the Executive Council on Integrity and Efficiency ("ECIE") (for agency-appointed IGs) were created by presidential Executive Orders and acted as forums for IGs to work together and coordinate their professional activities.[76] Chaired by the OMB's Deputy Director for Management, the Councils performed valuable work on behalf of the IGs by, among other endeavors: developing uniform standards for the conduct of the audit, investigative, and inspection and evaluation functions of the IGs; supporting the IGs' professional and management development through training programs; and advocating issues of common concern or interest among the IGs.[77]

The Councils did not have any authority to enforce the congressionally mandated safeguards in the Act for IG independence.[78] OMB nevertheless published periodic guidance regarding the IGs, including, in November 1992, *Inspectors General in Designated Federal Entities: Key Statutory Provisions and Implementing Guidance* ("*Guidance*").[79] Although the

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[76] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *A Progress Report to the President* at 1 (FY 2007) *available at* http://www.ignet.gov/randp/rpts1.html.

[77] *Id.* at 22.

[78] In the IG Reform Act of 2008, Congress replaced the PCIE and ECIE with a new statutory Council of the Inspectors General on Integrity and Efficiency ("CIGIE") whose mission is to "address integrity, economy, and effectiveness issues that transcend individual Government agencies" and increase the IGs' "professionalism and effectiveness" by "developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General." Pub. L. No. 110-409, *supra* note 30, § 7. Although the new Council is not expressly charged with assuring IG independence, it is possible that the Council may address ways that federal agencies and DFEs can support and enhance the independence of their IGs as part of its mission to develop standards that promote highly skilled OIGs.

[79] No citation available; author's copy received from Amtrak OIG.

Guidance was primarily directed to DFE heads with respect to the process of selecting their IGs, it also addressed other facets of OIG operations, including operational independence. Following are some of the highlights of this *Guidance*:

- Entity heads should ensure that the support staff skilled in personnel and procurement functions who are assisting the IGs understand the distinct personnel and procurement authorities of the IG and the need expeditiously to support the IG in the exercise of those authorities.[80]

- Entity heads cannot delegate budget formulation and budget execution decisions regarding the IG to an officer or employee subordinate to the entity head.[81]

- Entity audit and investigative functions should be carried out by the OIG. However, the statutory requirement for operational independence does not preclude communication between and cooperation with the OIG and entity management.[82]

- The IGs' need for legal advice and assistance may be met by employing counsel within the OIGs. However, when it is not cost effective to have attorneys on staff, and the IGs therefore need to rely on the entity General Counsel, the IGs and entity General Counsels are urged to enter into written memoranda of understanding delineating the role of the General Counsel when providing legal advice and assistance to the IG, so as to preserve the operational independence of the IG.[83]

The IGs have also developed a special relationship with GAO because the IGs and GAO have complementary roles in investigating waste, fraud, and abuse in government programs. In addition, the IG Act requires each IG to "comply with standards established by the Comptroller General of the United States [the head of GAO] for audits of Federal establishments, organizations, programs, activities, and functions."[84]

As a result of this relationship, GAO has periodically monitored and reported to Congress on the operations and effectiveness of IGs and has identified and brought to the attention of Congress problems regarding agency encroachments on IG independence.[85] Among

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[80] *Id.* at 6.

[81] *Id.* at 6-7.

[82] *Id.* at 8.

[83] *Id.* at 9.

[84] 5 U.S.C. app. 3 § 4(b)(1)(A).

[85] *See, e.g., Inspectors General: Proposals to Strengthen Independence and Accountability, supra* note 60.

these problems have been (1) IGs at DFEs supervised by management officials other than the entity head; and (2) entity officials who competed with IGs for agency resources making decisions affecting the IGs' budgets.[86] Other problems cited by GAO involved unproductive relationships between IGs and their agencies' Offices of General Counsel.[87]

GAO, both through the Comptroller General's *Auditing Standards* and GAO's periodic reports, has emphasized independence as one of the most important elements of an effective IG function.[88] GAO has focused particularly on standards for IG independence so that an IG can act as an effective auditor. As noted above, the *Auditing Standards* caution that audit organizations must avoid real or perceived impairments to their independence so that their opinions and findings will be impartial and will be viewed as impartial by objective third parties.[89]

The *Auditing Standards* and GAO reports make specific recommendations to preserve auditor independence in the three areas described, which are summarized here briefly.

- Personal Independence: The auditor must maintain an "independent and objective state of mind that does not allow personal bias or the undue influence of others to override the auditor's professional judgments." The auditor also must be free of "direct financial or managerial involvement with the audited entity or other potential conflicts of interest that might create the perception that the auditor is not independent."[90]

- External independence: The auditor and the organization should be free to make independent and objective judgments without "external influences or pressures" from other individuals or divisions within the entity that is being audited. GAO cited as some examples of impairments to such external independence the following: "restrictions on access to records, government officials, or other individuals needed to conduct the audit; external interference over the assignment, appointment, compensation, or promotion of audit personnel; restrictions on funds or other resources provided to the audit organization that adversely affect the

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[86] GAO Report, *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 4.

[87] GAO Report, *Inspectors General: Independence of Legal Services Provided to IGs*, *supra* note 48, at 5 (describing how an OGC had once directed the IG's attorney in writing not to provide legal advice to the IG on a particular issue).

[88] *See, e.g.*, GAO Report, *Inspectors General: Independent Oversight of Financial Regulatory Agencies*, GAO-09-524T, at 5 (Mar. 25, 2009).

[89] *Gov't Auditing Standards*, *supra* note 3, at 29.

[90] GAO Report, *Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60, at 2.

audit organization's ability to carry out its responsibilities; or external authority to overrule or to inappropriately influence the auditors' judgment as to appropriate reporting content."[91]

- Organizational independence: GAO has observed that IGs at DFEs such as Amtrak have the characteristics of internal auditors rather than external auditors.[92] The *Auditing Standards* indicate that internal auditors "can be presumed to be free from organizational impairments to independence" if certain criteria are met that, in effect, parallel many of the statutory safeguards of IG independence included in the Act.[93] Among the additional standards included within organizational independence, the *Auditing Standards* specifically state that the auditor must be "sufficiently removed from political pressures to conduct audits and report findings, opinions, and conclusions objectively without fear of reprisal."

The *Auditing Standards* further state that the internal auditor "should document the conditions that allow it to be considered free of organizational impairments to independence for internal reporting and provide the documentation to those performing quality control monitoring and to the external peer reviewers to determine whether all the necessary safeguards have been met."[94]

Apart from the standards adopted or recommended by OMB and GAO, several of the larger federal departments have adopted internal procedures on the organization and functions of their OIGs. For example, the Department of Health and Human Services ("HHS") periodically publishes and updates a *Statement of Organization, Functions, and Delegations of Authority* ("*Statement*") which outlines the operations of the HHS OIG and defines the relationships between the OIG and certain other officials or divisions of HHS.[95] Although the HHS IG is presidentially appointed and has oversight over one of the largest federal establishments, the duties and responsibilities of the HHS OIG and Amtrak's OIG are substantially the same. Therefore, the HHS *Statement* provides a useful example of a carefully crafted set of operating principles. Among the key provisions of the HHS *Statement* are the following:

- "In keeping with the independence conferred by the Inspector General Act, the Inspector General assumes and exercises, through line management, all functional

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[91] *Id.*

[92] *Id.* at 5.

[93] *Gov't Auditing Standards*, *supra* note 3, at 39.

[94] *Id.* at 40.

[95] Statement of Organization, Functions, and Delegations of Authority, 70 Fed. Reg. 20,147 (Apr. 18, 2005).

authorities related to the administration and management of OIG and all mission-related authorities stated or implied in the law or delegated directly from the Secretary."[96]

- "The Inspector General provides executive leadership to the organization [*i.e.*, to the OIG] and exercises general supervision over the personnel and functions of its major components."[97]

- "The Inspector General determines the budget needs of OIG, sets OIG policies and priorities, [and] oversees OIG operations . . . . By statute, the Inspector General exercises general personnel authority, e.g., selection, promotion, and assignment of employees . . . ."[98]

- A component of the OIG—the IG's Office of Management and Policy—"formulates and oversees the execution of the budget and confers with the Office of the Secretary, the Office of Management and Budget, and the Congress on budget issues."[99]

- Another component of the OIG—the Office of Counsel to the Inspector General ("OCIG")—"is responsible for providing all legal services and advice to the Inspector General . . . and all of the subordinate components of the [OIG], in connection with OIG operations and administration, OIG fraud and abuse enforcement and compliance activities . . . ."[100]

- OCIG "provides legal advice to the various components of OIG on issues that arise in the exercise of OIG's responsibilities under the Inspector General Act of 1978. Such issues include the scope and exercise of the Inspector General's authorities and responsibilities; investigative techniques and procedures . . . and the conduct and resolution of investigations, audits, and inspections."[101]

- OCIG "evaluates the legal sufficiency of OIG recommendations and develops formal legal opinions to support these recommendations. When appropriate, the

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[96] *Id.*

[97] *Id.* 20,148.

[98] *Id.*

[99] *Id.*

[100] *Id.* 20,149.

[101] *Id.*

office coordinates formal legal opinions with the HHS Office of the General Counsel."[102]

- OCIG provides legal advice on OIG internal administration and operations, including appropriations, delegations of authority, OIG regulations, personnel matters, the disclosure of information under the Freedom of Information Act . . . and defends OIG in litigation matters as necessary.[103]

E. Summary

Amtrak's OIG has been charged by Congress to act as a "watchdog" in support of the congressional mandate to protect the taxpayers' money and to contribute to the efficient, effective, and lawful conduct of Amtrak's operations. In furtherance of that mission, Congress has vested Amtrak's OIG with significant responsibility, far-reaching authorities, and extraordinary independence equal to those of OIGs in the largest federal departments. In particular, Congress deliberately extended to Amtrak's OIG the same safeguards of independence that apply to all other statutory IGs in the federal government. In the 20 years that have passed since establishment of the Amtrak OIG, the Act's safeguards for the OIG's independence have not diminished. Rather, they have been strengthened, with the expectation that the OIG can rededicate itself to the task of identifying and helping to remedy instances of waste, fraud, or abuse in Amtrak's operations. It is with those standards of independence in mind that we turn to a discussion of the current Amtrak policies and practices that we have been asked to review.

IV. CURRENT AMTRAK POLICIES AND PRACTICES GOVERNING OIG OPERATIONS

A. Introduction

The policies and practices at Amtrak that the OIG has asked Willkie to review—issues of Law Department oversight of the OIG, access to documents, and budgetary and personnel independence—first arose following several management reviews of the Amtrak Law Department conducted by GAO and the OIGs of Amtrak and the Department of Transportation ("DOT") between 2004 and 2007. These reviews focused on alleged mismanagement of outside law firms by the Amtrak Law Department and resulted in considerable and unfavorable publicity for Amtrak. Following some of the media reports, the Law Department accused the Amtrak OIG of breaching Amtrak's attorney-client privilege with respect to some of the information the Law Department had provided to the OIG.

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[102] *Id.*

[103] *Id.*

An assessment of those previous investigations or the significance, if any, of the alleged breach of privilege is beyond the scope of this report. Nevertheless, a brief discussion of those events follows in the next section in order to place in context the policies and practices regarding Law Department review of OIG document requests and other aspects of OIG oversight that are the subject of this report and are discussed in the sections that follow. Following that brief discussion of the background of the GAO, Amtrak OIG, and DOT OIG investigations, this section discusses the particular policies and practices at Amtrak that Willkie Farr has been asked to review.

B. Background

1. The GAO and OIG Joint Reviews

In 2004, the Chairman of the House Transportation and Infrastructure Committee (hereinafter "Committee")—which has legislative and oversight jurisdiction over Amtrak—asked GAO to examine Amtrak's management and performance.[104] GAO's review included a brief look at Amtrak's management of legal fees. According to GAO's subsequent report, the Law Department generally failed to protect Amtrak's interests in retaining and monitoring outside counsel.[105] Specifically, the report identified several problems related to Amtrak's procurement of outside counsel, including: lack of competition in selecting firms; lack of "spend analysis" on outside legal services; lack of specificity in documenting terms and conditions of the services to be provided; inconsistent review of invoices for compliance with established billing guidelines; inadequate documentation supporting purchases for certain matters; and lack of segregation of key approval and payment functions.

After receipt of this report from GAO, the Committee asked the DOT and Amtrak OIGs to conduct a more detailed examination of the Law Department issues raised by GAO.[106] The two OIGs formed a Joint Review Team ("JRT"), which ultimately confirmed and elaborated on the conclusions reached by GAO, including the following:

- Amtrak's Law Department failed to enforce Amtrak's *Billing Guidelines*. The JRT found inadequate management of outside counsel staffing and rates; insufficient review of outside counsel legal billing; failure to request and manage

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[104] GAO Report, *Amtrak Management – Systemic Problems Requiring Actions to Improve Efficiency, Effectiveness, and Accountability*, GAO 06-145, at 2 (Oct. 4, 2005). *See also* Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services (PowerPoint).

[105] *Amtrak Management – Systemic Problems Requiring Actions to Improve Efficiency, Effectiveness, and Accountability, supra*, at 118-123.

[106] Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services, *supra* note 104.

budgets for legal services; and failure to perform audits anticipated by the *Billing Guidelines*.[107]

- Amtrak did not sufficiently train its in-house legal staff on the *Billing Guidelines'* requirements, which led to misinterpretation or insufficient knowledge of the *Billing Guidelines*. The JRT found that Amtrak routinely accepted "block billing" (prohibited by the *Billing Guidelines*) and paid for work by higher-paid attorneys and staff that could have been performed by lower-paid staff. The JRT discovered duplicate payments and a lack of detailed information regarding legal work performed by outside counsel.

- The JRT found that the Law Department lacked standard record-keeping policies. Although the *Billing Guidelines* prohibit Amtrak from reimbursing firms for mark-ups on expenses, only one of the ten law firms in the sample routinely submitted receipts or other evidence of reimbursable expenses.

- Finally, the JRT found that in-house counsel signed retainer agreements with outside counsel that supplanted the *Billing Guidelines*. The terms of such agreements were often substantially less beneficial to Amtrak and more beneficial to the outside counsel.

In connection with the JRT review, in June 2005 Amtrak's OIG also retained John W. Toothman, a legal fee management and litigation consultant, to draft an independent expert report that had been requested by Congress in connection with the JRT review.[108] Toothman's review included an examination of the Law Department's management of outside law firms as well as a review of the bills and supporting data of the outside law firms billing the largest amounts to Amtrak. His confidential report to Congress was submitted in May 2006.[109]

Toothman's report largely confirmed the GAO and JRT findings. While noting that Amtrak's *Billing Guidelines* were "excellent" and provided "a strong basis for Amtrak to manage its lawyers," Toothman observed that the Law Department had failed to "enforce its own guidelines, resulting in excessive and wasteful legal bills." He recommended that Amtrak select firms "with the right expertise" instead of hiring a handful of firms for all matters and that the Law Department enforce its *Billing Guidelines* (without special agreements), obtain budgets, and reconcile budgets with bills.

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[107] *Id.* at 10.

[108] The Toothman Law Firm, PC Billing Agreement (June 15, 2005); John W. Toothman, Confidential Report: Review of Amtrak Law Department Performance (May 31, 2006).

[109] Confidential Report: Review of Amtrak Law Department Performance, *supra*.

2. *Alleged Disclosure of the JRT Reports and Congressional Referrals to DOJ*

Amtrak IG Fred Weiderhold has reported that, as the JRT's work was winding down in September 2006, Amtrak's then Chairman, David Laney, met with Weiderhold to discuss the Law Department review.[110] During the meeting, Laney told Weiderhold that he believed Weiderhold had leaked the OIG's report to the Wall Street Journal. Weiderhold denied Laney's allegation but confirmed that he had spoken with the Wall Street Journal about another report—related to the Engineering Department, not the Law Department.

Subsequently, in October 2006, the OIG authorized Toothman to disclose to the Committee any information, including any privileged or confidential information, relating to "the Amtrak/DOT OIG Joint Review report, [Toothman's] independent expert report, and the separate ongoing T&I Committee inquiry of the Amtrak Law Department,"[111] but only on condition that Toothman "specifically identify the information as privileged and/or confidential and notify the Committee accordingly." In addition, the OIG authorized disclosure of any information, including "pre-existing redacted (non-privileged) reports," at the request of the Committee, but refused to authorize "disclosure of any Amtrak privileged or confidential information to a third party." Later that month, a redacted copy of the Toothman Report was released by the House Committee[112] and the JRT's report was publicly released.[113] However, the Legal Times obtained an unredacted (*i.e.*, privileged) copy of the Toothman Report and published an article about it on November 7, 2006.[114] It is unclear how the Legal Times obtained an unredacted copy.

The Law Department regarded the leak of the unredacted Toothman Report as damaging to Amtrak. Counsel for the Law Department characterized the information contained in the report as "highly sensitive and privileged information regarding then-ongoing discovery disputes and settlement strategy."[115] The OIG maintains that it has neither been informed about nor is aware of any specific Amtrak legal matter adversely impacted by release of the information.

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[110] Undated draft letter from Fred Weiderhold to Chairman Young and Rep Mica at 2.

[111] Oct. 24, 2006 Letter from Fred Weiderhold to John W. Toothman.

[112] Anna Palmer, *Report Shows Law Firms' Railroad Ties*, Legal Times, Nov. 7, 2006.

[113] Offices of Inspector General: Joint Review Team, Review of Amtrak's Management of Outside Legal Services, *supra* note 104.

[114] Palmer, *supra* note 112.

[115] *See* June 19, 2007 Letter from Fried Frank LLP to OIG at 2.

Shortly following the events above, in November 2006 Committee Chairman Young and Representative Mica, a member of the Committee's Subcommittee on Railroads, asked the OIG to conduct an investigation into certain invoicing and expense charges to Amtrak by the law firm Manatt, Phelps & Phillips, LLP ("Manatt").[116] In connection with the request, the OIG was asked to report any instances of non-cooperation or significant hurdles imposed by the Law Department. A month later, Young and Mica sent letters to Attorney General Alberto Gonzalez requesting that the DOJ review potential "unlawful conduct" involving Amtrak's legal team and outside law firms.[117] Amtrak's Law Department subsequently received copies of both referral letters from a Legal Times reporter.[118]

Upon learning about the congressional referral letters to DOJ, Amtrak's then General Counsel Alicia Serfaty, concerned about the allegations of unlawful conduct,[119] sought, under section VI of Amtrak's 1992 "EXEC-1" (Amtrak's internal procedures relating to the OIG),[120] "an Administrative Report that documents the OIG's findings" to allow her to "take appropriate action." OIG Counsel Colin Carriere responded that the OIG could not provide more information to Serfaty at that time because, among other things, the investigation was ongoing. Carriere stated that he believed Serfaty had misread the requirements of the EXEC-1 and he emphasized the necessity of independence in OIG investigations.

In December 2006, Chairman Laney sent a separate memorandum to the IG regarding the two congressional letters,[121] also requesting that the OIG "promptly provide [him] with succinct, detailed summaries of [OIG's] current findings or conclusions regarding each of the matters . . . together with information your office has obtained that supports such allegations of illegal or inappropriate behavior."[122]

The OIG responded that because the matter was under review by DOJ, it could not provide the requested information. The OIG indicated, however, that it would provide the

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[116] Nov. 17, 2006 Letter from Chairman Young and Rep. Mica to OIG.

[117] Dec. 4, 2006 Letter from Chairman Young & Rep. Mica to the Attorney General.

[118] Memorandum from Alicia Serfaty to Fred Weiderhold on the Joint Review (Dec. 12, 2006).

[119] *Id.*

[120] *See* section IV.C *infra*.

[121] Memorandum from David Laney to Fred Weiderhold on Young/Mica Letter of Dec. 4, 2006; Request for Information & Supporting Documentation (Dec. 20, 2006).

[122] *Id.*

Board of Directors with prompt notifications and reports at the conclusion of investigations where Board or management action "may be warranted."[123]

3. Events Leading Up to the Adoption of a Law Department-OIG "Protocol"

In February 2007, the OIG issued a subpoena to Manatt for documents related to the investigation.[124] Manatt retained counsel at Zuckerman Spaeder LLP, with which the OIG then corresponded extensively regarding the production of documents, production deadlines, and issues of attorney-client privilege, attorney work product, privacy, and confidentiality.[125]

Between February and April 2007, D. Hamilton Peterson and Phyllis Sciacca of the OIG also repeatedly communicated with Amtrak's new General Counsel, Eleanor Acheson, regarding the Manatt subpoena.[126] Communication with Acheson regarding the subpoena was necessary because Manatt refused to produce documents to the OIG without the Law Department's consent. Although we have not interviewed Acheson, we have reviewed multiple e-mail exchanges between the OIG and Acheson in which the OIG attempted to meet with Acheson to discuss this matter. Although Acheson and the OIG did meet once, no progress was made in obtaining the Law Department's consent to the OIG's document request. This delay prevented the OIG from receiving the documents, even though Zuckerman Spaeder was otherwise ready by early April to produce the first installment.

Amidst this activity, in April 2007, Acheson e-mailed IG Weiderhold asking him to enter into a written "protocol" governing the Law Department's cooperation in OIG investigations.[127] Among other things, Acheson asked that: (1) Acheson herself be the exclusive Law Department contact for all communications from OIG personnel; (2) OIG agree not to waive attorney-client privilege or work product protections for documents and agree not to turn over any documents to third parties; (3) OIG provide the Law Department with reasonable notice of any future document requests or potential interviews to allow the Law Department sufficient time to work out appropriate arrangements, and (4) OIG provide any reports of investigation to the Law Department before providing them to Amtrak's Board of Directors or any third party, including DOJ. Acheson's request resulted in lengthy negotiations between the OIG and the

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[123] Memorandum from Hamilton Peterson to David Laney on Your Memorandum of Dec. 20, 2006, Request for Information & Supporting Documentation (Dec. 28, 2006).

[124] OIG Subpoena to Custodian of Records, Manatt, Phelps & Phillips, LLP (Feb. 1, 2007); Feb. 8, 2008 Letter from Zuckerman Spaeder LLP to OIG.

[125] Feb. 22, 2007 Letter from Zuckerman Spaeder LLP to OIG; Mar. 28, 2007 Letter from OIG to Zuckerman Spaeder LLP.

[126] Conversation with D. Hamilton Peterson memo.

[127] *Id.*

Law Department.[128] The OIG believed that many of the Law Department's proposals violated the OIG's statutory independence.

In May 2007, the OIG arranged a meeting at DOJ with two senior Fraud Section attorneys in an attempt to resolve the stalemate. The meeting was attended by Peterson and Sciacca on behalf of the OIG, the two senior Fraud Section attorneys, and Michael Bromwich of Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"), which the Law Department had hired to represent it in connection with the OIG investigation. We understand that the DOJ attorneys told Bromwich that the OIG's position was well grounded under the statute and relevant case law and that the Law Department had an obligation to consent to Manatt's production of the requested documents to OIG. We also understand that the DOJ attorneys maintained that the Law Department's failure to cooperate would be contrary to law.

Negotiations on a protocol continued with a new draft provided by the OIG, which incorporated the concepts discussed at the DOJ meeting.[129] The Law Department's counsel at Fried Frank proposed changes to the OIG's draft which the OIG refused to accept on grounds that the changes violated the IG Act and would undermine the integrity of OIG investigations.[130]

Sometime in early October, Chairman Laney presented Weiderhold[131] with two original versions of a draft protocol that Acheson had signed and which Laney had purportedly played a key role in drafting.[132] Weiderhold responded with a substitute draft, but Laney rejected it and directed Weiderhold to respond "immediately" to Laney's draft.[133] Weiderhold complied with what he has described as Laney's "directive," making a few proposed "changes."[134] Weiderhold also sent a last-minute e-mail to an Amtrak Board member in an effort

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[128] *Id.*

[129] *Id.*; Draft Memorandum of Understanding Regarding Privileged Materials (undated).

[130] Draft Fried Frank Revision of the Memorandum of Understanding Regarding Privileged Materials (May 16, 2007).

[131] Peterson conversation, *supra* note 126.

[132] Oct. 2, 2007 handwritten note from Eleanor Acheson to Fred Weiderhold.

[133] Oct. 10, 2007 e-mail from David Laney to Fred Weiderhold.

[134] Oct. 10, 2007 e-mail from Fred Weiderhold to David Laney.

to avoid "compromising the IG Act" under the pressure he felt he was getting from Laney.[135] Ultimately, the IG believed he had no choice and signed the protocol on October 10, 2007.[136]

C. The 2007 Protocol and Revised EXEC-1

A copy of the Protocol is attached as **Exhibit A**. Under the Protocol, the parties acknowledge that the OIG is entitled to obtain and review any and all information that the OIG considers necessary or appropriate to conduct its investigation, but prohibits the OIG from disclosing Amtrak information to any third party, except DOJ or as otherwise *required* by law, and even then only upon prior notification to and review by the Law Department. On its face, this restriction would presumably mean OIG may only disclose Amtrak information to Congress as part of a semiannual report or other report of "particularly serious or flagrant problems" under section 5 of the IG Act (no other reports to Congress being "required" by law). Moreover, even then, any such report to Congress containing "Amtrak information" must first be provided to the Law Department for review and any appropriate action "to restrict or limit disclosure of such information." The Protocol also restricts the OIG in the future from engaging and sharing Amtrak information with third-party consultants such as John Toothman. Equally significant, as discussed more fully below, the Protocol has also resulted in a practice of Law Department pre-screening of *all* OIG-requested or subpoenaed documents prior to production to the OIG.

Following the adoption of the Protocol, Chairman Laney also approved a new EXEC-1 (*see* **Exhibit B, "2007 EXEC-1"**) superseding the 1992 EXEC-1 which had in been in effect for 15 years (*see* **Exhibit C, "1992 EXEC-1"**). The 2007 EXEC-1 delineates the scope, authority, and oversight of the OIG and directs Amtrak personnel in responding to OIG requests.[137] The 2007 EXEC-1 differs materially from its predecessor in two important respects. First, section 5.3 generally requires the OIG to inform the Law Department before disclosing to any third party any information obtained or developed in the performance of the OIG's duties that is "confidential, classified, proprietary, or privileged," except as required by law. The circumstances in which the exception would apply are not defined.

Second, section 7.3 of the 2007 EXEC-1 requires the OIG to notify the head of any Amtrak department from whose employees the OIG expects to identify, review, or collect information in connection with a review, audit, inspection, or investigation—before the OIG begins it work—except where notification would be "inappropriate." It also states that the OIG

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[135] *Id.*

[136] Agreed Protocol of Amtrak Office of Inspector General and Law Department Regarding Disclosure of Privileged, Classified, Proprietary or Other Confidential Information (Oct. 10, 2007).

[137] *See* 2007 EXEC-1 at 1 (Nov. 5, 2007).

should keep department heads and managers informed of "the purpose, nature and content of OIG activities concerning their respective programs or operations" when "appropriate."[138]

D. Implementation of the Protocol and EXEC-1 in Current Audits and Investigations

1. Claims Department Data

In early January 2008, OIG Associate Legal Counsel James Tatum, Jr. asked Amtrak's Deputy General Counsel Ted Kerrine to produce the files for several closed legal cases involving Amtrak's Claims Department.[139] Kerrine responded that "it was necessary for him to speak with Eleanor Acheson, General Counsel, prior to releasing the records to the OIG."[140] Tatum believed that the delay in providing these documents was significant. Later in 2008, Tatum asked Kerrine for an updated list of case files involving two attorneys representing Amtrak employees but Kerrine refused to provide the documents unless the request was made in writing, citing the Protocol and the 2007 EXEC-1.[141] No such requirement appears in either document.

In June 2008, OIG Agent Jeff Black contacted Amtrak's Claims Department asking for reports from a database that tracks all claims paid by Amtrak to employees and outside parties since January 1, 2005.[142] According to the OIG, the Claims Department had "previously provided similar information to the New York Times pursuant to a FOIA request."[143] Black was informed by Amtrak Deputy General Counsel Charles Mandolia that the request

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[138] Soon after the adoption of the 2007 EXEC-1, Amtrak Board member Donna McLean replaced Laney as Amtrak's Chairman. *See* Press Release, Amtrak, Amtrak Bd. Elects Donna McLean Chairman (Nov. 15, 2007). In response to concerns expressed by IG Weiderhold, McLean had earlier sought to revise the 2007 EXEC-1 to eliminate the restrictions imposed on the IG's authority by suggesting a number of changes to Amtrak's President and CEO, Alex Kummant. *See* Oct. 3, 2008 Letter from Alex Kummant to Donna McLean. However, Kummant rejected McLean's suggested revisions, believing that the 2007 EXEC-1 was fully legal and fully consistent with the goals and policies of the company. *Id.*

[139] *See* Memorandum from Ted Kerrine to James Tatum on Amtrak Office of Inspector General Request for Information or Materials Pursuant to Section 6(b)(2) of the Inspector General Act (Jan. 25, 2008). Amtrak's Claims Department is part of its Law Department under the General Counsel.

[140] Kerrine memo, *supra.*

[141] Memorandum from James Tatum to Colin Carriere on Law Department at 2 (Aug. 2008).

[142] Undated note from Jeff Black to Charles Mandolia.

[143] *Id.*

should have been directed to him, in writing. Despite Black's effort to "provide [Mandolia] with details of [the] request verbally" Mandolia continued to insist on a written request."[144]

In subsequent correspondence, Black questioned the legal basis for the Law Department's apparent refusal to cooperate with OIG's verbal request, and he asked for copies of any Law Department memoranda or documents discussing how employees of the General Counsel's Office should respond to OIG requests.[145] Acheson then sent an e-mail to Colin Carriere of the OIG, indicating that the Law Department would comply with Black's request, but still asking for the request in writing to avoid any confusion.[146] Acheson also characterized Black's tone as "argumentative and confrontational" and asked OIG to give her notice of investigations in accordance with section 7.3 of the 2007 EXEC-1.[147]

In August 2008, an OIG agent scheduled an interview with Kerrine regarding "an investigatory matter."[148] When the agent and an OIG auditor arrived for the interview, Amtrak's Managing Deputy General Counsel, William Herrmann, told them that the 2007 EXEC-1 and Protocol required OIG to contact the head of the Law Department to conduct an interview and that attorneys from the Law Department's outside counsel at Fried Frank would attend Kerrine's interview. Kerrine refused to be interviewed without the Fried Frank attorneys.

2. Defeased Leases

Around December 2008, the OIG initiated an investigation of Amtrak's treatment of defeased leases. In particular, the OIG was investigating whether Amtrak's retention of financial adviser Babcock & Brown posed a conflict of interest, on grounds that Babcock & Brown had previously worked for two of the lessors of the Amtrak equipment.[149] The OIG suspected that a former Amtrak CFO and Amtrak Treasurer may have made false statements to the U.S. Department of Transportation regarding the existence of a conflict,[150] and that the Law

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[144] *Id.*

[145] *Id.*

[146] July 2, 2008 e-mail from Eleanor Acheson to Colin Carriere.

[147] As recently reported by the Washington Post, Sen. Charles E. Grassley (R-Iowa) recently charged that top officials at the Library of Congress have "interfered with investigations conducted by its independent watchdogs and have frequently admonished investigators regarding the tone and focus of their investigations." Such attempts, Sen. Grassley wrote, "to influence and/or control [the OIG] appear to be in direct contravention of the principles underlying the creation of the Inspectors General." "Independence is the hallmark of the Inspectors General throughout the country." Ed O'Keefe, *Library Officials Accused on Interference*, Wash. Post, June 5, 2009, at A15.

[148] Tatum memo, *supra* note 141, at 6.

[149] Memorandum from OIG answering questions regarding Defeased Leases issue.

[150] *Id.*; Sept. 9, 2008 e-mail from Fred Weiderhold to Steve Patterson.

Department may have been negligent in conducting its due diligence of Babcock & Brown prior to the engagement.[151]

In connection with the investigation, the OIG sought documents and information from Babcock & Brown, the CFO, and the Treasurer. In all three cases, the Law Department insisted that it pre-screen for privilege and confidentiality any documents to be produced to the OIG.

On December 19, 2008, OIG issued a subpoena to Babcock & Brown.[152] Babcock & Brown's counsel, O'Melveny & Myers LLP, notified the OIG in February 2009 that it had responsive documents but that Amtrak's Law Department would need to review the production to identify privileged documents.[153] OIG Counsel Colin Carriere replied that it was unacceptable for Babcock & Brown to permit the Law Department to review the documents to be produced,[154] but later the same day, General Counsel Acheson wrote to O'Melveny & Myers reaffirming her demand that certain documents be sent to her office for review, stating that Babcock & Brown could produce to OIG documents responsive to its request but must first provide to her office "any responsive documents you identify that are likely to be privileged and confidential." Acheson asserted that a privilege potentially attached to some of the documents because Babcock & Brown was retained through Amtrak's counsel, Vedder Price.[155] Acheson further stated that her office would neither "withhold nor redact a single document or item of text but will simply mark those that contain confidential and/or privileged material."[156] On February 20, 2009, O'Melveny & Myers produced to the OIG documents responsive to the subpoena following the Law Department review.[157]

As indicated above, the OIG also requested documents from the CFO, who was represented by Patton Boggs LLP. In an e-mail exchange between OIG and Patton Boggs in mid-January 2009, Patton Boggs declined to produce documents to OIG without first providing

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[151] Sept. 9, 2008 e-mail from Fred Weiderhold to Steve Patterson.

[152] OIG Subpoena No. 08-47 (Dec. 29, 2008).

[153] Feb. 11, 2009 Letter from O'Melveny & Myers LLP to OIG.

[154] Feb. 13, 2009 Letter from OIG to O'Melveny & Myers LLP.

[155] Feb. 13, 2009 Letter from Law Dep't to O'Melveny & Myers LLP.

[156] *Id.*

[157] Feb. 20, 2009 Letter from O'Melveny & Myers LLP to OIG.

copies to the Amtrak Law Department for a privilege review.[158] The documents eventually were provided to OIG after Law Department review.[159]

Similarly, around January 2009, the OIG requested documents from, and an interview of, Amtrak's Treasurer. The Treasurer's counsel, Kobre & Kim LLP, notified the OIG that he could not produce two potentially privileged documents requested by the OIG without approval from William Herrmann of Amtrak's Law Department.[160] When the OIG suggested that, rather than send the documents to the Law Department to be marked as privileged, Kobre & Kim could simply mark the documents "Privileged/Confidential/Proprietary to Amtrak" and provide them directly to OIG, Kobre & Kim stated that it would await approval from Herrmann "or someone else in [the Treasurer's] chain of command."[161] After hearing nothing further, the OIG wrote Herrmann on March 26, 2009 to advise him of the OIG's January document request to the Treasurer and to notify him that the Treasurer's counsel was delaying production of two potentially privileged documents on grounds that they first must be reviewed by the Law Department.[162] Several days later, Herrmann replied that he had reviewed the requested documents and marked them as privileged, and that the OIG should expect to receive the documents from the Treasurer's counsel.[163] On March 31, 2009, the OIG received the documents from Kobre & Kim.[164]

3. Moynihan Station Project Manager Investigation

In March 2008, the OIG began an investigation of the Moynihan Station Redevelopment Project, including review of a Memorandum of Understanding ("MOU") between Amtrak and the developer, and the activities of the Moynihan Station Project Manager.[165] Specifically, the OIG sought information regarding the expenses incurred by the Project Manager, including an apartment lease in New York associated with her employment, and the use of lobbying firms and consultants in connection with the project.[166]

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[158] Jan. 21, 2009 e-mail from Patton Boggs LLP to OIG.

[159] Memorandum from OIG answering questions regarding Defeased Leases issue.

[160] Mar. 3, 2009 e-mail from Kobre & Kim LLP to OIG.

[161] Mar. 4, 2009 e-mail from Kobre & Kim LLP to OIG.

[162] Memorandum from OIG to Law Department on Defeased Loans Amount Requested (Mar. 26, 2009).

[163] Mar. 30, 2009 e-mail and memorandum from Law Department to OIG.

[164] Mar. 31, 2009 e-mail from Kobre & Kim LLP to OIG.

[165] Referral Memorandum from John Grimes to Alex Kummant (Oct. 24, 2008).

[166] *Id.* at 3-4.

In May and June of 2008, OIG Chief Inspector John Grimes contacted Anne Witt, Amtrak's Vice President of Strategic Partnership/Business Development and the Project Manager's supervisor, to obtain the MOU, lease, and documents relating to the Project Manager's employment.[167] On June 26, 2008, Witt agreed to send Grimes the MOU and the lease, but told him that she did not have copies of documents relating to the Project Manager's personnel action, suggesting instead that Grimes request them from the Board/Corporate Secretary's office.[168] On August 15, 2008, General Counsel Acheson called Grimes to inform him that she had the personnel documents he had requested.[169] On August 22, 2008, Grimes picked up the documents, which he identified as two Board meeting minutes, one of which had been redacted.[170]

4. Shoreline East Commuter Rail Service Audit Issue

In June 2008, the OIG conducted a review of a proposal between Amtrak and the Connecticut Department of Transportation ("ConnDOT") for Amtrak to provide weekend services on the Shoreline East Commuter Rail. In particular, the OIG sought to review whether the proposal violated certain statutes including, among others, the Northeast Rail Services Act, which prohibits Amtrak from subsidizing a commuter rail service.[171]

In connection with this investigation, OIG auditor Mark Scheffler requested a document entitled *Senior Staff Summary No. 36850,* which Amtrak's Strategic Partnerships Department had submitted to ConnDOT and which outlined the proposal and its costs.[172] Scheffler also requested several related documents. Scheffler was informed by Tom Moritz, Senior Director of Commuter Planning in the Strategic Partnerships Department that "[w]e have been asked by Law to allow them to review any documentation before forwarding to OIG."[173] Scheffler's efforts to obtain the information continued throughout July.[174] On August 4, 2008, the Strategic Partnerships Department forwarded several responsive e-mails to the OIG and

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[167] Memorandum from John Grimes to Phyllis Sciacca on Moynihan Station Project Manager Investigation Docs (May 5, 2009).

[168] June 26, 2008 e-mail from Anne Witt to John Grimes.

[169] Grimes memo, *supra* note 167.

[170] *Id.*

[171] Memorandum from Mark Scheffler to Phyllis Sciacca on Amtrak/OIG Investigation Information Request, at 1 (May 4, 2009).

[172] *Id.*

[173] July 2, 2008 e-mail from Amtrak Strategic Partnerships Department to OIG.

[174] July 15, 2008 e-mail from OIG to Amtrak Strategic Partnerships Department; July 25, 2008 e-mail from OIG to Amtrak Strategic Partnerships Department.

indicated that a senior associate general counsel had needed to review them before they were provided to the OIG.[175] The OIG's review ended after ConnDOT decided not to implement a weekend rail service.

5. Rail Sciences Investigation

In December 2007, the OIG opened an investigation into the billing practices of an Amtrak vendor called Rail Sciences Inc. ("RSI") after receiving information from a whistleblower claiming that RSI—which provides consulting services to Amtrak on issues such as derailment, track/train dynamics, operations planning and analysis, and testing and instrumentation—had overcharged Amtrak by billing for time during which no work was performed and by billing certain employees at inflated rates.[176] The whistleblower provided documents to substantiate the allegations.[177] RSI retained Decker, Hallman, Barber & Briggs ("Decker") to represent it in the investigation.[178]

In connection with the investigation, the OIG made a number of document requests to RSI[179] including a request for "[a]ll records maintained in the Time Matters, Time Slips and Image Time data bases or applications that refer to hours expended on Amtrak matters and any software required to read the data."[180] The OIG also asked to interview certain RSI employees. Although some information was produced to the OIG, Decker declined to produce information contained in certain databases. Decker informed the OIG that providing the OIG access to these databases would require RSI to breach its confidentiality agreements with other clients.[181]

In the meantime, the Law Department had learned of the investigation, and on March 31, 2008, General Counsel Acheson sent a letter to Decker and to the OIG requesting that RSI send to the Law Department copies of certain documents that had been produced, or would

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[175] Aug. 4, 2008 e-mail from Strategic Partnerships Department to OIG.

[176] Memorandum Regarding Response to Rail Sciences Issues provided by OIG (undated).

[177] *Id.*

[178] Weiderhold memo, *supra* note 1.

[179] Subpoena issued by OIG to RSI Custodian of Records (Dec. 14, 2007).

[180] Jan. 30, 2008 Letter from OIG to Decker at 3.

[181] Mar. 24, 2008 Letter from Decker to OIG at 1.

be produced, to OIG.[182] Acheson said the Law Department wanted to mark the documents for privilege or confidentiality and would then provide them to the OIG.[183]

Thereafter, RSI told the OIG that it would not provide any further information in response to the OIG's request regarding Amtrak without the General Counsel's express permission. Decker also indicated that it would not allow the OIG to interview any RSI employees unless someone from the Law Department was present.[184]

6. Rocla/SEPTA

In January 2008, OIG began an investigation of products that Amtrak purchased from Rocla Concrete Tie, Inc. ("Rocla"). Specifically, OIG sought to determine if Amtrak or Rocla should bear the cost of replacing certain defective concrete ties provided by Rocla.

OIG auditor Cheryl Chambers requested background information and supporting details from Amtrak's Deputy Chief Engineer David Staplin regarding inspections performed on concrete ties furnished by Rocla.[185] In response, Amtrak's Chief Engineer Frank Vacca called the OIG to say that the Engineering Department was meeting with the Law Department to discuss the concrete tie failures and to suggest that OIG attend the meetings going forward to gather information for the audit.[186] Subsequent messages to the Engineering Department resulted in a February 11, 2008 e-mail from the Engineering Department directing the OIG to "[p]lease contact Christine Lanzon [Associate General Counsel] in the Law Department and she will include you in the various activities surrounding the Rocla ties."[187] When the OIG contacted the Law Department to discuss the scope of the audit and request background information on the concrete tie failures, the Law Department expressed concern about releasing proprietary information to the OIG.[188]

On May 28, 2008, the OIG met with the Law Department to discuss Rocla issues.[189] At the end of the meeting, the Law Department said it would provide the OIG with

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[182] Mar. 31, 2008 Letter from Law Department to Decker and OIG at 1.

[183] *Id.* at 2.

[184] Apr. 14, 2008 Letter from Decker to OIG and Law Department at 2.

[185] Jan. 28, 2008 e-mail from OIG to Engineering Department.

[186] Memorandum from OIG providing information for Rocla Audit Write-Up at 1 (May 6, 2009).

[187] Feb. 11, 2009 e-mail from Engineering to OIG.

[188] Memorandum from Cheryl Chambers to Kathi Ranowsky on Rocla - Request for Information (Aug. 7, 2008).

[189] Memorandum from Thelca Constantin to Cheryl Chambers on Rocla Concrete Ties (May 29, 2008).

some documents relating to the Rocla contract, including notes from a presentation made to the Board in February 2008 and copies of the current contract and a current purchase order agreement. When the OIG inquired on June 5, 2008 as to when the Law Department would deliver the documents, the Law Department responded that it was still gathering documents.[190]

On June 10, 2008, the Law Department and the OIG discussed the review of documents that the Engineering Department had collected since May 29, 2008.[191] The Law Department sent an e-mail to Chambers the same day, confirming their conversation and writing, "under the [October 10, 2007] Protocol all materials provided to the IG's office should first be reviewed by the Law Department" so that the Law Department could ensure that the OIG received "everything you require but that privileged material is also protected."[192]

On June 17, 2008, the Law Department provided documents responsive to the OIG's June 5, 2008 request but the production was incomplete.[193] Specifically, the Law Department did not provide all of the requested inspection reports, and redacted some of the documents, including the minutes of an Amtrak Board of Director's meeting.[194] In addition, the production designated certain documents as "privileged, confidential, proprietary."[195] The documents so designated included Amtrak Board meeting minutes, purchase orders, contract amendments, and retention letters to outside law firms and engineers hired by the Law Department to review Rocla's "financial records."[196]

7. OIG Reviews of ARRA Spending

On March 13, 2009, after enactment of the American Recovery and Reinvestment Act of 2009 ("ARRA"), the OIG made a global and recurring request to Amtrak's CFO for all ARRA-related documents.[197] Amtrak's CFO is the designated point of contact for all ARRA

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[190] June 5, 2008 e-mail from Law Department to OIG.

[191] June 10, 2008 e-mail from Law Department to OIG.

[192] *Id.*

[193] June 17, 2008 Letter from Law Department to OIG; Weiderhold memo, *supra* note 1, at 6.

[194] Weiderhold memo, *supra* note 1.

[195] June 17, 2008 Letter from Law Departmennt to OIG.

[196] *Id.*

[197] Memorandum from Fred Weiderhold to DJ Stadtler on Recovery Act of 2009 at 1(Mar. 13, 2009); OIG memorandum of ARRA issues.

matters,[198] and the OIG sought information from the CFO in order to facilitate current and future OIG reviews of ARRA spending by Amtrak.[199]

At some point between March 13, 2009 and March 23, 2009, Amtrak's CFO and the Law Department agreed on a protocol whereby the OIG's document requests would be processed by the Law Department for a privilege review and Bates stamping.[200] The OIG did not agree to this protocol or participate in its formulation.[201] The Law Department was then copied on various transmittals of documents and information from the CFO to the OIG.[202] On May 19, 2009 the Law Department circulated a document preservation request to a broad range of Amtrak departments informing them of the OIG's role in overseeing ARRA spending, the departments' obligation to preserve relevant documents, and the Law Department's role in handling documents for production to the OIG.[203]

The Law Department has engaged a third party for the production review.[204] During the processing by that third party, electronic documents are converted into hard copy form for eventual production to the OIG.[205] This conversion results in loss of metadata associated with the electronic documents.[206] In addition, the Law Department is making its own determinations regarding responsiveness of ARRA-related e-mails sought by the OIG.[207] In May 2009, the Law Department asked the OIG whether the OIG will agree to narrow the search terms in its request.[208]

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[198] *Id.*

[199] *Id.*

[200] Mar. 23, 2009 e-mail from DJ Stadtler to Fred Weiderhold; OIG memorandum of ARRA issues.

[201] May 6, 2009 e-mail from K. Ranowsky to K. Elias.

[202] *See, e.g.* Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #1 (Mar. 30, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documenation #2 (Apr. 6, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #3 (Apr. 10, 2009); Memorandum from DJ Stadtler to F. Weiderhold on Recovery Act Documentation #5 (Apr. 28, 2009).

[203] Memorandum from Eleanor Acheson to various Amtrak departments on Notice to Preserve Records - American Recovery and Reinvestment Act of 2009 (May 19, 2009).

[204] OIG memorandum of ARRA issues.

[205] *Id.*

[206] *Id.*

[207] *Id.*; *see also* May 11, 2009 e-mail from Law Department to OIG.

[208] May 11, 2009 e-mail from Law Department to OIG.

In addition, according to the OIG, the involvement of the Law Department and the use of a third party to create hard-copy documents creates unnecessary delays in the OIG's receipt of documents.[209] To partially address this issue, the Law Department has offered to permit the OIG access to the documents via the third party's website;[210] however, such access would be monitored by the third party.[211]

Beyond the ARRA-related request to Amtrak's CFO, the Law Department has directed all departments to notify it of all OIG requests for documents.[212] The Law Department has stated that the purpose of the notification is to permit the Law Department to review and mark potentially privileged documents before production to the OIG.[213]

8. Recent Investigation of Cyber Intrusion

The investigations and other incidents described above are the most significant examples of the implementation of the Protocol and 2007 EXEC-1 in current investigations. Similar examples of interaction between the Law Department and the OIG have occurred on a smaller scale from time to time, potentially adversely impacting the OIG's ability to fulfill its statutory mission and duties. One such episode involved the discovery that an Amtrak computer server had been compromised by an unknown outside intruder. The OIG opened an investigation into the matter. The Law Department was also investigating the cyber intrusion. At least one contract employee who had contact with the Law Department during the investigation was explicitly directed by the Law Department not to inform or discuss the matter with anyone from the OIG.

E. Issues Regarding the OIG's Personnel Authority

The Inspector General Act authorizes the IG "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 . . . ."[214] To implement this provision, Amtrak's IG entered into an MOU in 1999 with Amtrak's Vice President for Human Resources ("HR") to govern the

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[209] May 6, 2009 e-mail from Law Department to OIG; OIG memorandum of ARRA issues.

[210] OIG memorandum of ARRA issues.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] 5 U.S.C. app. 3 § 8G(g)(2).

working relationship between the OIG and the HR Department with respect to OIG personnel.[215] The MOU was approved and signed by Amtrak's then Chairman.

The 1999 MOU recognizes the IG's "independent human resources and personnel authority as provided for under the Inspector General Act" and acknowledges that the IG "possesses all human resources and personnel authority related to recruiting and staffing."[216] It provides that "[t]he IG will serve as final authority for all OIG human resources and personnel matters . . . ," including determining "the classification, salary, and title for all IG personnel" (in consultation with HR).[217] In making such determinations, the 1999 MOU states that "the IG will use as guideposts information regarding other IG offices . . . ." It also states that "[t]he OIG shall make pay-related decisions, provided that such determinations may be accomplished within the budget of the OIG . . . ."[218]

Additionally, the IG's own salary has historically been set by Amtrak's Chairman, not the Board of Directors, pursuant to the Chairman's statutory role under the IG Act as the sole general supervisor of the IG.[219] However, the 2008 IG Reform Act established new and specific parameters and adjustments for the salary levels of DFE IGs.[220] It does not grant authority over IG salaries or adjustments to any other agency or DFE officials.

1. Salary Adjustments for the IG and OIG Staff

In 2008, the IG sought a personal salary adjustment pursuant to the provisions of the 2008 IG Reform Act. The HR Department and the Law Department worked together to bring a proposed adjustment—which the OIG argued was lower than that provided for in the IG Reform Act—before the Board of Directors.[221] Amtrak's Board ultimately approved an adjustment to the IG's salary that was in line with the OIG's original recommendation and the provisions of the Act.

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[215] Memorandum of Understanding Concerning Human Resources Authorities and Services Between Amtrak's Office of the Inspector General and Human Resources (June 1999) ("1999 MOU").

[216] *Id.* at 1.

[217] *Id.* at 1, 3.

[218] *Id.* at 2.

[219] *See* 1999 MOU at 1; 5 U.S.C. app. 3 § 8G(d).

[220] Pub. L. No. 110-409 § 4(b), *supra* note 30.

[221] *See* Memorandum from Bret Coulson to Donna McLean on Inspector General Salary Adjustment (Nov. 21, 2008).

The HR and Law Departments have similarly been involved in the IG's recent efforts to grant salary adjustments to OIG staff. As described above, the 1999 MOU reserves to the IG the authority to set compensation levels in accordance with statutory requirements.[222] The IG has routinely exercised independent authority over OIG staffing and compensation in the past.[223] Nevertheless, in connection with a recently proposed percentage salary adjustment for OIG staff, the HR and Law Departments insisted on obtaining Board of Directors approval for the adjustments.

In an e-mail to the OIG on the issue, Amtrak's General Counsel stated that the basis for the Law Department's involvement in this matter was a signing statement issued by President Bush on October 14, 2008 in connection with the enactment of the IG Reform Act.[224] The signing statement notes that section 6 of the Act gives "Inspectors General the right to obtain legal advice from lawyers working for an Inspector General."[225] It further notes that, although IGs may obtain legal advice from lawyers who work for them, "determinations of the law remain ultimately the responsibility of the chief legal officer and the head of the agency."[226] Relying on this statement, the General Counsel has maintained that she has "the exclusive authority and duty to construe law . . . including the IG Act" and had the authority to advise the HR Department regarding compensation levels for OIG staff.[227]

2. Attempts to Hire a New Chief Investigator

On November 26, 2008, the OIG sent a memorandum to the HR Department regarding the OIG's plans to hire a new Chief Investigator. The proposed candidate had more than 20 years' relevant experience and most recently had served as a postal inspector whose work was instrumental in obtaining guilty verdicts in a $500 million fraud case. The anticipated starting date for the new Chief Investigator was within two weeks of the date of the memorandum.

By late February 2009, the OIG had still been unable to hire the candidate because of the HR Department's objections to the proposed salary. The OIG intended to offer the candidate a salary comparable to the salaries of other federal OIG chief investigators and law enforcement officers. The HR Department maintained that the salary offer should be approximately $22,000 lower, which the HR Department determined using non-OIG salaries,

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[222] 1999 MOU § 2.

[223] *See* Jan. 15, 2009 e-mail from Donna McLean to Lorraine Green.

[224] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

[225] Signing Statement for H.R. 928, Inspector General Reform Act of 2008 (Oct. 14, 2008).

[226] *Id.*

[227] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

such as the salaries for private sector security guards. In the OIG's view, these salaries should not have been considered in the calculation. In response, the HR Department proposed that Amtrak's Board of Directors decide the compensation level for the position.

On February 25, 2009, after a delay of almost three months, the OIG was informed that the HR Department would process the position as requested. As a result, the offer was made, the candidate accepted the position, and the parties agreed to a start date of March 9, 2009. Notwithstanding the agreement between the parties, the HR Department notified the OIG on March 6, 2009 that it had contacted the individual and rescinded the employment offer on behalf of Amtrak. Upon inquiry, the OIG was told that Amtrak's President had directed the HR Department to rescind the offer. The OIG subsequently received a memorandum from Amtrak Chairman Thomas Carper approving the new position but directing the OIG and the HR Department to rescind the agreement and to post (*i.e.*, advertise) the position.

F. Internal Procedures Governing ARRA Funds

A provision in Title XII of ARRA allocated $1.3 billion for Amtrak, primarily in the form of "capital grants" (in contrast to an operating subsidy). The measure expressly earmarked $5 million of that allocation to the Amtrak OIG. Specifically, the provision states:

> *Provided further*, That of the funding provided under this heading, $5,000,000 shall be made available for the Amtrak Office of Inspector General and made available through September 30, 2013.

Technically, none of these funds were appropriated directly to Amtrak. Rather, Congress directed that the ARRA funds be awarded in the form of grants made by the Secretary of Transportation through a process established in the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. No. 110-432) ("PRIIA"). Therefore, ARRA required Amtrak to apply to the Department of Transportation ("DOT") for the money. The OIG's ARRA funding is not exempt from this application process.

Amtrak submitted its grant application to DOT without the OIG's input, and the funds—including the OIG's earmark—have been deposited in Amtrak's capital account. Subsequently, Amtrak management circulated an internal document that, in summary format (similar to a PowerPoint presentation), outlines the procedures to be followed in seeking funds for ARRA projects. This document indicates that a specific project or use of ARRA funds must be approved by officials in the Procurement and Finance departments, as well as by the Chief Finance Officer ("CFO") and the Chief Operating Officer ("COO") and should also be reviewed (but not necessarily approved) by the Legal Department.

Around this time, according to a brief summary provided by the OIG, the IG had a discussion with the CFO about obtaining the OIG's ARRA funds. The IG objected to the approval process on the basis that it was inconsistent with the IG Act because both the approval procedures themselves and the officials whose approval is required are subject to OIG oversight. According to the OIG summary, the CFO responded by expressing "the opinion that all of the money provided under the economic stimulus package were Amtrak funds, including the amount allocated to OIG, and the funds will be accounted for using the procedures outlined."

Subsequently, Bret Coulson, Amtrak's Deputy IG for Management and Policy, had a similar discussion with Amtrak's Assistant Vice President for Financial Planning, who echoed the CFO's view: "[She] took the position that the money is given to Amtrak through an Amtrak Grant and that if OIG wants to make expenditures they had to request the funds from Amtrak." The OIG summary also indicates that Coulson initiated the process for hiring a new Assistant IG for Special Recovery Act Oversight and states that "Amtrak Corporate, when posting the position, set it up to require approvals" from several of the officials named in the ARRA funds approval process and Amtrak's President, as well as the officials normally involved in OIG hiring—the IG himself and the Human Resources Department.[228]

V. ANALYSIS UNDER THE IG ACT AND OTHER AUTHORITIES

This section examines the practices and policies discussed above to determine whether and to what extent they constitute impairments to the OIG's actual or perceived independence under the standards of the IG Act.

In sum, we conclude that Amtrak's current policies regarding OIG oversight constitute significant impairments to the Amtrak OIG's actual and perceived independence under the standards of the Inspector General Act and published OMB and GAO guidance. As discussed in Section III above, the IG Act gives each IG the authority and discretion to initiate and carry out audits, investigations, and inspections "as necessary" within the IG's judgment. The Act gives the IG direct access to entity information and vests the IG with independent authority over OIG staff and resources. The Act further provides that the IG shall report only to the agency or DFE head and contains no provision allowing the DFE head to delegate his or her general supervisory authority to any other entity official. In fact, the Act mandates expressly to the contrary: that the IG "shall *not* report to, or be subject to supervision by, any other officer or employee." (Emphasis added.) In addition, the Act creates a direct reporting relationship with Congress, requiring that reports be transmitted to Congress through the DFE head *only* for the purpose of allowing the DFE head to comment on the content of such reports.

Similarly, OMB's 1992 *Guidance* charges entity heads with ensuring that DFE officers and employees understand the IG's authorities and the need to "expeditiously" assist the IG in support of those authorities. Further, OMB prohibits entity heads from delegating OIG budget decisions to others and expresses a clear preference, since reflected in amendments to the Act, that IGs obtain legal advice and assistance from their own counsel, and not from the entity's or agency's Office of General Counsel. In the same vein, the GAO has strongly urged IGs to be free of "external influences or pressures" from others within the agency or DFE, commenting that auditors, such as IGs, "must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments to independence."

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[228] OIG summary regarding ARRA funding issues.

Evaluated against these principles, it is clear that each of the Protocol and 2007 EXEC-1, Amtrak's policies regarding OIG personnel authority, and Amtrak's internal procedures governing the OIG's use of ARRA funds constitute significant impairments to OIG independence because they improperly restrict the OIG's access to information, subject the OIG to oversight by the Law Department and other departments within Amtrak, and cast doubt on the objectivity of the OIG's work because of the fact and appearance of external political pressures on the OIG. We discuss these conclusions in more detail below.

A. The Policy and Practices Reflected in the Protocol and 2007 EXEC-1 Violate Prevailing Standards of IG Independence

Under the Law Department Protocol, the OIG may not disclose Amtrak information to any third party, except (1) in response to a request, referral, or discussion with DOJ, or (2) as required by law, but only with prior notification to the Law Department. Under the 2007 EXEC-1, the OIG is required, among other things, to inform the Law Department before disclosing to any third party any information obtained or developed in the performance of the OIG's duties that is "confidential, classified, proprietary, or privileged," except as required by law. It also requires the OIG to notify the head of each department from whose employees the OIG expects to identify, review, or collect information in connection with a review, audit, inspection, or investigation—before the OIG begins it work—except where notification would be "inappropriate," and, when "appropriate," to keep department heads and managers informed of "the purpose, nature and content of OIG activities concerning their respective programs or operations."

The Protocol and 2007 EXEC-1 each contravene multiple provisions of the IG Act. First, both the Protocol and the EXEC-1 prohibit the OIG from disclosing any "Amtrak information" to Congress until *after* review by the Law Department and an opportunity by the Law Department to take appropriate action "to restrict or limit disclosure of such information." Even then, disclosure of Amtrak information to Congress is permissible under these policies only if *required* by law. This limitation would presumably prohibit any reporting of Amtrak information to Congress other than in a semiannual report or seven-day letter, including any of the informal reporting mechanisms discussed above in section III.B. The Protocol and 2007 EXEC-1 are accordingly inconsistent with the letter and spirit of Congress's intention to create a direct reporting relationship between the IGs and Congress. They also contravene the clear requirements of the Act that IG reports to Congress—whether semiannual reports or seven-day letters—be provided in advance only to the DFE head, and even then only for purposes of review and comment; the DFE head may not intercept, change, or reject such reports and, *a fortiori*, clearly is not empowered to delegate any such authority to the entity general counsel.[229]

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[229] *See* 5 U.S.C. app. 3 § 5 (requiring IGs to make both regular semiannual reports to Congress on the OIG's activities and immediate reports regarding "particularly serious or flagrant problems" in the agency or DFE; both kinds of reports are conveyed first to the entity head who must then transmit them to Congress without change (but with comments, as appropriate) within specified time frames).

Second, the Protocol prohibits the OIG from sharing Amtrak information with third-party consultants such as John Toothman. As detailed above, the Protocol allows the OIG to disclose Amtrak information only to DOJ or "as required by law." Neither circumstance would empower OIG to share information with a third-party consultant. As a practical matter, therefore, the Protocol is inconsistent with section 8G of the Act, which authorizes an IG to, among other things, "obtain the temporary or intermittent services of experts or consultants . . . ."

Third, the Protocol and EXEC-1 create reporting requirements in contravention of the Act. In order to protect the IG's independence, section 8G(d) of the Act provides that a DFE IG "shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to or be subject to supervision by, any other officer or employee of such designated Federal entity." Congress specifically vested supervisory authority over an IG in only the DFE head so that an IG would not be "severely handicapped" by the conflicts of interest or internal political pressures that would inevitably arise if an IG were under the direction of other agency or DFE officials whose programs or conduct would be subject to the IG's oversight.[230] The Protocol and 2007 EXEC-1 plainly violate the spirit of section 8G by requiring, in effect, that the OIG report to and be supervised by the Law Department in the context of the OIG's use of Amtrak information. Section 8G of the Act is also violated more generally by EXEC-1's requirement that the OIG notify department heads of OIG activities affecting their departments.

The reporting requirements of the Protocol and EXEC-1 also violate the spirit, if not the letter, of section 6 of the Act. Section 6 gives each IG the discretion to undertake investigations and reports "as are, in the judgment of the Inspector General, necessary or desirable." To require the OIG to notify department heads of impending audits or investigations and keep them informed of their "purpose, nature, and content" significantly impairs the IG's ability to exercise that statutory discretion. In some situations, it may be completely inadvisable for the IG to discuss an investigation with the head of the department that is the subject of the investigation. Although the 2007 EXEC-1 *seems* to acknowledge the IG's discretion to give or withhold information from department heads "when appropriate," this is a meaningless protection. Incorporating these requirements in EXEC-1 in the first place creates a presumption that the IG should be informing others of his activities, effectively placing the burden on the IG to justify instances where information is not shared. More practically, such a presumption will lead to arguments over whether the IG's decision to withhold information in a specific instance is "appropriate" and thus delay the progress of time-sensitive investigations.

Fourth, the Protocol and EXEC-1 have been implemented at Amtrak in ways that violate the IG Act. Practices such as the Law Department's pre-screening of all OIG-requested or subpoenaed documents, its correspondence with third parties instructing them on how to respond to the OIG, or—as occurred in connection with an investigation of the cyber intrusion discussed above in Section IV—instructions by the Law Department to Amtrak contractors not

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[230] *See, e.g.*, H.R. Rep. No. 100-1027, *supra* note 11, at 4.

to provide information to the OIG, each contravene the OIG's explicit authority of *direct* access to Amtrak's documents and information. Section 6 of the Act authorizes the IG to "have access to all records, reports, audits, reviews, documents, papers, recommendations or other material" that relate to the OIG's responsibilities. The language of section 6 does not in any way qualify or restrict the IG's access to information, nor does it subject such access to the approval of any other agency or DFE official. In fact, section 6 expressly contemplates that the IG report only to the entity head when, in the IG's judgment, any requested information is "unreasonably refused or not provided." The legislative history of the Act makes plain that Congress deliberately incorporated these authorities into the Act after an exhaustive examination of numerous instances of federal agency roadblocks to audits and investigations.[231] Amtrak's policies allowing the Law Department to pre-screen documents produced to the OIG, attend OIG witness interviews, and block information to the OIG have re-created the very types of roadblocks Congress intended the IG Act to eliminate.[232]

The Law Department has defended its role as necessary to protect legal privilege and other interests of the corporation. This is an important consideration. But under well established case law, OIG agents are "representatives" of their respective agencies or entities,[233] and documents transferred to an OIG in connection with an audit or investigation remain privileged, proprietary, confidential, and classified.[234]

Indeed, the Law Department acknowledged as much in a June 19, 2007 letter by its counsel at Fried Frank to the OIG:

> [O]n May 2, 2007, I met with representatives from the OIG and—at the request of your staff—the Department of Justice . . . . I repeated at that meeting what the General Counsel had previously advised you—that there is no dispute about the OIG's right to the

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[231] Statement of Sen. Eagleton, *supra* note 14; statement of Rep. Fountain, *supra* note 12.

[232] The Protocol and 2007 EXEC-1 also ignore GAO's standards for an IG's organizational independence by establishing restrictions on access to records or individuals needed to conduct an audit or investigation. GAO has expressly characterized such practices as "impairments" to an IG's independence." *Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60, at 2.

[233] *See NASA v. FLRA*, 527 U.S. 229 (1999); *DOJ v. FLRA*, 266 F.3d 1228 (D.C. Cir. 2001); *see also* 5 U.S.C. app. 3 § 8G(d) (Amtrak's Inspector General "report[s] to and [is] under the general supervision of" the head of Amtrak).

[234] *See, e.g., Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270 (11th Cir. 2004) (prohibiting a law firm from obtaining audit materials from the OIG); *Hamilton Secs. Group Inc. v. HUD*, 106 F. Supp. 2d 23 (D.D.C. 2000) (refusing to allow an outside company to obtain information relating to an audit by an OIG); *United States ex rel., Martin Locey v. Drew Med., Inc.*, Case No. 6:06-cv-564-Orl-35KRS, 2009 U.S. Dist. LEXIS 5586 (M.D. Fla. Jan. 12, 2009) (finding that a document remained protected by the attorney-client privilege despite a subsequent transfer to an OIG law enforcement officer).

information it is seeking, even though much of it is protected by the attorney-client privilege and work product doctrine.[235]

Moreover, the OIG has the same ability as the Law Department to protect Amtrak information when necessary. The OIG and its legal staff can determine whether and to what extent Amtrak information is privileged, proprietary, confidential, or classified, and mark and protect that information as warranted, mindful of the risks of potentially waiving privileges and disclosing confidences.

The Law Department's approach—which involves designation by the Law Department of privileged and confidential documents before they ever reach the OIG—is contrary to the IG Act and not workable for numerous reasons. First, the very process of reviewing documents (even for the simple task of a privilege review) notifies the Law Department of an OIG investigation and permits the Law Department to actively monitor it. This is unacceptable under the IG Act and particularly problematic in cases where the Law Department's own wrongdoing or negligence may be in issue. Second, the process has on occasion led the Law Department to stray from its stated purpose of performing a privilege and confidentiality review into performing a *responsiveness* review; in such cases the Law Department impermissibly restricts information to be reviewed by the OIG. Third, the process significantly delays the production of documents to the OIG. Fourth, the process sometimes results in documents being redacted or withheld from the OIG, even though there is no waiver of privilege or confidentiality posed by sharing the documents with the OIG. Fifth, the Law Department can purport to limit OIG's use of documents collected from Amtrak departments, employees, and vendors through overbroad privilege and confidentiality designations.

The Law Department's separate attempt to limit the disclosure of potentially privileged and confidential information by the OIG to non-Amtrak parties is also problematic. As during the gathering stage, it is not appropriate for OIG to notify the Law Department of the existence, progress, or findings of its investigations, especially in cases where the Law Department's own wrongdoing or negligence may be at issue. For interviews with non-Amtrak personnel, it would not be appropriate or realistic for OIG to consult with the Law Department in advance of every such interview in order to satisfy the Law Department of its stated concerns regarding privileged and confidential information. Instead, the IG Act, by making the OIG responsible only to Amtrak's Chairman,[236] affords the OIG discretion in conducting its investigations without input or interference from the Law Department. The same holds for disclosure of OIG findings to third parties. The OIG in consultation with the Chairman can make its own determinations regarding such disclosures that may contain Amtrak's privileged and confidential information, mindful that there is no absolute prohibition against the OIG's

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[235] June 19, 2007 Letter from Fried Frank LLP to OIG.

[236] 5 U.S.C. app. 3 § 8G(d).

disclosure of privileged and confidential information.[237] A policy that presumptively empowers the Law Department and not the OIG to make such determinations is improper.[238]

B. The Extent of Involvement of the Law and HR Departments in OIG Personnel Matters Impairs the OIG's Independent Personnel Authority

The procedures lately followed at Amtrak with respect to the IG's salary adjustment run counter to IG Act section 8G(d)'s requirement that the IG be subject only to the "general supervision of the head of the designated Federal entity." As already stated, the head of Amtrak for purposes of the Act is the Chairman of the Board, not the President or Board of Directors. The purpose of section 8G(d) is to emphasize and reinforce the unique role Congress intended for the IG and to preserve the IG's independence from political pressure exerted by others in an organization who might seek to influence the OIG by manipulating its personnel resources and staffing decisions. In implementing the salary adjustment required under section 4 of the 2008 IG Reform Act, IG Weiderhold's salary should have been immediately adjusted and should only have been subject to the approval of the Chairman, not the Board.

Similarly, the circumstances surrounding the OIG staff salary adjustments and the proposed hiring of a new Chief Investigator contravened the OIG's independent personnel authority as protected by section 6(a)(7) of the IG Act. This provision clearly states that an IG "is authorized to select, appoint, and employ such officers as may be necessary for carrying out the functions, powers, and duties" of the OIG. Decisions regarding salaries, including raises for particular employees, are also within the discretion of the IG as matters intrinsic to "selecting, appointing, and employing" the OIG staff. The IG's personnel authority is one of several safeguards established by Congress to protect the Amtrak OIG's independence and objectivity. Amtrak's procedures also ran afoul of GAO's standards for OIG independence. GAO unambiguously regards external interference in the assignment, appointment, compensation, or promotion of audit personnel and restrictions on funds or other resources that adversely affect the ability of an audit organization (or an OIG) to carry out its responsibilities as impairments to auditor (or IG) independence.[239]

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[237] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Federal Offices of Inspector General* at 7 (Oct. 2003) ("In some instances, legal or professional obligations may require an OIG to disclose [privileged, confidential, or classified] information it has received.").

[238] In analogous circumstances the Project on Government Oversight advises that attorneys for the inspector general, and not attorneys for the agency, should advise on redactions to reports that may be necessary for Freedom of Information Act purposes; the organization recognizes that "General Counsels ... have the power to undermine IG investigations through decisions such as ... redactions from IG reports." Project on Gov't Oversight, *Inspectors General: Many Lack Essential Tools for Independence* at 3, 21 (Feb. 26, 2008) *available at* http://www.pogo.org/pogo-files/reports/government-oversight/inspectors-general-many-lack-essential-tools-for-independence/go-ig-20080226.html.

[239] *Inspectors General: Proposals to Strengthen Independence and Accountability, supra* note 60, at 2.

The way in which these personnel matters were handled also violated the terms of the 1999 MOU, which recognizes the IG's personnel authority and limits the involvement of Amtrak officials in OIG personnel matters, including OIG salaries, and provides no role for the Board of Directors in these matters.[240] The OIG salary adjustments and choice of candidate for the position of Chief Investigator were therefore fully within the IG's authority should have been implemented as the IG proposed.

Moreover, the General Counsel's assertion of authority over OIG personnel decisions based on the presidential signing statement that accompanied the 2008 IG Reform Act is misplaced. The role of a presidential signing statement in interpreting the meaning of a statute is unclear and controversial. Federal courts have rarely used signing statements to aid their interpretations of the law.[241] They may be ambiguous and may contravene other statements in the legislative history. In fact, a bipartisan group of key Senate sponsors of the 2008 Act disputed the interpretation made by the President in his signing statement. The Senators (including the Chairman and ranking member of the Senate Homeland Security and Governmental Affairs Committee, which authored the legislation) explained that section 6 of the Act, which authorized the new position of Counsel for each IG, "did not address the authority of the general counsel within an agency," and "if an IG ultimately disagrees with a legal interpretation of agency counsel, then that IG should be free to record this disagreement, and their position on the matter, in their reports and recommendations to the head of the agency and to Congress."[242] In other words, the Act did not give general counsels any new authority, nor any supervisory authority over IGs, let alone, as the Amtrak General Counsel put it, "the exclusive authority and duty to construe law . . . including the IG Act."[243]

C. Amtrak's ARRA Funding Procedures Violate Standards of IG Budgetary Independence

The procedures put in place at Amtrak regarding Congress's $5 million earmark in ARRA funds for the OIG also run afoul of the letter and spirit of the IG Act. According to GAO's *Principles of Federal Appropriations Law*, an earmark is "the portion of a lump-sum appropriation [that is] designated for a particular purpose" and is a device "Congress uses when

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[240] In that respect, the 1999 MOU is similar to the Judicial Compensation Clause in Article III of the Constitution, which prevents the compensation of federal judges from being "diminished during their Continuance in Office." *Compare* Const. art. I, § 3 *with* 1999 MOU.

[241] GAO Report, *Presidential Signing Statements: Agency Implementation of Selected Provisions of Law*, GAO-08-553T, at 9 (Mar. 11, 2008).

[242] Press Release, Sen. Finance Comm., Senators Protest Presidential Signing Statement on Inspector General Reform Act, *available at* http://finance.senate.gov/sitepages/grassley2008.htm (Oct. 30, 2008).

[243] Jan. 8, 2009 e-mail from Eleanor Acheson to Bret Coulson.

it wants to restrict an agency's spending flexibility."[244] More importantly, 31 U.S.C. § 1301(a) provides that "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." In addition, under general principles of statutory interpretation, the use of the word "shall" (as in, "shall be made available for [the Amtrak OIG]") can be interpreted only as a "command."[245] This view has been codified in several sections of the U.S. Code setting forth rules of statutory construction, which state that "'shall' is used in an imperative sense."[246] In view of these factors, it is clear that Amtrak may not use the $5 million earmarked for the OIG for any other purpose.

Because ARRA does not appropriate funds "to" the OIG, but "for" the OIG, and because ARRA does not exempt the OIG from PRIIA's grant process, it appears that the OIG is required to apply to DOT for the ARRA funds. This procedure does not infringe on the OIG's independence. However, Amtrak's multi-layered approval process for the OIG's ARRA earmark improperly impairs the OIG's independence.

As noted elsewhere, the IG Act protects the Amtrak IG's independence by limiting general supervision of the OIG to the Chairman and by prohibiting supervision of the OIG by any other officer or employee. In addition, section 6 of the IG Act requires the agency or DFE head, but not any other official, to provide the OIG with the resources "necessary" to the OIG's operations. Amtrak's ARRA funding approval process, which requires that any OIG expenditure of ARRA funds be approved by officials in the Procurement and Finance departments, as well as by the CFO and COO, is clearly inconsistent with these provisions of the IG Act.

Amtrak's procedures are also inconsistent with OMB's *Guidance*, which provides that entity heads cannot delegate budget decisions regarding the OIG to officers or employees subordinate to the entity head.[247] The Amtrak approval process is also an example of the agency encroachments on IG independence cited as problematic by GAO because such a process puts decision-making regarding the IG's ARRA funds into the hands of officials who may be competing with the IG for these funds.[248]

Amtrak should have followed its existing OIG budget process in handling the OIG's request for ARRA funds. Under existing procedures pursuant to section 8 of PRIIA, the OIG normally submits its budget request to Amtrak's Chairman, who transmits the request,

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[244] U.S. Gov't Accountability Office, Principles of Federal Appropriations Law, 3d ed., Vol. II, at 6-9, 6-26 (Feb. 2006).

[245] Tobias A. Dorsey, *Legislative Drafter's Deskbook* §6.55 (2006).

[246] *Id.*

[247] OMB *Guidance*, *supra* note 79.

[248] *See, e.g., Inspectors General: Proposals to Strengthen Independence and Accountability*, *supra* note 60.

along with any comments, to the Administration and Congress. This process was followed as recently as February 2009, when Amtrak President Boardman transmitted Amtrak's budget request to Congress and the transmittal incorporated the OIG's separate budget request.[249] A similar process for obtaining ARRA funds—whereby Amtrak's Chairman would have transmitted the OIG's request for its earmarked funds to DOT unchanged, along with Amtrak's general ARRA funds request—would have been consistent with the IG Act, PRIIA, and the OMB *Guidance* and should have been used. Such a procedure would have recognized the special congressional earmark for the OIG in ARRA but bypassed the intermediate levels of approval that Amtrak has set up for ARRA funding for other departments and that violate the IG Act.

VI. RECOMMENDATIONS

In light of the foregoing issues and analysis, we provide below certain recommendations necessary for the Chairman of Amtrak to reestablish the OIG's independence and Amtrak's compliance with the IG Act.

A. The OIG Should Be Empowered To Collect Documents and Information Without Notification to or Involvement of the Law Department or Other Departments

The cornerstone of the inspector general function is independence from other departments within the organization.[250] In turn, an essential component of an inspector general's independence is unfettered access to documents and information.[251] In addition, because many inspector general investigations involve suspected wrongdoing within the subject organization, it is especially important to limit to the greatest extent possible the number of personnel aware of and involved in such investigations. Failure to keep OIG activities discreet could lead to spoliation of evidence and improper collaboration among witnesses, thereby compromising the effectiveness and integrity of OIG investigations.

As described above, Amtrak's current policies have frustrated the goals of unfettered access by the OIG to documents and information and maintaining strict confidentiality of OIG investigations by demanding that all Amtrak departments, employees,

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[249] Feb. 17, 2009 Letter of President Boardman to the Vice President of the United States and the Speaker of the House of Representatives at 13.

[250] *Inspectors General: Independent Oversight of Financial Regulatory Agencies*, supra note 88, at 5; *Inspectors General: Many Lack Essential Tools for Independence*, *supra* note 238, at 16, 30; *Quality Standards for Federal Offices of Inspector General, supra* note 237, at 6; *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities*, *supra* note 44, at 4.

[251] 5 U.S.C. app. 3 § 6(a)(1); *see also Inspectors General: Independent Oversight of Financial Regulatory Agencies*, *supra* note 88, at 6; Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Investigations* at 6 (Dec. 2003).

and vendors notify the Law Department of document requests from the OIG. Law Department actions in pre-screening documents (sometimes with the assistance of outside vendors) and, in some cases, withholding or redacting documents before production to the OIG are wholly improper, given that the IG Act gives the OIG direct access to Amtrak information and documents and requires the OIG to report to the Chairman and no other officer.[252] Moreover, as with the investigation of Amtrak's outside counsel relationships, the OIG is sometimes required to investigate possible wrongdoing or negligence by the Law Department itself. In such circumstances, the Law Department's involvement in OIG investigations is even more patently inappropriate.

The process of using the Law Department as a liaison between the OIG and Amtrak departments, employees, and vendors is not only troublesome from the perspective of OIG independence and the integrity of its investigations, but is also unnecessary, time consuming, and wasteful of Amtrak resources. There is no reason why Amtrak departments, employees, and vendors cannot directly submit documents and information to the OIG, without the attendant expense and delay caused by submitting such materials first to the Law Department.

For those reasons, the OIG should be empowered to gather documents and information in support of its investigations from Amtrak departments, employees, or vendors without any involvement of, or notification to, the Law Department or other departments. In addition, because Amtrak departments and employees in recent years have become conditioned to notify the Law Department of all OIG document and information requests, the Board of Directors should issue an Amtrak-wide directive announcing that this practice is no longer to be followed and reaffirming the OIG's right to unfettered access to documents and witnesses.

B. The Law Department Should Not Be Present for OIG Interviews with Amtrak Employees or Employees of Vendors

In several instances discussed above, Amtrak employees and even vendors' employees have sought to have Law Department attorneys (or outside counsel retained by the Law Department) present at OIG interviews. This practice is patently improper. In fact, the Office of Legal Counsel of the Department of Justice has provided analogous guidance that a federal agency may not indemnify an employee for legal representation in connection with an inspector general investigation of possible wrongful conduct.[253]

Because the interests of Amtrak and the interests of an employee under investigation will often be incompatible, serious conflicts can arise when Law Department attorneys or outside counsel purport to simultaneously represent Amtrak and Amtrak employees suspected of wrongdoing. The practice is also impermissible for the same reasons as stated

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[252] 5 U.S.C. app. 3 § 8G(d).

[253] 4B U.S. Op. Off. Legal Counsel 693 (1980).

directly above; it is contrary to the IG Act, disruptive, and wasteful to permit the Law Department to monitor and actively participate in OIG investigations in any manner, and especially during witness interviews. It may have, or be perceived as having, a chilling effect on a witness's candid cooperation. Accordingly, the routine participation of Law Department staff or outside counsel retained by Amtrak during OIG interviews should be stopped.[254]

C. The OIG Should Use Its Own Attorneys—Not the Law Department—To Advise on Issues Relating to Privileged and Proprietary Information

One of the principal stated reasons for the Law Department's attempts to position itself between the OIG and Amtrak departments, employees, and vendors is the Law Department's concern for protecting Amtrak's privileged and confidential information. Although this is an important consideration, it is does not require the Law Department to supervise OIG activities. As the Project on Government Oversight observed, "an agency general counsel's role is to protect the agency, which is at odds with the IG's role," and "in no case should an IG be allowed or required to use the agency's general counsel for legal advice."[255]

The OIG itself is capable of identifying privileged and confidential information that it collects in the course of investigations. The OIG can similarly determine how to utilize such privileged and confidential information in the course of witness interviews and further information gathering, mindful of the risks of potentially waiving privileges and disclosing confidences. Amtrak's policies and procedures should reflect that the OIG's attorneys, not the Law Department, are empowered to make these determinations in the context of OIG activities.

D. The OIG Should Be Permitted To Utilize ARRA Funding Allocated by Congress, and To Set Compensation for Its Staff, Without Involvement of other Amtrak Departments

Finally, the OIG's effectiveness is also threatened by interference in the OIG's budget and personnel decisions. Budget and staff determinations are an important aspect of the OIG's independence.[256] Indeed, pursuant to the IG Act's requirement that an inspector general be subject to the "general supervision" (rather than day-to-day supervision) of the agency head,

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[254] This is not to say that Amtrak employees or Amtrak's vendor's employees must be prohibited from having individual counsel present at OIG interviews; only that such attorneys cannot be Law Department staff or paid for by Amtrak, except under certain limited circumstances. Moreover, the IG, in his sole discretion, may invite participation of Law Department attorneys where he deems it appropriate.

[255] *Inspectors General: Many Lack Essential Tools for Independence*, *supra* note 238, at 3, 32.

[256] *Id.* at 18-21.

even an agency head is limited in the measures it may take to limit an inspector general's spending.[257]

Whatever the proper role of an *agency head* in decisions affecting an inspector general's budget, this much is clear: no other department, *including the Law Department*, has any authority whatsoever to oversee or influence how the OIG utilizes funds specifically allocated to the OIG by Congress; nor do the Law or HR Departments have authority to dictate the terms of OIG staff compensation. To the contrary, these intrusions by the Law Department are in contravention of the IG Act, which gives the OIG considerable discretion 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 and to obtain the temporary or intermittent services of experts or consultants or an organization thereof . . . ."[258] Nowhere does the statute give an agency general counsel any input as to such matters. Moreover, any such attempt to limit the OIG's use of resources tends to make the OIG subordinate to the Law Department even though the statute provides that the OIG shall report only to Amtrak's Chairman and no other officer.[259] The mere suggestion of such subordination poses a threat to OIG independence and effectiveness.

Other commentary likewise makes clear that an inspector general should have freedom from other departments with respect to budgetary matters. For example, the President's Council on Integrity and Efficiency and the Executive Council on Integrity and Efficiency reported that "interference in the assignment, appointment, or promotion of inspection personnel" and "restrictions on funds or other resources provided to the inspection organization" are impairments that deprive an inspector general of "complete freedom to make independent and objective judgment, which could adversely affect the work."[260] Both such impairments are squarely presented by the Law Department actions reviewed in this report. GAO also notes as problematic instances where entity officials competing with inspectors general for resources make budget decisions affecting the inspectors general.[261]

For these reasons, Amtrak's Board of Directors should make clear that no other Amtrak department may attempt to restrict or influence the OIG's budgetary or personnel decision-making.

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[257] *Id.* at 19 (discussing agency "micromanagement" of inspector general spending as a potential violation of the IG Act).

[258] 5 U.S.C. app. 3 § 8G(g)(2).

[259] *Id.* § 8G(d).

[260] Pres. Council on Integrity & Efficiency / Exec. Council on Integrity & Efficiency, *Quality Standards for Inspections* at 6-7 (Jan. 2005); *see also Quality Standards for Investigations, supra* note 251, at 6.

[261] *Inspectors General: Action Needed to Strengthen OIGs at Designated Federal Entities, supra* note 44, at 1.

E. Suggested Measures to Implement the Recommendations

1. Implement a New EXEC-1

As detailed above, the 2007 EXEC-1 contravenes multiple provisions of the IG Act. The OIG has drafted a new EXEC-1 (a copy of which is attached as **Exhibit D**), which should be implemented by the Chairman. In order better to provide the OIG with unfettered access to Amtrak's documents and information, to preserve the integrity of OIG investigations by limiting disclosure of matters under review, and to align Amtrak's OIG policies with those of the Department of Justice, this EXEC-1 includes the following provisions:

- A general requirement that Amtrak employees cooperate fully with any OIG request or investigation;
- A requirement that Amtrak employees give sworn statements to the OIG when requested;
- A requirement that Amtrak employees keep all information related to an OIG investigation strictly confidential (except as necessary to get legal advice from their own counsel). This confidentiality obligation would preclude disclosure to the Law Department or the employee's supervisors and would include questions asked and answers given, requests for documents and information, the subject of the inquiry, and even the very existence of the inquiry itself.
- A requirement that Amtrak employees notify OIG if another employee or other individual attempts to interfere with an OIG request or investigation;
- If asked, OIG will acknowledge that an Amtrak employee may have counsel or another representative present during an OIG interview; and
- A reminder that interviews should be scheduled directly between the OIG and the Amtrak employee, except that, in appropriate cases where the investigation will not be jeopardized and with the OIG's prior consent, the employee's supervisor may be consulted.

2. Issue a Directive from the Board of Directors to All Amtrak Employees and Departments

Because so many Amtrak departments and employees now operate under the requirement that OIG requests must be routed through the Law Department, a memorandum should be distributed along with the new EXEC-1 highlighting that this practice should not continue. The memorandum (a proposed copy of which is attached as **Exhibit E**) should include the following:

- A statement of the function and importance of the OIG;

- An instruction that OIG requests be answered promptly and without notification to or involvement of the Law Department;
- An instruction that OIG requests not in writing should be considered valid and enforceable;
- An instruction that OIG investigations and information requests are confidential and should not be reported to supervisors or others unless prior authorization is provided by OIG; and
- An assurance that the OIG will coordinate with the Chairman before the release of reports that may contain privileged or confidential information.

3. Rescind the Protocol

The October 10, 2007 Protocol is an agreement between the OIG and the Law Department to govern the use of privileged and confidential information by the OIG. The Protocol restricts the ability of the OIG to conduct investigations and make disclosures as may be required under the IG Act or requested by Congress. For example, paragraph 3 of the Protocol prohibits the OIG from disclosing Amtrak information to any third party (except the Department of Justice or as otherwise required by law, and only after prior notice to the Law Department). In the most literal sense, this provision would prohibit the OIG from gathering information (whether or not privileged or confidential) from one Amtrak vendor and then, without prior Law Department notification, asking questions of another Amtrak vendor using the information learned from the first. Paragraph 3 would also permit the Law Department to redact or limit disclosure of reports to third parties other than the Department of Justice, which means that the Law Department could impose such restrictions on OIG reports to Congress. Beyond those and other specific issues that may arise, the general difficulty with the Protocol is that the Law Department has no statutory basis to be involved in OIG investigations at any stage or for any reason. Thus, the Protocol should be rescinded.

4. Schedule Periodic Meetings between the Inspector General and Amtrak's Chairman To Monitor and Evaluate the Remedial Measures

It is important that the Inspector General and Chairman meet on a regular basis to discuss progress on implementing the recommendations above, and to discuss any concerns by either party regarding the efficacy and impact of the recommendations. In fact, the IG Act specifies that an inspector general shall have "direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act."[262] We recommend that such meetings occur in

[262] 5 U.S.C. app. 3 § 6(a)(6).

person, and at least once every 90 days until the Inspector General and Chairman conclude that the OIG's ability to function as envisioned by the statute has been restored.

5. Report to Congress

Finally, in light of the conclusions of this report that the OIG's ability to carry out its statutory functions has been compromised, we recommend that the Inspector General report these issues to Congress in either its next-filed semiannual report or in a "seven-day letter."

VII. CONCLUSION

The OIG performs an essential service, required by statute, in detecting and preventing waste, fraud, and abuse at Amtrak. In particular, the OIG in recent years has discovered and investigated instances of waste by Amtrak employees and vendors involving hundreds of millions of dollars.

In carrying out its statutory duties, the OIG must be independent from other Amtrak departments in fact and in appearance. This is a clear requirement of the IG Act, which specifies that the OIG reports only to Amtrak's Chairman and not to any other department or employee. Commentary related to the IG Act also makes abundantly plain that independence is critical to the inspector general function. Likewise, the IG Act makes clear that an inspector general must have unfettered access to agency documents and information.

The issues and analysis discussed above demonstrate that, contrary to the requirements of the IG Act, the OIG's independence at Amtrak has been diminished and threatened by recent policies and practices at Amtrak affecting OIG investigations and giving the appearance that OIG is subordinate to the Law Department. The involvement by the Law Department in OIG investigations both impermissibly and unnecessarily restricts the OIG's access to documents and information, and simultaneously permits the Law Department to become aware of, monitor, and, in some cases, actively restrict, OIG investigations. In addition, the OIG is facing unwarranted interference in its budget decision-making, both with respect to ARRA funds specifically designated by Congress to the OIG and the composition and compensation of OIG staff.

Amtrak can begin to restore its full compliance with the IG Act by implementing a modest number of corrective measures, principally by eliminating the role of the Law Department as a document and information clearinghouse for the OIG. Those and other recommendations discussed in this report will help reestablish the independence of the OIG and enhance its effectiveness and efficiency within Amtrak.

NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Ave NE., Washington, DC 20002

Amtrak Management's Response to the June 18, 2009 Report Regarding Amtrak's Office of Inspector General

July 22, 2009

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A. Summary

This memorandum summarizes Amtrak management's response to the allegations set forth in the Report (the "Willkie Report") commissioned by former Amtrak Inspector General Fred Weiderhold and authored by Robert Meyer from the law firm of Willkie, Farr & Gallagher ("Willkie Farr"). In sum, the Willkie Report appears to have begun its review with the premise already established that "the policies and practices in question were 'inconsonant with the Inspector General [Act] and the standards of the IG community' and resulted in 'serious and unreasonable interference with OIG activities.'" (Page 1) Robert Meyer was asked to "examine these issues" and to "make recommendations for how to address them within Amtrak or otherwise." Id. Apparently, Mr. Meyer was not asked to examine whether the facts supported the OIG's assertions.

The Willkie Report acknowledges, at the end of a lengthy footnote, "We have not sought or received documents or information from the Board of Directors, Law Department, or any other Amtrak personnel, and we have not conducted any interviews of Amtrak directors, officers, or other personnel in connection with this report." (Page 4 fn. 7)

This admission that the Willkie Report is one-sided, incomplete, and the product of obtaining only part of the story is at odds with the sober, earnest, and reasonable tone of the Report. It is also a profound indictment of the process by which the Willkie Report was compiled and diminishes the credibility and reliability of all that it contains.

In short, the Willkie Report is simply a megaphone for the grievances articulated to Willkie Farr's lawyers by the OIG and its personnel. The Willkie Report is based solely on whatever documents the OIG provided to the Willkie Farr lawyers, and whatever additional information the OIG chose to share. The complete and accurate record of the facts, as recited in this memorandum, demonstrate the following:

- No document or information requested by the Amtrak OIG has been withheld by the Law Department or, as far as the Company is aware, any other department of the Company.
- The Law Department does not pre-screen all Amtrak information and documents before their production to the OIG.
- Only likely privileged, confidential or proprietary material is reviewed by the Law Department, and marked as such where appropriate, and then provided to the OIG, pursuant to EXEC-1.
- The Law Department does not make any determination as to what information or documents are responsive to any OIG request. The OIG has always been provided all requested materials. No requested materials have ever been redacted.
- No document has been or can be withheld by the Law Department from either the Department of Justice or Congress.

- The Amtrak OIG has full access to all stimulus fund related documents.

- Neither the Company, nor the General Counsel nor the Law Department has ever required having a Law Department attorney present for an OIG interview of an Amtrak witness or required that an Amtrak witness have legal counsel; no Law Department attorney has ever been present at an interview of an Amtrak witness.

- OIG personnel decisions arenot subject to Law Department oversight; the Law Department, upon request, provides legal guidance to Human Resources and the Board Chairman on the proper application of the law and company policies.

- Nothing in the EXEC-1 Policy established by Amtrak's former Chairman of the Board, nor the protocols agreed to and signed by the General Counsel and Inspector General, infringes on the independence of the OIG orits ability to conduct investigations and audits within the scope of its authority.

The remainder of this memorandum includes the facts that were not presented or considered in the Willkie Report and demonstrates that Amtrak's policies and procedures are legal and appropriate and that the events and conclusions described in the Willkie Report are not accurate, complete or fair descriptions of the incidents in question. When the Amtrak President & CEO was advised by the Amtrak Board Chairman that the OIG believed EXEC-1 and the Protocols contradicted the Inspector General Act, the General Counsel retained outside counsel experienced in these matters toevaluate the assertion. A copy of that memorandum is provided along with this Memorandum to demonstrate not only that the terms of the policy and protocols are completely appropriate and typical of what is found in federal agencies, but, also, that the Amtrak Board Chair who in his "head of entity" capacity promulgated EXEC-1 was relying on expert counsel to work with him and Inspector General Weiderhold to identify a policy that squarely fit within the parameters of the IGAct while balancing theresponsibilities of both Amtrak and its OIG and the requirement that the OIG maintain its independence from the Company. See Exhibit 1, M. Bromwich Memorandum, "Amtrak Inspector General Policy" (October 15, 2008).

B. General Comments

The Willkie Report relies on unsupported exaggerations and hyperbole even when such absolutes are not supported by the examples or source material provided. For example:

- The Law Department is characterized as a"document and information clearinghouse" for the OIG. (Page 64) This is untrue.

- The Willkie Report claims that the "OIG's personnel decisions are subject to Law Department oversight . . . ." (Page 1) This is untrue.

- It is asserted that the "Law Department at Amtrak pre-screens all Amtrak documents before production to the OIG." (Page 1) This is untrue.

- It is asserted that the Law Department has "redact[ed] information from documents to be produced to the OIG." (Page 1) This is untrue as far as information and documents requested by the OIG. The two supporting examples in the Report are instances where redacted Board meeting minutes were provided to the OIG. (Pages 41 and 44) The facts demonstrate that no requested material was redacted and this production is consistent with the Company's history and practice with respect to productions of Board related material. OIG did not ask to review the material that was redacted, which was not requested by the OIG and constituted unrelated material.

- The Report states that with respect to an investigation of the Law Department's relationships with outside counsel (commenced in 2005 and still uncompleted), the Law Department required the General Counsel to "be notified of, and approve, all document requests by the OIG to Law Department employees." (Page 6) This is not true, and the Willkie Report does not cite to any supporting evidence that the General Counsel required all requests to be "approved" by her. The truth of this is that because Eleanor Acheson became Amtrak's General Counsel after the period covered by the OIG's investigation, she was the only lawyer in the Law Department not potentially involved in the OIG investigation and thus requested to be the point of contact for document requests in order to coordinate the Law Department's production and response – nothing more.

- The Report also claims that the OIG sought interviews of Law Department employees and that the Law Department required separate counsel for all Law Department employees to be interviewed. This is not true. The OIG has had every opportunity – as is its right and our duty – to interview employees of the Law Department. Employees who choose to be represented by counsel have such a right, although several Law Department employees have agreed to be interviewed and have been interviewed without benefit of counsel.

- The Willkie Report concludes that many of Amtrak's policies and practices have "unlawfully restricted the OIG's access to information and documents," "improperly subjected the OIG to the supervision of the Law Department," and "undermined the objectivity of the OIG's work product because of the appearance and reality of improper external political pressures on the OIG." (Page 8) The OIG has always had full and unrestricted access to Amtrak documents. There has never been any Amtrak policy or practice that has restricted the OIG's access to any Amtrak information, regardless of its privileged nature.

- The wholly unsupported claim that the Law Department has "supervised" the OIG is not true.

- The claimed lack of objectivity attributed to the OIG as a result of the "improper external political pressures" put on the OIG is untrue– indeed, these "improper external political pressures" are never identified. There is no evidence in the Willkie Report that supports this sweeping claim.

Setting aside the unfounded conclusions contained inthe Willkie Report, there is still much left to contend with due to what has been omitted. What the reader is left with is less than half the story and a misimpression of the work that is done to comply with the OIG's requests.

1. **Oversight**

One overriding theme throughout the Willkie Report is that it equates "oversight" with another party having any role or involvement in OIG activities at any level. The fact is that all Inspectors General must operate within certain constraints – all anticipated by the Inspector General Act, as amended (the "IG Act") – and develop a working relationship with the entity for which they are responsible. Most do so through professiona l interaction and open communication while respecting each other's independe nt responsibilities, while others rely on written policies, protocols and practices to guide both management and OIG personne l on the sort of professional cooperation and engagement thatserves both the OIG and interest s and those of its agency, in this case the Company. The implication in theWillkie Report is that any rules – even those agreed to by an Inspector General – are improper. There is no basis in the IG Act or common practice among Inspectors General forthis assertion. This is discussed inmore detail throughout this memorandum as the OIG's relationship with the Company is a recurrent theme throughout both this and the Willkie Report.

2. **OIG's Obligation to Balance Its Unquestioned Right of Access to Amtrak Documents with the Company's Privil eged and Proprietary Information**

The Willkie Report claims that "Section 6 of the[IG] Act authorizes an OIG to have access, without limitation, to the internal information and records necessary to carrying out the IG's responsibilities." (Page 18). In a similar vein, the Report asserts that "Congress made clear its intent that IGs have *unfettered* access to all information .. ." and that "Congress did *not* qualify the provision in any way." (Page 18) The words "without limitation" and "unfettered" have been added here; they are not in the statutory text quoted in the Willkie Report. As is discussed below, the OIG's grant of access to agency information does not include the unqualified right to breach agency privileges and shareconfidential or proprietary inform ation to the detriment of the agency's interest.

The directors and officers of the Company have a duty to protect privileged, confidential and proprietary information that belongs to the Company. The EXEC-1 policy and process appropriately execute the Board of Directors' responsibil ity to protect the corporate interests and rights of Amtrak, its board members, officers and senior management and reflects and utilizes the function and expertise of the relevant corporate officer (Amtrak's General Counsel) to execute this responsibility, asis done throughout the corporate world. It is a fundamental element of the structure of basic corporate governance. The section 5.3 policy and OIG-Law Department protocols were designe d and written to respond to thefact that Amtrak is, at the same time, a corporation under, effectively, state law with all of the rights and interests of other corporate entities and, for certain purposes, a federal entity with an OIG. Accordingly, the policy and protocols serve the interests and respect the rights of the corporation and the interests and authorities of the OIG, without jeopardy or injury to either. Specifically on the latter point,

no document or other form of information covered by any privilege or subject to any confidentiality interest has ever been withheld from the OIG or redacted in any respect.

The Willkie Report assumes that the genesis of the Company's desire to protect its privileged information was a breach of that privilege, involving documents provided to the OIG, that occurred in 2006. That assumption is incorrect, but it was an important event. The Willkie Report's discussion of the episode involving the leak of privileged information contained in the Toothman Report is truncated and inaccurate. The Willkie Report acknowledges that the Law Department considered the leak of privileged information in connection with the Toothman Report to be "damaging to Amtrak," but the Willkie Report states that the "OIG maintains that it has neither been informed about nor is aware of any specific Amtrak legal matter adversely impacted by release of the information." (Page 32)

The claim that the OIG has not been informed and is unaware of any specific Amtrak legal matter that has been adversely affected by the release is false. The OIG has been informed of potential adverse effects on Amtrak's legal interests. On November 13, 2006, former General Counsel Alicia Serfaty sent a memorandum to the IG attaching an earlier memorandum she provided to the Amtrak Board of Directors regarding the breach of Amtrak's privilege. See Exhibit 2, Memorandum from A. Serfaty to F. Weiderhold with Attached November 6, 2007 memorandum to Amtrak Board of Directors re Breach of Legal Privilege by OIG and Transportation & Infrastructure Committee (Nov. 13, 2006).

In her memorandum to the Board, Ms. Serfaty specifically noted that [redacted] See Exhibit 2, Memorandum from A. Serfaty to F. Weiderhold with Attached November 6, 2007 memorandum to Amtrak Board of Directors re Breach of Legal Privilege by OIG and Transportation & Infrastructure Committee (Nov. 13, 2006) at 1-2. At the time, the ExpressTrak litigation was still ongoing, and, although Ms. Serfaty noted that [redacted] the impact of the breach of Amtrak's privilege in that case could not be known or quantified.

Exemption 5
Attorney-Client Privilege

Exemption 5
Attorney Work Product

Moreover, to the extent the OIG is not aware of any negative effect this disclosure had on any Amtrak legal matters would appear to be a function of the OIG's failure to investigate the circumstances leading to the leak. Former General Counsel Serfaty requested that the IG take appropriate action, but no such investigation has been forthcoming.

To date, the OIG has provided no information to the Company regarding whether an investigation has been undertaken or the matter referred to the Integrity Committee of the PCIE/ECIE (now the Council of the Inspectors General on Integrity and Efficiency).

It is, in any event, beside the point whether the OIG has been informed of any specific legal matter that was adversely affected by the unauthorized breach of Amtrak's privilege. Even assuming that Amtrak suffered no measurable harm from this particular instance of waiver, the potential for future unauthorized waivers by the OIG or its agents continues to exist. Amtrak cannot ignore this potential threat to its legitimate corporate interests.

3. Employee's Right to Counsel

The Willkie Report asserts that the Law Department "required that separate counsel be appointed at Amtrak's expense, to represent all Law Department employees to be interviewed." (Page 6) The facts are otherwise. There is no support in the Willkie Report to suggest that all Law Department employees were even entitled to counsel. Indeed, several lawyers in the Amtrak Law Department have agreed to be interviewed by the OIG without benefit of counsel. The Willkie Report does not attempt to differentiate between those employees of the Law Department who, by reason of their status, would be *entitled* to have counsel provided pursuant to Amtrak's Bylaws and policies.

On July 29, 2008, the General Counsel sent a memorandum to all Law Department employees advising them of the OIG Investigation and indicating that the Department was fully cooperating in that investigation. See Exhibit 3, Acheson email with Attached Memo re OIG Investigation (July 29, 2008). The memorandum also states that Law Department employees are "free to speak with the OIG investigators and answer their questions" and that they also had the right to request counsel if they so choose. Nothing about that memorandum required Law Department employees to have counsel and clearly left that decision up to each individual employee. This was prompted by the OIG's behavior during investigative interviews and disputes relating to OIG reports of what witnesses said during its interviews.

4. OIG Obligation to Comply with IG Act Reporting Requirements

The Willkie Report itself discloses instances when the OIG failed to follow the requirements of the IG Act. For example, according to the Willkie Report, in late 2006, the OIG apparently reported to the House Transportation and Infrastructure Committee that the OIG was experiencing non-cooperation and/or significant hurdles from the Law Department in connection with the OIG's investigation of certain invoicing and expense charges from the law firm Manatt, Phelps & Phillips, LLP ("Manatt"). This report apparently prompted referral letters from members of Congress to the U.S. Attorney General requesting that the Department of Justice review potential "unlawful conduct" involving Amtrak's legal team and outside law firms. (Page 33) See Exhibit 4, Letter to Attorney General Gonzales (December 4, 2006).

Despite former Amtrak Board Chairman Laney's request that the OIG promptly provide him with information regarding the OIG's findings or conclusions regarding the allegations of illegal or inappropriate behavior, according to the Willkie Report, the OIG refused to provide such information on the grounds that the OIG's Investigation was still ongoing. (Pages 33-34) See Exhibit 5, Laney Memorandum to Weiderhold & Peterson (January 3, 2007). Chairman Laney's request to be promptly informed of the results of the OIG's investigation was entirely appropriate and consistent with his "general supervisory" role over the OIG and the IG Act's directive that the IG "report to" and keep the Chairman "fully and currently informed." IG Act §§ 4(a)(5) & 8G(d).

The OIG's failure to bring its concerns initially to Chairman Laney, unless it had reason to believe that he was somehow implicated in the "unlawful conduct," was inconsistent with the requirement in the IG Act to keep the Chairman "fully informed." Notably, the Willkie Report

does not state that the OIG ever provided a report to Chairman Laney at the conclusion of the OIG's investigation.

Most importantly, this episode highlights the Amtrak OIG's skewed understanding of its reporting obligations under the IG Act. If the OIG was indeed experiencing non-cooperation or significant hurdles in the OIG's investigation of the Law Department, the OIG was required to notify Chairman Laney (not Congress) in the first instance if requested information was being "unreasonably refused or not provided" by the Law Department. IG Act § 6(b)(2). The Willkie Report does not state that Chairman Laney was ever informed by the OIG of such problems.

5. OIG Independence and its Improper Role in Managerial Matters

A recurrent theme in the Willkie Report is that Amtrak Management – particularly the Law Department – has intruded on the independence of the OIG. The Law Department operates within the authority and direction of Amtrak's President & CEO and its Board of Directors. The policies that govern the Law Department's actions were reviewed and approved by those offices. See Exhibit 6, EXEC-1 (November 5, 2007), and Exhibit 7, OIG-Law Protocols (October 10, 2007) .

The IG Act and the Quality Standards that govern Inspectors General set high ethical and professional standards for OIGs and contemplate ongoing and engaged communication and cooperation between OIGs and their agencies to serve their respective interests. The existence of policies, protocols and practices relating to such communication and cooperation does not interfere with the independence of an OIG.

Furthermore, in pressing its claim of improper interference, the Willkie Report cites approvingly to the Comptroller General Standards for Auditor Independence. More specifically, the Willkie Report cites (Pages 20-21) the following standards:

- "[T]he audit organization and the individual auditor, must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments of independence." Section 3.02.

- "Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information." Section 3.03.

The OIG apparently did not share with Willkie Farr the ways in which the OIG's long-standing and deep involvement into management and operational matters violated the Comptroller General's Standards on a regular basis. Nor, to our knowledge, did any of the OIG's reports on matters in which it played a management and operational role disclose impairments of the OIG's independence, as required by Comptroller General Standard 3.04. The Willkie Report goes on at great length (see Pages 25-27) to discuss the importance of auditor independence without any mention of the roles assumed by the OIG in management and operational matters that, in fact, significantly eroded its independence.

C. **Analysis of Protocol and Events Leading Up to the Protocol and the 2007 Exec-1**

At the outset, Amtrak directs the reader's attention to the October 15, 2008 Bromwich Memorandum for a narration of the drafting of EXEC-1, as former Chairman and head of entity, David Laney, Mr. Bromwich and former Inspector General Fred Weiderhold exclusively participated in that effort. See Exhibit 1, M. Bromwich Memorandum, "Amtrak Inspector General Policy" (October 15, 2008).

The Willkie Report suggests that concerns relating to the OIG's potential waiver of Amtrak's attorney-client and other privileges first came to light in 2007. (Page 5) This is not accurate.

The Protocol - and the initial suggestion for a protocol by the General Counsel in April 2007 - was not unprecedented, nor were the concerns about privilege waiver by the OIG unique to General Counsel Eleanor D. Acheson. In 1999, former General Counsel Sarah Duggin sent a memorandum to the IG regarding ways to preserve Amtrak's privilege. See Exhibit 8, Memorandum from S. Duggin to F. Weiderhold re Attorney-Client Privilege Issues (May 4, 1999).

In that memorandum, General Counsel Duggin stated that she was authorizing the disclosure of privileged information to the OIG with the understanding that, inter alia, "OIG will protect confidentiality of the information provided and ensure that no privileged or protected information will be disclosed to a third party absent specific written approval of Amtrak." The memorandum further stated that "[i]f OIG deems it necessary during the course of its work to make disclosures to a third party that may include privileged or protected information, OIG will first consult with the General Counsel about how to protect the privilege."

The Willkie Report asserts that at the May 2007 meeting among the OIG, the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP and two DOJ attorneys the "DOJ attorneys told Bromwich that the OIG's position was well grounded under the statute and relevant case law and that the Law Department had an obligation to consent to Manatt's production of the requested documents to OIG."[1] (Page 35) The Willkie Report also asserts that "the DOJ attorneys maintained that the Law Department's failure to cooperate would be contrary to law." (Page 35) These statements are materially misleading and incomplete.

No one at the meeting questioned that the Law Department had an obligation to consent to Manatt's production of the subpoenaed information to the OIG.[2] Rather, the meeting was about what procedures could be put in place to ensure that Amtrak's privileged information (given the

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[1] The date of the meeting was May 2, 2007. The Willkie Report suggests that the DOJ attorneys were "two senior Fraud Section attorneys." The Fraud Section is part of the Criminal Division; the two attorneys who attended were with the Civil Fraud, Commercial Litigation Branch of the Civil Division.

[2] The Willkie Report's description of the OIG's dealings with "one of Amtrak's principal outside law firms [Manatt]" inaccurately suggests that the production of responsive documents has been the source of delay in that investigation over the past two years. (Page 6) In fact, we understand that production was completed by Manatt in February 2008; a letter was supplied by counsel stating that production was complete; and the OIG never suggested that the failure to supply a formal certificate of compliance somehow rendered the production incomplete. Contrary to the suggestion of the Willkie Report, the causes of endless delays in the investigation are known only to the OIG.

nature of the information Manatt would be turning over to the OIG) could best be protected from inadvertent or unauthorized waiver.

The primary concern of the DOJ attorneys was ensuring that the OIG could provide DOJ with any evidence, whether privileged or not, of potential criminal activity without any prescreening or other notice to Amtrak's Law Department. Amtrak's outside counsel, Michael Bromwich, made it clear at the meeting that the General Counsel was not concerned about the OIG's provision of privileged information to the DOJ without Law Department notice and fully understood DOJ's rights in that regard. Rather, he explained, the concern - based on prior experience - was with the OIG's providing privileged information to Congress (based on the then recent disclosure of privileged information to a third party) without a means for the Law Department to take reasonable steps to protect Amtrak's privilege in those cases when such protection would be appropriate. On that point, the participants in the meeting had a frank and productive discussion about relevant case authorities and possible approaches to address the concerns of both sides.

The Willkie Report states that "[n]egotiations on a protocol continued with a new draft by the OIG, which incorporated the concepts discussed at the DOJ meeting." (Page 35) In fact, the meeting is where "negotiations" with the OIG ended. The OIG presented its draft protocol to Mr. Bromwich as the OIG's "proposed agreement." See Exhibit 9, E-mail from H. Peterson to M. Bromwich with Proposed MOU (Agreement) Attached (May 14, 2007). Mr. Bromwich responded two days later with some proposed revisions to that draft, but, rather than engaging in a dialogue about changes that would be acceptable to the OIG, the OIG's representatives declared in a subsequent teleconference that all of the proposed changes were "unacceptable." The OIG demanded that Mr. Bromwich redraft the proposed changes for the OIG's consideration, even though the OIG's representatives were unwilling to identify or discuss what was unacceptable about the changes which had been proposed.

The Willkie Report states that, in October 2007, Chairman Laney presented the IG with a draft protocol in which Mr. Laney had purportedly played a key role in drafting and that the IG "responded with a substitute draft," which was rejected by Laney. (Page 35) The "substitute draft" that the IG provided Laney was, in fact, the very same proposed protocol that the OIG had sent to Mr. Bromwich in May 2007.

The Willkie Report also states that, after Chairman Laney rejected the "substitute draft" from the IG, the IG responded to the version proposed by Laney with a "few proposed 'changes.'" (Page 35)

The Willkie Report fails to mention that, months before the Protocol was signed by the IG in October 2007, the Law Department had produced privileged documents and had instructed Manatt to produce privileged materials pursuant to different and arguably less "onerous" conditions than those set forth in the Protocol. Amtrak documents were produced by the Law Department in June 2007 and Manatt concluded its production by February 2008.

The Law Department provided privileged documents to the OIG with the understanding that the OIG would not disclose privileged documents outside the OIG (except to DOJ or Congress)

without prior notice tothe General Counsel. See Exhibit 10,Letter from M. Bromwich to F. Weiderhold (June 19, 2007) at 3-4. Theseprivileged documents were provided on the understanding that the OIG coulddisclose privileged documents to DOJ without any notice to the Law Department. For disclosure to Congres s, the Law Department requested prior notice "unless there are exigent circumstances," and in such cases, the OIG was requested to provide notice to the Chairman of Amtrak, but only if Congress did not object to such notice.

Finally, the Law Department fullyrecognized that the OIG, from time to time, would need to disclose privileged information to third-party experts and consultants retained by the OIG, and the Law Department simply requested that the OIG obtain a confidentialit y agreement with those third parties to ensure they would maintainthe confidentiality of such privileged information. Given that the Protocol wasmerely an agreem ent between the IG andthe General Counsel, the IG could have, but did not, contact the Genera l Counsel to see whethe r she would agree to a different protocol, includ ing a protocol that wasmore closely aligned with the conditions already agreed to by the Law Departme nt in the June 19, 2007 letter.

D. Alleged Instances of Interference with OIG Activities

The instances of alleged "interference" recounte d in the Willkie Report are instances where the Law Department asked the OIG to adhere to existing Amtrak policies -including the Protocol that was signed by the IG and the 2007 EXEC-1 which was negotiated by and among then Amtrak Board Chairman David Laney, Michael Bromwich – who had been engaged by Chairman Laney for this work, and Inspect or General Weiderhold. Although the OIG has reversed itself and believes thosepolicies to be inconsistent with the IG Act, there is nothing illegal about the EXEC-1 and Protocol and there was nothing untoward or inappropriate about the Law Department following those policies and expecting the OIG adhere to those policies.

If the OIG wanted the policies to be rescinded or changed, the proper course of action would have been to seek those changes - not to thwart Amtrak policy or to ignore the IG's own agreement with the General Counsel. The Compa ny found itself in the untenable situation where its OIG was unilaterally choosing not to comply with a Company policy because the OIG unilaterally decided it was improper. The OIG– the entity charged with ensuring Company employees abide by its policies in order to avoid waste, fraud and abuse – is itself violating the very policy it is charged with upholding.

What follows is a description of the individual examples contained in the Willkie Report that purport to demonstrate how the EXEC-1 policy and protocols interfere with the OIG's independence. What the following descriptions demonstrate, however, is that the Willkie Report contains only a portion of the story. When the full story and allthe facts are known, it is clear that the OIG has received every document ithas requested and that there has been no interference with its independence or ability to perform its functions.

1. Claims Department Data

The Willkie Report states that, after an OIG agent requested certain documents from an associate legal counsel in the Law Department, the OIG agent "believed that thedelay in providing these documents was significant." (Page 37) The Willkie Report gives no indication of what that

delay, if any, was or why the OIG agent believed the delay to be "significant." A timeline of what occurred demonstrates that not only was there no delay – the OIG agent's communications at the time indicate that he was satisfied with and appreciated the response.

On January 8, 2008, [redacted] an attorney in Amtrak's Law Department, met with [redacted] an OIG Investigator and an attorney, and an assistant of the Amtrak OIG. At that time, [redacted] requested the claims files for a number of individuals purportedly represented by a private sector plaintiffs' attorney in Chicago.[3] A list containing the names of nine individuals and their dates of injury was handed to [redacted] at the conclusion of the meeting.

Later that same day, [redacted] sent [redacted] an email asking for the name of a claimant in a Texas derailment whom he had referred to in their meeting. When [redacted] received no reply, he re-sent the email two days later on January 10, 2008. See Exhibit 11, Emails from [redacted] to [redacted] (January 8 and 10, 2008). By January 15, 2008, having still not received a response, [redacted] sent a third email informing [redacted] of the progress of [redacted] efforts and requesting an answer to his inquiry. See Exhibit 12, Email from [redacted] to [redacted] (January 15, 2008). On January 16, 2008, more than a week later, [redacted] finally replied that he "did not recall inquiring about a Texas case" and thanked [redacted] for the update. See Exhibit 13, Email from [redacted] to [redacted] (January 16, 2008).

In the interim, working with a legal assistant, [redacted] had begun gathering the files for review. On January 10, 2008, [redacted] learned that all but one of the files were located in Chicago and the remaining file was in Los Angeles. See Exhibit 14, Email from [redacted] to [redacted] (January 10, 2008). [redacted] also learned that one of the dates of injury provided by [redacted] was incorrect. Arrangements were made to transport the files to Washington D.C. in order to conduct a review for privileged, confidential and proprietary material, prepare a log of such material, and copy the files.

On January 23, 2008, [redacted] advised [redacted] that he would be notifying the General Counsel of his pending production of the requested files. On January 25, 2008, [redacted] emailed to [redacted] a document entitled "Amtrak Office of Inspector General Request for Information or Materials Pursuant to Section 6(b)(2) of the Inspector General Act" threatening to "request action by the head of the designated federal entity" if the documents or a response were not produced by January 31, 2008. See Exhibit 15, Email from [redacted] to [redacted] (January 25, 2008). Later that day, [redacted] advised [redacted] that he intended to produce the documents, but "allowing time for copying and review of the material in accordance with the protocol agreed to by the OIG and the Law Department, a more realistic timetable for production is the week of February 4, 2008." See Exhibit 16, Email from [redacted] to [redacted] (January 25, 2008). Three days later, on January 28, 2008, [redacted] wrote "Thank you for your prompt response. As long as the documents requested are provided to the OIG on or before February 8, 2008, your time frame is acceptable. Thanks again." See Exhibit 17, Email from [redacted] to [redacted] (January 28, 2008).

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[3] "Claims files" are Law Department files created when an employee, passenger or other individual files a tort claim for damages. These files contain numerous privileged documents and are the basis of the Company's defense against such claims.

Exemption 6

On February 4, 2008, two boxes containing the requested files in their entirety totaling 4737 pages were hand-delivered to [redacted] office. See Exhibit 18, Email from [redacted] to [redacted] (February 4, 2008). [redacted] responded "I also thank you for your full cooperation in this matter." See Exhibit 19, Email from [redacted] to [redacted] (February 4, 2008).

Twenty-seven days passed from the time when therequest was first received until delivery. As stated above, thirteen of those days were delays attributable to the OIG. This request for claims files was the first production of documents forthat department since the adoption of the Protocols and, consequently, it took slightly longer to process than it would today; nevertheless the files were delivered ahead of schedule. During the labor-intensive file-gathering and review process, [redacted] was continually kept informed and, except for the January 23, 2008 email, communicated his appreciation andconcurrence with the timetable. Ultimately, the files were delivered ahead of schedule and [redacted] took noexception to the time in which it took or the manner in which they were produced. The report's allegation that '[redacted] believed that the delay in providing these documents was significant" is squarely contradicted by the facts.

The Willkie Report also asserts that the associate legal counsel, apparently [redacted] "refused to provide" a subsequent request for documents "unless the request was made in writing, citing the Protocol and the 2007 Exec-1." (Page 37) [redacted] never refused to provide the documents unless the request was submitted in writing. [redacted] heard nothing further from the OIG on this matter until late August, when [redacted] contacted [redacted] with a request to "follow up" with respect tothis investigation. [redacted] asked [redacted] to specify his request to writing in order to ensure clarity and avoid miscommunicatio n and potential delay. [redacted] flatly refused stating that his superiors in the OIG were of the opinion that they were not compelled to reduce their request to writing and were therefore unwilling to do so. Another representative of the Law Department, [redacted] spoke with [redacted] to try to understand why the request could not be made in writing and was told by [redacted] he could not answer that question and [redacted] would need to speak with [redacted], OIG Counsel. [redacted] attempted to speak with [redacted] but received no response.[4]

It is common - and not problematic or an infringement on the OIG's independence or access to information - for a party receiving a document request to ask for the request in writing. Written requests are used by investigative agencies to create shared and accurate understandings of what has been requested and what needs to be produced. Such written requests are standard practice; they are not an infringement on the prerogatives of an investigating entity.

Moreover, as a matter of historical practice, OIGsent requests for documents in writing. It was not until the summer of 2008 that the OIG suddenly refused to provide written requests or confirmation of its requests. Even though no additional justification is necessary for written

[4]Insteadof responding to the LawDepartment'soutreach, about a m onth later, a federalgrand jury subpoena from theU.S.Attorney for theNorthern District of Illinois (Chicago)was served on Amtrak compelling the production of certain documents in the Chicago attorney investigation matter.When [redacted] contacted the Assistant U. S. Attorney ("AUSA") named in the subpoena to ask why thesubpoena had been issued, theAUSA said that ithadbeen requested by [redacted] the same OIG attorney who had a month earlierasked the Claims attorney for "followup". TheAUSAstated that the OIG advisedhim they required a subpoenabecause the LawDepartment wasuncooperative and they *couldnot otherwise*obtain documents from the LawDepartment. Not only wereno documents denied theOIG – no specific or described documents were even asked for,just "followup."

requests, the Amtrak OIG had a history of creating confusion and misunderstandings by issuing scattershot oral requests for information. The request to put requests for documents in writing was designed to bring order to the process. Nothing in the IG Act precludes a good faith request for the OIG agent to provide a request in writing. In order to accommodate the OIG's refusal to put its requests in writing, Amtrak modified its practice so thatwhen an oral request is received, an email confirming the request is sent to theOIG agent so that both have a record of the recipient's understanding of what has beenrequested. OIG agents have occasionally acknowledged these confirmations while refusing to set forth the request in writing themselves.[5]

The Willkie Report also describes a request by OIG Agent [redacted] in June 2008 for reports from a database maintained by the Amtrak Claims Department. The request was very broad and general. The Law Department requested that the OIG confirm its request in writing by identifying exactly what information it sought from the database. See Exhibit 20, Email from [redacted] to OIG Agent [redacted] (June 30, 2008). Copies of the emails involved are attached and clearly show that the Law Department was attemp ting to comply with the OIG's request, but was seeking confirmation of their request in writing in order to be sure everyone was clear about the scope of the request. See Exhibit 21, Email fron [redacted] to [redacted] (July 1, 2008), and Exhibit 22, Email from Acheson to [redacted] July 2, 2008). What is left out of the Willkie Report are the facts that the Law Department (Claims group) responded to the OIG's request by providing the OIG the basic report of the Claim's database for the period requested and a list of all the available fields that could be reported out of the database so that the OIG could identify further information it wanted to receive. SeeExhibit 23, Letter from [redacted] to [redacted] (July 7, 2008). Nothing more was heard from the OIG. Some time later, the General Counsel approached Inspector General Weiderhold after a Company meeting they had both attended to ask if the OIG had identified the claims files or other information it needed and Mr. Weiderhold offered that the IG was not satisfied with the fields included in the report they received and wanted further information. TheGeneral Counsel suggested that OIG staff and Claims meet, review all of the available fields; then the OIG could identify the fields it wanted and Claims would provide that data promptly. Mr. Weiderhold stated that he thought that was a good approach. The General Counsel followed upthat conversation with an e-mail to Mr. Weiderhold but nothing further has been heardfrom the OIG on this matter. See Exhibit 24, Email from Acheson to Weiderhold (July 29, 2008)

The Willkie Report also includes a footnote with a quote from Senator Grassley about top officials at the Library of Congress allegedly interfering ininvestigations by, among other things, admonishing investigators about the "tone and focus" of their investigations and also recounts that, in an e-mail, the General Counsel "characterized" an OIG agent's "tone as 'argumentative and confrontational.'" (Page 38) The obvious implication is that the General Counsel was seeking with her e-mail to interfere in the OIG's investigation by criticizing the agent's tone, but the Willkie Report does not place any of this in context.

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[5] TheWillkie Report asserts that the LawDepartment provided claims reports (or at least"similar information") to the NewYork Times pursuant to a FOIArequest but theLawDepartment required theOIG's request to be in writing before it would comply with therequest. (Pages 37-38) If this circumstance isat all relevant to thequestion ofwhether itwasreasonableof theLawDepartment to ask that theOIGput its request in writing, it is that all FOIArequests are required to be made in writing.

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The full context for the "argumentative and confrontational" statement by OIG staffer [redacted] email to Claims group director, [redacted] and the full relevant text of General Counsel Acheson's response to OIG Counsel [redacted] is this: "[T]he balance of the e-mail from [redacted] to [redacted] seems unnecessarily argumentative and confrontational for reasons that are not at all clear given our commitment - and our practice - of cooperating with your office. In the time that I have been here, the Law Department has never declined to respond to the OIG and never declined to produce information to the OIG, so it is false and counterproductive to suggest that we have not been sufficiently responsive." See Exhibit 22, Email from Acheson to [redacted] (July 2, 2008).

The final example contained in the Willkie Report in this category involves a request by the OIG to interview a Law Department attorney, [redacted] on very short notice. [redacted] apprised [redacted] of the OIG's request and, as was his right under Amtrak's policies, asked to have legal counsel present with him at the interview. When told of these developments, the General Counsel's understanding was that [redacted] was, at least in part, concerned about the accurate recording of what he would say in the interview. In order to expedite the Company's indemnification process entailing the engagement of an attorney, which can take a week or two, the General Counsel suggested that an attorney from the Law Department's outside counsel provide [redacted] representation so long as there was no conflict. When the OIG investigator arrived, [redacted] explained the situation, including that Mr. Weiderhold had not notified the General Counsel of this new investigation as was provided for in EXEC-1 some ten months after its promulgation by the Chairman of the Board of Directors and head of entity for the OIG. The investigator stated that she was unaware of the EXEC-1 provisions or the protocol. In response to being told that [redacted] had requested legal representation for the interview, the OIG investigator said she would have to check with OIG [redacted] as to whether that would be permitted. [redacted] confirmed to the OIG Agent that he was prepared to be interviewed but wanted legal representation at the interview and the OIG Agent indicated they would not proceed with the interview.

Although much is made of the OIG's requests for Claims Department documents and access to witnesses, the fact is that no Amtrak document was withheld, all Amtrak employees have been made available for interviews, and all were accomplished within the OIG's timeframes.

2. **Defeased Leases**

The OIG's investigation into this matter involved privileged information. The financial advisor involved in the OIG's investigation, Babcock & Brown, had been engaged on Amtrak's behalf by outside counsel for Amtrak. Thus, an attorney-client relationship existed -- through Amtrak's outside counsel -- between Babcock & Brown and Amtrak. As noted in the Willkie Report, the General Counsel requested that counsel for Babcock & Brown provide her with copies of any potentially privileged and confidential Amtrak documents in Babcock & Brown's possession in accordance with the Protocol and EXEC-1 for review and appropriate marking prior to their production to the OIG.

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The Willkie Report notes that, following the Law Department's review of those potentially privileged documents, counsel for Babcock & Brown produced the documents without any redactions to the OIG.

Absent from the Willkie Report, however, is an acknowledgement of how long that process took. In all, the process took just 9 days from when Babcock & Brown's counsel informed the OIG that it was ready to produce the documents until those documents were actually produced to the OIG following the Law Department's review.

Similarly, the Willkie Report recounts that counsel for the former CFO would not produce Amtrak documents to the OIG without the Law Department's prior review for privilege. A true accounting of these events can be found in a memorandum written by the former Inspector General and the responses it generated. See Exhibit 25, Memorandum from Weiderhold to Boardman (December 24, 2008); Exhibit 26, Email from Acheson to Boardman (December 29, 2008); Exhibit 27, Letter from [redacted] to Weiderhold (December 29, 2008); and Exhibit 28, Email from [redacted] to Boardman (January 5, 2009). Mr. Weiderhold subsequently told [redacted] "We're good" and that he had been misinformed by his investigators. The Willkie Report states that the documents were produced to the OIG, but the report does not indicate how long that process took. In fact, the Law Department's review was accomplished in a few days.

As for the documents from the Treasurer, it should be emphasized that according to the Willkie Report there were only two documents that were not initially produced to OIG by the Treasurer's counsel and that the Treasurer's counsel stated that those documents contained potentially privileged material that would need to be reviewed by the Law Department. The Law Department, however, was not aware that the Treasurer's counsel was withholding those documents and immediately notified the Treasurer's counsel to produce the documents when the OIG requested assistance in moving the production forward. See Exhibit 29, Email from Stein Counsel to [redacted] (March 30, 2009); Exhibit 30, Email from [redacted] to Stein Counsel (March 30, 2009); and Exhibit 31, Email from Weiderhold to [redacted] (March 30, 2009). As noted in the Willkie Report, those two documents were produced in their entirety to the OIG within a month of the Treasurer's counsel first informing the OIG that the documents were to be reviewed before production and within days of the Law Department being provided copies for its privilege review.

Although much is made of this review for privileged documents, the fact is that no Amtrak document was withheld and the review process added – at most – a few days to the production. All responses were accomplished within the OIG's timeframes.

3. <u>Moynihan Station Project Manager</u>

The complaint in this section of the Willkie Report implies that Anne Witt, the then Vice President for Strategic Initiatives, declined to provide the requested personnel action documentation and that such material would have to be provided by the Law Department. What the Report did not say was that these personnel documents were materials and resolutions considered and acted upon by Amtrak's Board of Directors and therefore were not in Ms. Witt's possession, but were instead in the possession of the General Counsel and Corporate Secretary, Eleanor D. Acheson. Ms. Witt told OIG [redacted] that she did not have the documents and

would ask the Corporate Secretary about them. Upon learning that OIG [redacted] wanted copies of this material, Ms. Acheson called him and left him a message, as he was on vacation, that she had the material available for him to pick up at his convenience. Contrary to the Willkie Report, none of the subject matter involving the requested personnel action was redacted. The documents included minutes from a meeting of the Board of Directors. Matters completely unrelated to the requested personnel action were removed because they were confidential Board personnel actions involving different individuals and departments. This is consistent with the practice between the Law Department and the OIG for twenty years and this is the first time there has been a complaint. The OIG has access to any and all documents within Amtrak. To avoid accidental release of confidential material, the Corporate Secretary's office has regularly removed material that is non-responsive to the OIG's request. If the OIG had serious concerns about the material that was redacted, it could have inquired into what was redacted and why it was redacted.

4. **Shore Line East Commuter Rail Service Audit Issue**

The Willkie Report implies that the Law Department reviewed the documents the OIG requested regarding this matter and caused an undue delay in the OIG's review. To be clear, the Law Department neither sought to review nor reviewed any documents or information requested from Strategic Partnerships by the OIG or provided by Strategic Partnerships to the OIG, in connection with the Shore Line East weekend service project in the spring of 2008.

The Wilkie Farr Report summarizes OIG activities associated with an agreement between Amtrak and the Connecticut Department of Transportation under which weekend service was added to the Shore Line East service that Amtrak was providing between New Haven and New London. While the Willkie Report states that th at idea of weekend service was eventually dropped; in fact, weekend service was approved via the referenced Senior Staff Summary 36850 on June 27, 2008, and this service was implemented in time for the July 4, 2008 weekend. See Exhibit 32, Senior Staff Summary 36850 (June 27, 2008). Weekend Shore Line East service continues to this day.

The OIG did request information regarding this agreement on June 30, 2008, shortly after the Staff Summary had been fully approved. The representative of Strategic Partnerships who was responsible for the Shore Line East agreement contacted a lawyer in the Law Department about whether the responsive materials needed to be reviewed for proprietary or confidential material by the Law Department. He was initially, and mistakenly, told yes, and the material was forwarded to the Law Department on July 15, 2008. See Exhibit 33, Email from [redacted] to [redacted] containing email of same day from [redacted] to [redacted] (July 15, 2008). A follow-up inquiry from Strategic Partnerships as to the status of the request resulted in a July 25 email from the lawyer indicating that the material did not require Law Department review. See Exhibit 34, Email from [redacted] to [redacted] (July 25, 2009) and Exhibit 35, Email from [redacted] to [redacted] (July 25, 2009). No review by the Law Department was undertaken and the requested information was provided to OIG by Strategic Partnerships on August 4, 2008. See Exhibit 36, Email from [redacted] to [redacted] (August 4, 2008). All responsive documents were provided to the OIG involving the Shore Line East weekend service and no further request was received from the OIG.

5. **Rail Sciences Investigation**

To a great extent, the complaints the Willkie Report makes with regard to this investigation are the result of the refusal by Rail Sciences Inc. ("RSI"), an expert consultant retained by the Claims group and its attorneys, and RSI's counsel to produce certain documents to the OIG on the grounds that such production would violate confidentiality agreements with other RSI customers and their refusal to allow the OIG tointerview any of its employees without counsel for the Law Department present. Neither of theseissues seems to be connected with or the result of any request, direction or advice from the Law Department. Regarding witness interviews, presumably RSI was relying on the fact that theOIG has no legal power or authority to compel witness testimony from outside vendors; the OIG's subpoena power is limited to obtaining records from outside parties. See IG Act § 6(a)(4).

As noted in the Willkie Report, Amtrak notified the OIG that it would be reviewing and marking as privileged Amtrak documents in RSI's possession that qualified for protection consistent with the EXEC-1 policy and protocols. The General Counsel did so by letterto both RSI and the OIG dated March 31, 2008. See Exhibit 37, Letter from Acheson to RSI (March 31, 2008). The RSI privileged materials were reviewed, marked and returned for production. Itis also correct that RSI subsequently sent a letter to the OIG stating that it would not provide any further information to the OIG without the Amtrak General Counsel's express consent and would not permit RSI officials to be interviewed without Amtrak legal counsel present. Amtrak's General Counsel immediately notified RSI's counsel by letter dated April 30, 2008 and the OIG that the Law Department's only role was to review and mark privileged documents and that we had done that and had no other role thatshould be "understood, construed or characterized in any way as raising any concern about or objecting to any aspect of the OIG's inquiry in this matter." See Exhibit 38, Letter from Acheson to RSI (April 30, 2008)

The Willkie Report fails to include Ms. Acheson's April 30th letter toRSI copying the OIG and setting the record straight on her prior letterand directing that RSI comply with the OIG's request for documents immediately with the appropriate privilege marks. The Willkie Report's failure to acknowledge the General Counsel's direction to RSI tocomply with the OIG's request for documents belies its implication that the Law Department was somehow assisting RSI in its efforts to limit its production. The facts demonstrate otherwise.

Although the Willkie Report recounts that the General Counsel requested that RSI's counsel provide copies of "all" documents that had been produced and would be produced to the OIG so that the Law Department could review those documents for privilege, this is an inaccurate description of the General Counsel's direction to RSI as set forth in her March 31st letter. It is clear in that letter that shewas directing RSI to provide her with copies of any Amtrak documents that may be privileged, confidential orproprietary. At no pointin that letter does it demand that RSI provide its entire production tothe Law Department prior to transmitting those documents to the OIG.

Despite the assertions of the Willkie Report, the OIG received every Amtrak document that was requested.

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Commercial Privilege

6. [redacted]

[redacted] is a manufacturer of concrete ties that has supplied Amtrak for many years. Over those years, Amtrak and [redacted] have had a series ofcontract disputes over the performance of those ties, and those disputes continue to this day. Many of the disputes could have resulted in litigation, and still may, absent a satisfactory resolution. Consequently, the Law Department has worked with several other Amtrak departments on these disputes over the years. Amtrak has met with OIG auditors and kept them up to dateon matters. Additionally, the Law Department has tried to facilitate OIG's document requests to ensure the documents were properly identified as privileged and confidential so as not to waive any rights Amtrak may have in the event of litigation. The OIG was apprised of this concern so they would be sensitized to the ongoing dispute and the possibility of litigation.

The complaint raised in the Willkie Reportis that the Law Department's June 17, 2008 production was "responsive but incomplete" saying that it excluded certain inspection reports and redacted some of the documents, including minutes from a Board of Directors meeting. First, as to the inspection reports, there apparently was some confusion over the production of these, but the OIG was notified that the reports were in the possession of the Engineering Department – not the Law Department – and no oneat the OIG ever inquired as to whether the Law Department could assist inretrieving these reports or why they had not been provided. Indeed, the Law Department provided every document related to [redacted] that was in its possession. Second, regarding the redacted Board minutes, a telephone call would have confirmed that Amtrak had provided the section of the Board minutes involving [redacted] and had only withheld that portion of the minutes unrelated to [redacted] – consistent with the protocol that has been followed for decades. The OIG did not inquire as to what material was redacted or why it was redacted. All of the documents that were provided were marked – where appropriate – as privileged and confidential pursuant to the EXEC-1 policy and protocols.

7. **OIG Reviews of ARRA Spending**

TheWillkie Report complains about the process by which the Company intends to comply with the OIG's request for documents related to the American Recovery and Reinvestment Act ("ARRA") stimulus funds received by Amtrak. What the Willkie Report omitted is that the OIG was apprised of the steps the Company intended to take, that the Company requested that the OIG appoint a contact in order to discuss thatprocess and ensure the OIG's needs were being met, and that the OIG failed to respond until the Interim Inspector General was appointed. The first indication that the OIG had any concern about the ARRA production was when the Company received a copy of the Willkie Report.

As noted in the Willkie Report, the Amtrak has identified its Chief Financial Officer as the key executive responsible for oversight of ARRA matters. On March 13, 2009, the Inspector General sent the CFO a memorandum outlining what he acknowledged to be a substantial document request that was intended to continue for at least the two-year period in which ARRA funds would be expended. See Exhibit 39, Memorandum from F. Weiderhold to DJ Stadtler (March 13, 2009). The CFO's officeis not equipped to handle such a large-scale, company-wide production and quickly asked the Law Department toassist in complying with the OIG's request. Managing Deputy General Counsel [redacted] followed up on a telephone conversation

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with an e-mail to the Inspector General onMay 6, 2009. [redacted] had discussed the Law Department's coordination of the production of the Company's responsive documents but received no further response and in his e-mail requested that the Inspector General appoint someone with whom [redacted] could meet to discuss how to accomplish such a large production. See Exhibit 40, Email from [redacted] to Weiderhold re Document Production (May 6, 2009). There was no response.

On May 11, 2009, [redacted] again wrote to theInspector General indicating that the first search for responsive emails had retrieved an extremely large volume of unresponsive materials. See Exhibit 41, Email from [redacted] to Weiderhold re Document Production (May 11, 2009). In that e-mail, [redacted] asked that someone from the OIG meet with him to review the search parameters that were used in order to reduce the volume of unresponsive emails. There was no response.

On May 19, 2009 the Law Department sent a preservation notice to allindividuals in the Company likely to have ARRA documents advising them of their responsibi lity to retain ARRA-related documents. [redacted] forwarded thatnotice to the IG on the next day to keep him apprised of the steps being taken. See Exhibit 42, Email from [redacted] to Weiderhold with Attached May 19, 2009 Retention Notice (May 20, 2009). There was no response.

The Willkie Report appears to make four complain ts about this document production: first, that the Law Department is involved in the production at all; second, that the electronic documents were being converted in such a way as to eliminate their "metadata"; third, that the Law Department was making its own decisions regarding the scope of the e-mails sought by the OIG and asking the OIG to narrow the scope of itsrequest; and finally, that the Law Department would monitor the OIG's use of the documents through its outside vendor. None of these complaints withstands scrutiny.

1. The Law Department was brought into the process because it is the only department in the Company with the experience indocument productions of this scope and duration and, thus, is best suited to respond to and manage such a large document production. The CFO's office was initially trying to respond by assigning a secretary with one senior executive providing oversight. It quickly became clear that the size of this production would overwhelm the CFO's resources and they lacked the expertise to organize thistype of production in a manner that would be complete and responsive. See Exhibit 43, Various emails Regarding ARRA production. The Law Department accomplishes these tasks daily when responding to discovery requests in litigation and has staff experts whose job is to collect responsive documents and produce them in an organized, coherent and complete manner that withstands the scrutiny of federal courts. The CFO concluded that as a practical matter, the Company would struggle to comply with its responsibilities under the ARRA and the OIG's appropriately comprehens ive request unless the task was taken on and managed by the Law Department.

2. The OIG's March 13th request for documents did not request that metadata be maintained or provided, and the OIG has never requested that metadata be maintained or provided. The OIG on March 13 requested copies of all documents and, to the extent electronic copies were provided, that they be provided in their "native application," meaning the program in which they

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were created so that the data could be reviewed. Although never requested, if the OIG would like metadata for any document – or all – thatcan be provided because every original document has been ordered to be maintained. Again, this issue was not raised with the Law Department before appearing in the Willkie Report.

3. The May 11, 2009 e-mail from [redacted] tothe Inspector General reveals that the Law Department was seeking input from the OIG in order to meet the OIG's request. See Exhibit 41, Email from [redacted] to Weiderhold re Document Production (May 11, 2009). There is no indication that the Law Department was limiting the scope of the OIG's request or trying to get the OIG to limit the scope of its request or do anything more than what typically happens in this type of electronic document production. SeeExhibit 44, Project Manager Communications Outlining Process for ARRA Document Collection (Various Dates).

4. The Willkie Report suggests that the Law Department will somehow monitor the OIG's activity by producing these documents through a vendor. To the contrary, the Law Department is adopting the same techniques used in litigation discovery. The Law Department will collect all responsive documents, load them onto a vendor's secure website, and then the OIG is free to download them and use them as they see fit. Itis not expected that the OIG will use the vendor's website as an archive – unless the OIG chooses to – but will instead download the documents and then store and manipulate them as the OIG sees fit. The vendor is not monitoring the OIG's activities, although it may very well have an electronic record that the OIG did indeed download the documents that were produced much in thesame way a FedEx or UPS delivery will include a receipt that documents were delivered to the intended client.

Amtrak is expending considerable resources to ensure that each and every stimulus related document is produced to the OIG. Amtrak takesits obligations in regard to the use of these funds very seriously and has expended significant effort to be able to comply with the OIG's requests for documents in as efficient and prompt manner as possible.

8. **Recent Investigation of Cyber Intrusion**

The Willkie Report states that "[a]t least onecontract employee who had contact with the Law Department during the investigation was explicitly directed by the Law Department not to inform or discuss the matter with anyone from the OIG." (Page 46) This particular incident involved an Amtrak computer server that appeared to have had suspicious malware installed through access from outside the Company. The claim that the Law Department directed at least one contract employee not to inform or discuss the matter with anyone from OIG is untrue.

Contrary to Company protocol designed to respond to the potential of both criminal activity and jeopardy to the corporate interests of Amtrak, this matter was initially referred to the OIG without the required coordination with the Law Department. When the Law Department learned of this matter, it immediately retained an outside forensic expert and legal counsel to assist in the Company's investigation. Managing Deputy General Counsel [redacted] spoke with the Inspector General and apprised him of what the Law Department was doing and who had been retained. The OIG confirmed that the forensic expert was well qualified and asked that the OIG be kept apprised of their progress. [redacted] indicated that OIG would be provided with any material that was developed and that [redacted] would provide it in a manner that would

maintain the Company's privileges during the investigation. See Exhibit 45, Email from Weiderhold to Herrmann re Cyber intrusion Expert (April 9, 2008). The Law Department immediately made contact with the FBI in order to ensure the Company took no steps that might compromise the FBI investigation. The Company was soon advised by the FBI that the criminal investigation was concluded with no findings and that no further action would be taken. The Law Department concluded its investigation and provided the OIG with a copy of the Final Report issued by the forensic expert. See Exhibit 46, Letter Transmitting Expert Report to Black (December 12, 2008). The Law Department has received no requests for information from the OIG regarding this incident that were not immediately provided.

9. **Salary Adjustments for the IG and OIG Staff**

The Willkie Report states that the Human Resources and Law Departments were involved in "the IG's recent efforts to grant salary adjustments to OIG staff." (Page 48) The assertion that the General Counsel has claimed authority to oversee OIG personnel decisions is wrong and without basis in fact.

The Willkie Report ignores the terms of the 1999 Memorandum of Understanding signed by the IG and the HR Department. See Exhibit 47, OIG-Human Resources Memorandum of Understanding (June 30, 1999). Regarding pay and grade determinations, the IG specifically agreed in 1999 that the OIG "shall make pay-related decisions, provided that such determinations may be accomplished within the budget of the OIG in accordance with the general Amtrak salary guidelines and band/zone plan for positions as classified." Regarding bonus and reward programs, the IG agreed that "[a]n OIG sponsored bonus and reward program may be instituted only upon the approval of the Vice President-HR and the Chairman of the Board of Directors."

The Willkie Report asserts that the General Counsel "objected to, among other things, the IG's decision to increase the salaries of certain OIG staff" and that, "[i]n attempting to reject the salary increases, the General Counsel took the position that she is the ultimate legal authority within Amtrak regarding interpretations of the Inspector General Act and OIG's personnel authority." (Page 7)

The statement from the Willkie Report quoted above is false. The General Counsel took no position as is suggested on the salaries or salary increases of OIG personnel. The General Counsel provided requested legal advice to the Vice President of Human Resources and the Board Chairman, as is her job. As the chief legal officer of Amtrak, the General Counsel is the arbiter of legal issues facing Amtrak.[6] The Law Department became involved in the OIG personnel issues when the HR Department asked the General Counsel for legal advice regarding the proposed actions. See Exhibit 48, Email from Acheson to Green re General Counsel's Authority to Interpret Law (January 6, 2009). Thus, it was entirely appropriate for the HR Department to seek the General Counsel's advice as to whether the OIG's proposed actions comported with the law and Amtrak policy, including the 1999 MOU.

[6]This is a fundamental premise of organizational governance for federal agencies and corporate organizations alike and was recently recognized in President Bush's signing statement in connection with his signing into law of the Inspector General Reform Act of 2008.

In connection with this matter, the OIG, through an individual who is not an attorney, was pressuring Human Resources to make the salary adjustments sought by the OIG with lengthy purportedly legal memoranda. The General Counsel reminded Human Resources and the OIG of her exclusive standing to provide legal advice to the Company.

The General Counsel never claimed authority to decide personnel matters for the OIG. Instead, upon their request, she advised the HR Department and other Amtrak officers as to whether the OIG's proposed personnel actions were consistent with the IG Act, Amtrak policies, and the budgetary authority provided tothe OIG by Congress. Moreover, it was the Amtrak Chairman and head of entity for the OIG who delineated the authority and lines between Amtrak Human Resources and the OIG. See Exhibit 49, Memorandum from Chairman Carper to Green and Weiderhold (March 5, 2009). As was made clear by the Chairman:

> [T]he OIG must follow company policies and procedures for any new position or vacancy in an existing position as any department would, (i) work with the Human Resources Department on a position justification and/or job description, (ii) follow Amtrak policies, rules and guidance on band, zone, salary and benefit determinations, posting of jobs, interviewing of candidates, and (iii) follow all other policies, rules and guidance for making such job offers, terms andconditions of employment, start date, etc. As is clear in the MOU, the IG retains the decision of which candidate to hire subject to Amtrak's equal employment opportunity policies and the IG may determine the precise salary within the band and zone established by the Amtrak compensation process.

10. Distribution of ARRA Funds to OIG

The Willkie Report mistakenly attributes the requirements for distributing ARRA stimulus funds to Amtrak and implies that Amtrak management was improperly withholding these funds. With respect to the ARRA and the $5 million designated for Amtrak's OIG, it is not – and never was - Amtrak's position that expenditures of such funds must be approved by Amtrak management. Amtrak ARRA funds are appropriated to the Federal Railroad Administration ("FRA") and then provided to Amtrak as a grant. FRA provides the funds to Amtrak under a Grant Agreement between FRA and Amtrak. The original Grant Agreement for ARRA funds assumed Amtrak (the grantee) would be responsible for the tracking and reporting onthe entire $1.3 billion (which includes $5 million for the OIG). The OIG raised concerns about Amtrak tracking and reporting their funds, and therefore did not draw downany of the $5 million. In light of the OIG's concerns, FRA and Amtrak agreed to amend theGrant Agreement so that the designated funds can be released to Amtrak's OIG without going through Amtrak's tracking process for ARRA funds. This amendment has been executed andthe OIG has recently drawn down its funds and will account for its expenditure of the funds as required by lawand the Grant Agreement. See Exhibit 50, Timeline of Events Prepared by DJ Stadtler for Board of Directors and Exhibit 51, Amendment 1 to FRA Grant Agreement (July 21, 2009).

All of this was known to OIG staff and it is unclear why they chose to conflate this issue between the OIG and the FRA into a dispute with Amtrak management, which was bound by the terms of the ARRA and its Grant Agreement with the FRA.

E. Recommendations Made in the Willkie Report

1. OIG Should Be "Empowered" to Collect Documents Without Notification to or Involvement of Other Departments

This recommendation ignores the Amtrak OIG's undisputed entitlement to unrestricted access to Amtrak information and the fact that the OIG has always received all requested documents. It also appears to eliminate legitimate and essential core interests of Amtrak such as the protection of privileged, proprietary and confidential materials that parallel government agency interests such as executive privilege and security classified information. Just as federal agency materials subject to executive privilege status or security classification are identified by agency counsel before they are provided to their OIGs and arehandled subject to agency-OIG protocols designed to serve both the OIG's and theagency's interests, so should Amtrak materials which fall into the sensitive categories be identified by Company officers and directors having a fiduciary obligation to protect such materials through aprocess of identifying, marking and producing them subject to such protocols. Moreover, the Willkie Report recommendation ignores the practical realities of how documents are routinely collected and produced in order to properly respond to an OIG request.

Under current policy, the OIG is empowered to collect documents without notification or involvement with other departments. The 2007 EXEC-1 states in the strongest terms that the "OIG shall have full, free and unrestricted access to all Amtrak records, property or other materials necessary to conduct reviews, audits, inspections and investigations that are within the scope of duties of the OIG." 2007 EXEC-1 § 5.2.

The 2007 EXEC-1 also instructs that all Amtrak employees "are responsible for providing requested assistance and information to the OIG," including "cooperat[ing] fully by disclosing complete and accurate information" and "notconceal[ing] information or obstruct[ing] or mislead[ing]" the OIG. 2007 EXEC-1 § 7.1.

As a practical matter, however, there will be occasions when department heads or managers, or even other Amtrak departments, will need to be involved in responding to OIG requests for information. Coordinating such efforts is both practical and efficient.

The suggestion in the Willkie Report that blanket secrecy should be the norm for all OIG investigations or activities because of the risk of "spoliation" and "improper collaboration" by employees seems unnecessarily rigid, without acknowledging the many situations when such blanket secrecy is unwise or inappropriate. Nor, as a matter of policy and practicality, is blanket secrecy the normal practice in federal agencies. (Page 58) Very few OIG investigations involve alleged wrongdoing by Amtrak employees that would require the type of secrecy contemplated by the Willkie Report. Moreover, there are policies already firmly in place that prohibit spoliation of evidence or improper witness collaboration and other forms of obstruction. E.g., 2007 EXEC-1 §§ 7.1 & 7.2.

Far from being inappropriate, the notice to department heads and managers included in the 2007 EXEC-1 are, in fact, good and appropriate practices in most OIG investigations, ensuring coordination and efficiency.

In any event, the 2007 EXEC-1 specifically allows for those situations where the OIG "may require that the department head maintain any necessary confidentiality" or, when "in the judgment of the Inspector General, such notification would be inappropriate under the circumstances" to decide unilaterally not to provide such notice. 2007 EXEC-1 § 7.3.

2. Witnesses Should Not Be Allowed To Have Counsel Present

The Willkie Report asserts that it is "patently improper" for, among other things, Amtrak employees to have counsel present at OIG interviews where that employee's counsel has been retained and paid for by Amtrak. (Page 59) To support this assertion, the Willkie Report cites as "analogous guidance" an Office of Legal Counsel ("OLC") opinion stating (according to the Willkie Report) that "a federal agency may not indemnify an employee for legal representation in connection with an inspector general investigation of possible wrongful conduct." (Page 59) This "analogous guidance" is not binding on Amtrak and directly contravenes Amtrak's bylaws, which provide for indemnification including payment of legal fees for certain employees in specified circumstances including investigations.

The Amtrak corporate bylaws provide as follows:

> The Corporation shall indemnify and hold harmless its Directors, officers, employees and designated agents to the fullest extent permitted by law and these Bylaws. An Indemnitee, as defined in Section 9.01(b), shall be entitled to indemnification and advancement of expenses under this Section unless and until there has been a specific determination, pursuant to subsection 9.01(e), that he has not acted in accordance with the standard of conduct set forth in Section 9.01(c). See Exhibit 52, Article IX, Section 9.01 Amtrak Corporate Bylaws.

More importantly, even on its own terms, the OLC opinion does not apply to Amtrak. Although the Willkie Report does not acknowledge it, the OLC opinion's conclusion that the federal agency may not "retain and compensate private lawyers to serve the employees being investigated by the Inspector General" was grounded on the fact that there was no "explicit authority" for the federal agency in that case to retain counsel for those employees. As the OLC opinion stated: "At bottom, the question of representation is one that depends upon whether there exists a fair basis for concluding that Congress has granted to your agency the authority to provide counsel to employees who become subject to the type of administrative investigations initiated by your Inspector General."

In stark contrast to the situation presented to the OLC, Amtrak's bylaws explicitly require the Company to provide counsel for certain Amtrak employees. Notably, the Willkie Report does not seek to distinguish between those witnesses identified in the report who requested that counsel be present for their interviews and who were entitled, pursuant to Amtrak's bylaws, to such counsel at Amtrak's expense, and those witnesses who did not have this right.

In fact, all of the employees identified in the report who had outside counsel present for their OIG interviews were entitled, as a matter of Amtrak's bylaws, to have counsel provided to them by Amtrak.

The Willkie Report in a footnote seems to concede that it would be proper for Amtrak to pay for counsel for an employee "under certain limited circumstances" (Page 60 fn. 254), but the Report does not elaborate as to what those "limited circumstances" might be. The Willkie Report also posits that "serious conflicts can arise when Law Department attorneys or outside counsel purport to simultaneously represent Amtrak and Amtrak employees suspected of wrongdoing." (Page 59) It should be noted that at no time since 2005 – the period covered by the Willkie Report – has any Law Department attorney satin on an interview of an Amtrak employee without the consent of the OIG.

The mere potential for conflicts of interest is no reason to impose a blanket prohibition on having counsel retained and paid for by Amtrak represent employees who are interviewed by the OIG. Every day, thousands of private sector employees around the country are interviewed by government investigators or counsel for private litigants where the company's counsel represents both the company and the employee being interviewed. On those occasions where representational conflicts do arise between the company and the employee, those conflicts are addressed and separate counsel retained as appropriate.

3. OIG Should Decide What Is Privileged

The Willkie Report recommends that "OIG itself is capable of identifying privileged and confidential information that it collects in the course of its investigations" and, thus, "the OIG's attorneys, not the Law Department," should be "empowered" to make privilege determinations "in the context of OIG activities." (Page 60) On the face of it, this suggestion violates Amtrak's interests and rights in its privileged and confidential information and to have its chief legal officer provide the Company critical advice on those matters which is her role to do. As stated earlier, it is the exclusive role of Amtrak's General Counsel, its chief legal officer, to give legal advice to the Company; no aspect of that responsibility may be delegated to the OIG. The OIG has no institutional competence to identify Amtrak's privileged, proprietary, or confidential information. A system in which the OIG has primary responsibility for identifying and protecting Amtrak's privilege interests would vest in the OIG a pure management function that is incompatible with the OIG's mandate under the IG Act, outside its institutional competence to perform, create a conflict of function and interest and jeopardize the Company's interests..

Generally speaking, the power to waive a corporation's privilege rests with the corporate decision maker at the time the waiver determination is made, whether it is the corporation's board or its officers, and, in Amtrak's case, these powers are vested in the Board of Directors and delegated as set forth in the bylaws to officers of the Company. In light of this structure, any decision that could affect Amtrak's ability to protect its privileges can only be made by the full Board or, to the extent there has been a delegation, the Company's officers.

On matters of privilege, as with all other matters of legal advice, it is the duty of the General Counsel to advise on legal matters and, in addition, she is best positioned to make such judgments and to protect the interests of the Corporation. If the OIG were to be charged with protecting Amtrak's privilege interests, the OIG would be operating under an inherent conflict of interest. The OIG has its own statutory interests and responsibilities and in its function is always potentially at odds with Amtrak and, at times, is actually at odds with Amtrak. For this reason as

well, the OIG is singularly ill-equipped to play the institutional role of deciding when to waive Amtrak's privilege interests.

Federal agency OIGs routinely are required to work with other departments within their respective agencies to protect sensitive material. As a point of reference, other OIGs frequently conduct investigations involving highly-classified materials. In those investigations, the decision whether to declassify certain information as part of the OIG's public reports is ultimately made by counsel to the agency that originated the information, and not by the OIG. This arrangement is fully consistent with the IG Act and in line with the PCIE/ECIE's 2003 admonition that Inspectors General "respect[] the value and ownership of privileged, confidential, or classified information received." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (October 2003) at 6.

The rationale for not permitting OIGs to make unilateral declassification decisions is the same as the rationale for not permitting the Amtrak OIG to make decisions about waiving Amtrak's attorney-client privilege. OIGs are not the proper entities to make judgments as to whether information is privileged or otherwise confidential and, if it must be released, how that should be done outside of the Department of Justice or Congress. In these circumstances, OIGs have an institutional bias to release, rather than protect, information.

In the past, the Amtrak OIG has proven itself incapable of adequately protecting Amtrak's privilege interests. The Toothman event illustrates the problem of leaving Amtrak's privilege in the hands of the Amtrak OIG.

The Willkie Report itself recounts that "the OIG authorized Toothman to disclose to the [House Transportation and Infrastructure] Committee any information, including any privileged or confidential information, relating to 'the Amtrak/DOT OIG Joint Review report, [Toothman's] independent expert report, and the separate ongoing T&I Committee inquiry of the Amtrak Law Department, but only on the condition that Toothman 'specifically identify the information as privileged and/or confidential and notify the Committee accordingly.'" (Page 32)

There are a number of very troubling aspects to this story that highlight the OIG's inability and (in this particular instance) failure to protect Amtrak's corporate interests. First, without any authority to do so, the OIG unmistakably took it upon itself to waive Amtrak's privilege. And despite the OIG's apparent attempt to limit the scope of the waiver only to Congress, under clearly established law, a waiver of privilege as to one third party is a waiver as to all third parties, so any attempt to restrict the waiver to Congress and exclude any other "third party" was futile. In any event, this attempt to limit the disclosure of privileged information also proved to be ineffective in this case, since the privileged information was eventually leaked to the Legal Times.

Second, and more strikingly, the OIG apparently delegated responsibility for identifying and marking privileged and confidential information to the OIG's outside agent – someone outside of Amtrak who has no personal or institutional responsibility or connection with Amtrak. Such a delegation of responsibility is without authority and inappropriate.

Exemption 5
Commercial Privilege

The release of privileged documents associated with the Toothman Report was not an isolated incident. Amtrak recently learned that the Amtrak OIG released privileged material to an outside entity without first notifying Amtrak's Law Department of its intention to do so when the OIG knew that Amtrak, through its Law Department, has been and remains deeply involved in a collateral matter regarding the [redacted] concrete ties. This entity was not the Department of Justice, Congress, or another law enforcement agency – but an Amtrak contractor with no private right to the documents. Amtrak learned of this release from the entity, which is apparently considering legal action against Amtrak based on the documents that were provided. Amtrak OIG is reported to be seeking the return of these documents to the OIG, but the damage to Amtrak's interests has been done. Had OIG staffproperly executed its responsibilities to protect Amtrak's privileged material and comply with the terms of EXEC-1, OIG staff would have worked with the Law Department on the matter and it is likely that this event would not have occurred.

4. **The Chairman Should Adopt a New EXEC-1**

The Willkie Report suggests that a new EXEC-1 should be adopted. (Page 62 and Exhibit D) The new EXEC-1 recommended by the Willkie Report is a version previously drafted by the Amtrak OIG. It is not a document that was prepared by Willkie Farr. The Willkie Report suggests that the new EXEC-1 should be adopted, in part, "to align Amtrak's OIG policies with those of the Department of Justice." Other than this passing reference to DOJ policies, the Willkie Report does not identify in any way how the proposed EXEC-1 would "align" Amtrak's OIG policies with the policies of the DOJ.

There are a number of problematic and inappropriate provisions included in the EXEC-1 proposed by the OIG beyond those addressed inSections 2 and 3 above. The OIG recommends that Amtrak policy require Amtrak employees to give sworn statements to the OIG when requested. This proposal is ill-advised for a number of reasons. Imposing this requirement raises concerns in terms of potential consequences for employees and the OIG should an Amtrak employee refuse to provide a sworn statement. The application of a penalty to Amtrak employees based on this requirement raises concerns of an increased risk of constitutional claims brought by employees under a Bivens theory, which allows individuals to bring claims for damages against Federal Government agencies for constitutional violations. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

This is a concern for the Company, not the OIG, because any discipline required to be imposed as a penalty for failing to provide a sworn statement to the OIG would be imposed by the Company. (The OIG itself has noauthority to discipline Amtrak employees.) If employees were to be disciplined for failing to comply with this provision, they may assert that the Company violated their constitutional rights under color of federal law. See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 394 (1995)(holding, in a First Amendment case, that Amtrak is "an agency . . . of the United States for the purpose of individual rights guaranteed against the Government by the Constitution").

In addition, Amtrak's bylaws entitle Amtrak employees tobroad indemnification rights, including the payment of attorneys' fees by Amtrak. A requirement that employees sign a sworn

statement could entitle them to legal counsel paid for by Amtrak to advise them on whether to sign such a statement when it has been demanded by the OIG.

The OIG would like Amtrak employees to be required - apparently in all instances - to keep "all information related to an OIG investigation strictly confidential," including keeping such information from "the employee's supervisors." The IG Act does not authorize the OIG to prohibit an employee from speaking with anyone else. Such a prohibition raises serious concerns about employee rights. To the extent such a prohibition would be designed to avoid the obstruction or impairment of OIG investigations, it is framed too broadly. It should properly be limited to discussions with others who the employee believes - or is told by the OIG - to be a likely witness during the investigation. Maintaining strict confidentiality of OIG activities is an appropriate limitation in some cases, but only where there is some legitimate basis for concern that such notification would impair or impede the investigation. In short, that prohibition should be the exception, not the rule.

Blanket confidentiality for OIG investigations is not the norm within the IG community and should not be the norm for Amtrak. In fact, professional standards for OIGs strongly suggest that OIGs should engage with management and inform management of their activities. Specifically: "The OIG should make a special and continuing effort to keep program managers and their key staff informed, if appropriate, about the purpose, nature, and content of OIG activity associated with the manager's programs. These efforts may include periodic briefings as well as interim reports and correspondence." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (Oct. 2003) at 30.

5. The Chairman Should Issue a New Directive To Amtrak Employees

The Willkie Report recommends that the Chairman issue a "directive" to all Amtrak employees along with a new EXEC-1 policy to "highlight[]" that OIG requests should no longer be "routed through" the Law Department. (Page 62) The premise for recommending this directive is false. It simply is not true that "so many Amtrak departments and employees now operate under the requirement that OIG requests be routed through the Law Department." (Page 62)

The proposed items to be included in the directive recommended by the Willkie Report are either redundant of provisions already included in EXEC-1 or should be rejected as ill-advised. The 2007 EXEC-1 already includes statements regarding the importance and role of the OIG within Amtrak, and it requires Amtrak employees to respond promptly and completely to OIG requests. The proposed blanket secrecy that the directive would impose on Amtrak employees regarding OIG requests are unwarranted for the same reasons that apply to the similar provisions in the EXEC-1 recommended by the Willkie Report.

Finally, including an "assurance" in the directive that the OIG would coordinate with the Chairman before the release of privileged or confidential information in OIG "reports" does nothing to ensure Amtrak's privilege will be protected (the "directive" would not be "policy"), nor would the proposed solution address the practical problem of how to ensure Amtrak's privileges are, in fact, appropriately identified and protected throughout the course of an OIG investigation or audit. To the extent that this is another attempt to recommend that the OIG take

on the duties and responsibilities of Amtrak's chief legal officer to identify and protect the Company's privileged and confidential information, it is objectionable for the reasons discussed in Section 3 above.

6. The Protocol Between the IG and the General Counsel Should Be Rescinded

The Willkie Report recommends that the Protocol be rescinded because it "restricts the ability of the OIG to conduct investigations and make disclosures as may be required under the IG Act or requested by Congress." (Page 63) This recommendation is apparently founded on several perceived problems with the Protocol.

First, the Willkie Report claims that paragraph 3 of the Protocol would "prohibit the OIG from gathering information (whether or not privileged or confidential) from one Amtrak vendor and then, without prior Law Department notification, asking questions of another Amtrak vendor using information learned from the first." (Page 63) This claim is meritless -- there is no basis for reading the Protocol to prohibit the OIG from asking a vendor questions based on information the OIG gathered from another vendor. The Protocol is concerned with the unauthorized disclosure of privileged and other sensitive Amtrak information outside of Amtrak.

Second, the Willkie Report claims that the Protocol "would also permit the Law Department to redact or limit disclosure of reports to third parties other than the Department of Justice." (Page 63) With or without the Protocol, the Law Department has never claimed the authority to redact information being transmitted by the OIG to Congress (or other third party), so this suggestion is baseless. In any event, the Protocol does not authorize the Law Department to redact information. Rather, the Protocol states that notice to the Law Department should be made to "afford the Law Department reasonable opportunity to" identify privileged information and then "take appropriate action to restrict or limit disclosure of such information."

Consistent with the Law Department's practices in the past (especially with regard to disclosures to Congress), the range of options available for "appropriate action" to protect confidentiality includes discussing the matter with the requesting party in Congress, making arrangements with Congress to maintain confidentiality, seeking a reasonable accommodation with the OIG regarding the disclosure, and seeking to obtain a confidentiality agreement with the third party, among other options.

The Willkie Report states elsewhere that the Protocol "restricts the OIG in the future from engaging and sharing Amtrak information to third-party consultants." (Page 36) This reading of the Protocol is unnecessarily narrow and certainly is not a construction of the Protocol asserted at any time by the Law Department. Had the OIG ever communicated this concern to the Law Department, the General Counsel would have agreed that third-party experts or consultants engaged by the OIG in carrying out its mission clearly fall within the scope of "the OIG" for purposes of access to Amtrak's privileged information within "the OIG."

To the extent the OIG believes that a fair reading of the Protocol would prohibit sharing information with third parties, this perceived problem could easily have been addressed by the OIG. To date, however, the OIG has not contacted the General Counsel to seek a revision to the Protocol to address this concern.

The failure to seek a modification to the Protocol - or to confirm that General Counsel and the OIG both did not read the Protocol to impose such a restriction - is all the more surprising since the Law Department had previously specifically recognized the OIG's legitimate need to engage third-party experts or consultants and, from time to time, share privileged information with those experts or consultants. See Exhibit 10, Letter from M. Bromwich to F. Weiderhold (June 19, 2007) at 4 (requesting on behalf of the Law Department that, should the OIG engage third party consultants or experts, the OIG obtain confidentiality agreements to protect the confidentiality of privileged material).

Contrary to the Willkie Report's suggestions, the current Protocol ensures that the OIG has access to all Amtrak information regardless of its privileged or confidential nature, while at the same time ensuring that the Law Department, which has the institutional responsibility to protect those privileges for Amtrak, can do so.

This arrangement is fully consistent with the IG Act and in line with the PCIE/ECIE's 2003 admonition that Inspectors General "respect [] the value and ownership of privileged, confidential, or classified information received." See Exhibit 53, PCIE/ECIE, Quality Standards for Federal Offices of Inspector General (October 2003) at 6.

7. **The Chairman Should Schedule Regular Meetings with the IG**

This recommendation seems at odds with the OIG's proposed rewrite of the EXEC-1 policy which removes the Inspector General's reporting obligation – the same obligations that are required by the IG Act – from the EXEC-1 policy.

While the Willkie Report asserts that the OIG must "be free of supervision from and entanglements with the management and operations of the entity that it oversees" (Page 3) and focus solely on the critical features of OIG independence and objectivity, the Willkie Report ignores the IG Act's requirement that the OIG keep the head of the establishment, as well as Congress, "fully and currently informed" about serious problems at Amtrak. IG Act §4(a)(5).

8. **"Seven-Day Letter"/Reports to Congress**

The Willkie Report recommends that the Inspector General report the issues identified in the report in "either its next-filed semiannual report or in a 'seven-day letter.'" (Page 2 and 64) This invocation of the "seven-day letter" misconceives the role and function of that seldom-used tool by ignoring the vital role played by the Amtrak head of entity (Board Chairman) in this process.

Section 5(d) of the IG Act provides that the IG "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." Thus, the seven-day letter is designed to alert the head of the entity, in this case the Chairman of Amtrak, to "serious or flagrant problems, abuses, or deficiencies." It would then be the Chairman's responsibility to "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."

This structure was designed to alert the Chairman of Amtrak, prior to notification to Congress, of such problems. This is a tool rarely used in the IG community because the structure of the IG Act is designed to promote, indeed ensure cooperation and collaboration between the heads of the organizations and the OIG. Such cooperation and collaboration are impossible when the OIG fails to keep the Chairman of Amtrak fully and timely informed of its issues or concerns.

The Willkie Report asserts that the 2007 EXEC-1 and the Protocol "would presumably prohibit any reporting of Amtrak information to Congress other than in a semiannual report or seven-day letter . . . ." (Page 51) In fact, the limitation, as acknowledged in other parts of the Report, applies solely to Amtrak information that is confidential, classified, proprietary, or privileged and would not prohibit reporting of such information but is designed to deal with "how".

The Willkie Report refers to the requirement to report such problems in the first instance to, in the case of Amtrak, the Chairman, but the emphasis remains on transmitting the information to Congress rather than providing notice of the alleged serious or urgent problems to the Chairman. (Page 14) As a point of information, the DOJ OIG has never, in its 20 years of existence, issued a seven-day letter. Issuance of seven day letters, which the Willkie Report fails to acknowledge, is an extraordinary remedy and therefore very rare.

F. Conclusion

It is clear that the relationship between Amtrak and the Amtrak OIG is not as good as either would hope. The Company has answered the allegations asserted in the Willkie Report and is taking steps to rebuild a working and cooperative relationship as soon as possible. See Exhibit 54, Board Resolution re OIG Search Committee and Task Force (July 8, 2009).