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Issues & Overview

Stimulus Bill And Strings: Massive Federal Spending Will Be Accompanied By Increased Inspectors General Oversight And Investigations

The American Recovery and Reinvestment Act of 2009 (“the Recovery Act” or the “Act”) will result in massive new federal spending, much of it through grants, contracts and procurement. As always, with federal money there are strings attached. Indeed, the Act directs more than \$350 million to oversight of stimulus funding and programs and creates a new federal oversight board with broad subpoena powers. Combined with legislation passed last fall to enhance the authority of Offices of Inspector General (OIGs), these provisions mean that companies receiving stimulus funds will be under more scrutiny by the federal government and especially OIGs.

Significantly, the Recovery Act creates the Recovery Accountability and Transparency Board (“Recovery Board”) to coordinate and conduct oversight of covered funds to prevent waste, fraud and abuse. The Recovery Board is composed of nearly a dozen major federal agency inspectors general, and President Obama recently appointed Earl Devaney, the highly respected and seasoned former inspector general for the Department of the Interior, to chair the Recovery Board. Among other things, the Recovery Board is empowered to audit and review the spending of stimulus funds. Not only will the Recovery Board have the same authority to subpoena documents traditionally held by OIGs, it will also be able to compel testimony from private persons. This represents a substantial increase in federal enforcement power. Finally, the Recovery Board will coordinate much of its activity through the OIGs by, among other things, referring to them matters for investigation.

Although OIGs have had oversight responsibilities since the Inspector General Act of 1978, Congress has attempted to increase their funding and influence on numerous occasions. Significantly, the Recovery Act includes over \$250 million for OIGs to use in oversight activities. This funding is on top of the \$50 million that Congress provided last fall to create the Office of the Special Inspector General for the Troubled Asset Relief Program, which is responsible for overseeing the \$700 billion financial system bailout.

Moreover, the Recovery Act includes numerous provisions regarding accountability and transparency, authorizing OIGs to review concerns raised by the public about use of stimulus funds and to report any findings to agency heads and the public. The Act also authorizes OIGs to examine government contract records and interview contractor employees. Finally, the Act includes significant new protections for whistle-blowers, who are

allowed to submit complaints to an appropriate OIG, and requires the OIG to investigate and report upon any complaint of unlawful discharge, demotion or discrimination – unless it is determined to be frivolous – not related to covered funds or already addressed in another federal or state proceeding.

Although the Recovery Act is the most recent example of increased OIG funding and authority, other recent legislative initiatives have also broadened the scope of OIG power. The Inspector General Reform Act of 2008 (IGRA), amending the Inspector General Act, enhanced OIG authority in several ways:

- increased the pay level of the inspectors general;
- authorized all OIGs to have their own legal counsel, rather than relying on agency counsel;
- created a Council of the Inspectors General on Integrity and Efficiency in order to develop best practices for all OIGs;
- gave all OIGs more authority over their budgets, to reduce agency influence over them;
- clarified OIG subpoena power as including electronically stored information as well as physical evidence;
- allowed all OIGs to apply to the Department of Justice (DOJ) for law enforcement authority; and
- amended the Program Fraud Civil Remedy Act (often known as the “mini-False Claims Act”) to allow all OIGs to bring actions under it.

A major purpose of the IGRA was to give inspectors general, who are not appointed by the president, many of the same powers and authorities as those who are so appointed.

As the government increases efforts to monitor and protect its funding, companies in all industries should take steps to strengthen their compliance programs and be prepared to address any questions raised by OIG investigations. This is especially important due to the unique dual responsibility of OIGs to report to both Congress and the executive branch. Accordingly, both Congress and the DOJ have access to, or are advised of, the results of any significant OIG inquiry. Some proactive initiatives include –

- perform compliance risk assessments by analyzing sources of federal funding and the specific rules and regulations that govern the funds; and
- assess compliance programs to ensure that they are well designed and implemented to “prevent, detect, and/or correct” potential non-compliance with Recovery Act funding requirements.